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

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● THE COMMITTEE on Land Acquisition and Control of Highway Access and Adjacent Areas sponsored an open meeting at the 1959 Annual Meeting of the Highway Research Board.

At this meeting, Norman Erbe, Attorney-General of Iowa, presented a paper entitled, "A Review and Some New Thinking on Control of Highway Access." His paper is a skillful attempt to answer the difficult question as to what extent the control of access is a compensable taking involving the exercise of the power of eminent domain or a noncompensable exercise of the police power. He suggests that the answer does not depend upon legal concepts alone, but rather upon economic and social considerations. This well-written and highly documented paper also analyzes the principles involved in the diversion of traffic, circuity of travel, and cul-de-sac doctrines.

Erbe's contribution was followed by a panel discussion on "Highway Taking and Protection Procedures in Wisconsin." This panel was heard the first time during the preceding Annual Meeting and was called together for the second time in order to allow the members to give the committee the benefit of their findings after an additional year of intensive research. The panel members were sponsored through the courtesy of Professor J. H. Beuscher of the University of Wisconsin, and included Frank M. Covey, Donald Heaney, and Ray Vlasin, who led the discussion on the following subjects, respectively: "The Impact of Police Power Controls in Providing Roadside Protection Along the Wisconsin State Trunk Highway," "Comparison of Court-Made Rules of Eminent Domain Valuation with Actual Evaluation Practices," "Some Highway Planning and Land Acquisition Procedures and Their Effect on Property Owners." These subjects are a continuation of those presented at the preceding meeting.[1] An introduction by Professor Beuscher is also included in this report.

Frank Covey's excellent paper reviews the need and value of roadside controls. It is his considered opinion that control devices have not been as effective as they might be in many respects because of their improper or inadequate use, and also because of the lack of cooperation between the several levels of government in resolving their conflicting interests at the planning stages of proposed highways. In conclusion, he makes suggestions which he believes will overcome the shortcomings of the past in regard to roadside control measures in Wisconsin.

Donald Heaney made some worthwhile observations on the relationship between the law of eminent domain valuation as it exists on the books and the activities of highway administrators working under that law. He gives some pointed examples illustrating the existence of a large gap between condemnation theories and condemnation practices.

Ray Vlasin addressed himself to the problems of rural property owners and communities during highway planning and land acquisition. He also submitted some notable ideas on how the magnitude of some of these difficulties could be reduced by modifying certain procedures used by the acquiring agencies.

All of the above mentioned papers are included in this report. They are highly recommended for close reading by all persons interested in the subject matter of these research projects.

A lively discussion ensued after the formal presentation by the panel. The discussion focused primarily upon the remarks by Mr. Covey. Of those who took part in this part of the discussion, William L. Garrison, and Sergei N. Grimm submitted their ideas in writing to the committee. These comments, together with a rejoinder by Mr. Covey, are also included in this report.

Also included in this bulletin is a report prepared by Francis Ryan, on an economic

[1] See Highway Research Board Bulletin 206 for a report of the previous discussion.

impact study sponsored by the Storrs Agricultural Experiment Station at the University of Connecticut, the Connecticut State Highway Department and the Bureau of Public Roads. Professor McKain, under whose direction these studies of the economic impact of the Eastern portion of the Connecticut Turnpike are being made, presented a paper at an open meeting of the committee last year. His paper, "Economic and Social Impact of the Connecticut Turnpike," was included in the committee's annual report, "Land Acquisition and Economic Impact Studies, 1958" HRB Bulletin 189. Mr. Ryan's paper, "A Method of Measuring Changes in the Value of Residential Properties," is well done, and adds interest to the Connecticut studies.

During the year the committee assisted some of the State highway departments in the resolution of certain right-of-way problems pertaining for the most part to land acquisition and control of access. The committee also answered many inquiries for data concerning the subject fields of its operation.

Interest in economic impact research continued its rapid growth. Several economic impact studies recently have been completed, and additional studies have been started. There are now some 43 studies in progress in 30 States. These studies are assuming an increasing role in connection with public hearings, highway location and design, right-of-way acquisition, public relations, etc.

So far as highway law is concerned, the most significant legislation enacted during the year was the bill the President of the United States approved on August 27, 1958, which revised, codified and enacted into law, Title 23 of the United States Code, entitled "Highways." This enactment, among other things, is bound to simplify research required for the determination of highway legal problems involving Federal reimbursement.

This title incorporated all existing Federal highway laws into one complete act. Some refinements and technical adjustments were made in the wording of the prior laws, but their fundamental principles remain unchanged.

Of comparable importance is a provision included in the Federal-Aid Highway Act of 1958, declaring it to be in the public interest to encourage and assist the States to control the use of and to improve areas adjacent to the Interstate System by controlling the erection and maintenance of outdoor advertising signs, displays, or devices adjacent to that system. The avowed purpose of this provision is to promote the safety, convenience, and enjoyment of public travel and the free flow of interstate commerce and to protect the public investment in the Interstate System. This act was designed to control advertising within 660 ft of certain portions of the system. An increase of one-half of one percent of the Federal share on any project to which the National policy applies was made available as an incentive. Pursuant to a directive contained in the act, National Standards for the guidance of States wishing to enter into agreement with the Secretary of Commerce to carry out the National policy were promulgated in final form on November 12, 1958, by publication in the Federal Register.[2]

The Federal Standards are applicable only to the Interstate System. They make no provision for the removal of illegal advertising signs by the Federal Government since the Federal law contemplates regulation and enforcement by participating States. The standards, therefore, will be effective only in States where sufficient authority has been given to enable the State highway department to conform to them.

Earlier in the year, before the passage of the Federal-Aid Highway Act of 1958, three States, Maryland, Ohio and Virginia, enacted laws designed to control advertising along expressways. There is, however, some doubt as to whether the varying standards established by some of these acts meet the Federal reimbursement requirements. A similar problem exists in other States which have given the State highway commissioner very broad discretion in applying outdoor advertising restrictions. It will be interesting to follow the legislative adjustments the States make in attempting to meet the Federal standards.

New legislation at the State level was extremely limited during 1958, because most State legislatures hold their regular sessions during the odd-numbered years. Never-

[2]See Highway Research Board Special Report 41, "Outdoor Advertising Along Highways, A Legal Analysis," 1958, for a comprehensive report on this subject.

theless, Arizona and Virginia made additional changes in their highway laws.

Arizona amended its right-of-way acquisition law to provide that the measure of damages of property acquired for highway purposes under the power of eminent domain is the actual value immediately preceding the filing of the resolution of necessity by the highway commission, if court action is not commenced within two years. If court action is instituted, the commission may abandon the proceedings and the action dismissed at any time prior to payment of damages awarded, provided costs are paid as a condition of dismissal. (H. 234, Ch. 103)

Virginia authorized the State Highway Commission to acquire rights-of-way 12 years in advance for Interstate highway construction, and six years in advance for other highway construction. Property so acquired may be held in the possession of the owner until the highway commission gives written notice of intention to immediately begin construction. In the event such contemplated highway has not been substantially completed within 12 years if on the Interstate System, or seven years if on any other system, such property shall be reconveyed to the owner upon written demand and repayment of the original purchase price without interest is to be made. (H. 58, Ch. 345)

Perhaps the year's most significant State legislative enactments relating to control of highway access involved the prohibition of commercial enterprises and roadside services within the rights-of-way of controlled access facilities. Three States, Mississippi, South Carolina, and Virginia, passed such legislation. This brings the number to 20 States having similar provisions.

Arizona remained the sole State without specific legislation to permit the establishment of controlled-access facilities. An attempt to enact an enabling statute failed again in 1958.

Mississippi granted authority to municipalities to acquire property for and construct off-street parking lots. Bonds were permitted to be issued to finance the cost. Municipal authorities are permitted to operate the lots or rent, lease or sell the facility on the condition that it shall continue to be operated as a public parking facility for a specified period of time.

LAND ACQUISITION

Authority to Condemn

Although the provision of highway facilities has long been established as a public use for which property may be condemned by those authorities to whom the power of eminent domain has been delegated, such authority continues to be challenged in isolated instances by landowners and others claiming that the condemner has exceeded his authority in some particular respect. During the past year, at least six cases of this type reached the State supreme courts. Involved were the authority (1) of the State to condemn land in a city (Delaware); (2) of a county to condemn land for the State (Georgia); (3) of the State to condemn an easement to provide access to a land-locked parcel (Massachusetts); and (4) of a State for future highway purposes (Delaware). The court in a Texas case questioned the State authority to condemn in the absence of a showing of necessity and lack of evidence that the State had bargained with the landowner in good faith before instituting condemnation proceedings. In another Delaware case, the State's authority to condemn land for future use was questioned. Lastly, the Missouri Supreme Court held that landowners who had accepted the amount awarded by condemnation commissioners could not raise the issue of the State's authority to condemn on appeal. The substance of these cases is contained in the following paragraphs.

Delaware: In this case the State Highway Department entered into agreement with the Commissioners of the Town of Bethany Beach to construct a State highway through the Town, by relocating State Highway 14 on Delaware Avenue as a dual highway. Certain residents of the town sought an injunction to prevent the proposed construction, on the grounds that the commissioners acted in bad faith in consenting to construction of the dual highway on Delaware Avenue, and that certain sections of the town charter operated as a limitation upon the authority of the State Highway Department to condemn land in Bethany Beach for highway purposes. The Court of Chancery of Sussex County

denied the injunction, and on appeal its decision was affirmed by the State Supreme Court.[3]

The Supreme Court noted the charter gave the commissioners complete power to act for the municipality without the necessity of submitting questions to a referendum of the voters. Since no bad faith on the part of the commissioners was shown, the court decided their action fell within the scope of their powers.

The contesting residents called attention to a provision of the charter requiring the commissioners, whenever they proposed "to locate and lay out any new street or reopen old streets" to follow a certain fixed method of condemnation, which required a hearing to determine the necessity for the proposal. They insisted that this provision was applicable to the giving of consent by the commissioners to the proposed construction of a State highway through the municipality.

However, the court noted that Delaware statutes authorized the department to construct and maintain a State highway through any municipality, provided that the department might not change the width of any street therein without the consent of the duly constituted governing body thereof. The court found it clear that the department might determine the necessity for and proceed to provide for State highways through municipalities and acquire the necessary land by condemnation. The only limitation on this authority was the requirement that the consent of the governing body of the municipality be obtained prior to the acquisition of new land and the widening of streets. If this was not the proper construction of the statutes, the court continued, then the provisions of the charter on which the protesting residents based their case were repugnant to the above noted sections of the statutes, and since the State Highway Department Act was enacted later in point of time, were overridden by the doctrine of implied repealer.

It was decided, therefore, that the provisions of the town charter respecting condemnation were not a limitation upon the authority of the State Highway Department to condemn land in the town for highway construction.

Georgia: In a Fulton County case, the county's authority to condemn certain lands for a controlled-access highway was questioned on the ground that the county was not itself constructing the road.[4] The Superior Court rendered judgment for the county and the landowner appealed.

The opinion of the Supreme Court quoted the State's controlled-access law which provides:

> The State Highway Department of Georgia and the highway authorities of the counties or municipalities in the State may acquire private or public property and property rights for limited access facilities and service roads, including rights of access, air, view and light through gift, devise, purchase or condemnation in the same manner as such governmental units are now or may hereafter be authorized by law to acquire such property or property rights in connection with highways and streets within their respective jurisdictions.[5]

The Supreme Court thought it apparent the legislative intent was that where a highway of this type was to be constructed by the joint action of several governmental agencies, the necessary rights-of-way might be acquired by any of the cooperating governmental authorities. Moreover, it was not a new procedure in Georgia for a highway to be constructed by one agency of government, and the right-of-way acquired by another.

The landowner also contended that the condemnation was illegal because the land to be condemned was located in the City of Atlanta, and the city had neither instituted the condemnation action nor given its consent. In answering, the court stated that this contention was fully met by an amendment to the condemnation proceeding, which alleged that the road to be constructed was a part of a system of controlled-access highways which the Federal Bureau of Public Roads, the State Highway Department, Fulton County, and the City of Atlanta, acting in conjunction, had determined to construct. It was therefore unnecessary to decide whether the consent of

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[3] Campbell v. Commissioners of Town of Bethany Beach, 139 A. 2d 493, March 1958.
[4] Martin v. Fulton County, 101 S. E. 2d 716, January 1958.
[5] Code of Ga. Ann. § 1704a.

the city would be necessary before condemnation could be instituted.

Massachusetts: The highest court of the State affirmed the authority of the Massachusetts Turnpike Authority to take a private easement in connection with the construction of a turnpike.[6]

The facts of this case indicated that Powers, Luke and Ford were respective owners of three parcels of land abutting the Larrywaug Lee Road, a public way in the town of Stockbridge, Massachusetts. The turnpike authority, in connection with the construction of a toll road, took part of Larrywaug Lee Road and portions of the three parcels. This left Powers with no access to any public or private way. The authority then sought to take a permanent easement across the land of Luke and Ford to provide access to the remaining Powers' land, and to grant easements therein to Powers, Luke and Ford. This easement consisted of the right to construct utility facilities and to use this land for all purposes for which a public way may be used in the town.

Mrs. Luke complained, contending that the taking of the private way was beyond the power granted the authority by the legislature, or, if the legislature had granted such power, the grant was unconstitutional. She asserted that the easement had no legitimate purpose in connection with the turnpike itself, and had nothing to do with the construction, maintenance, repair and operation of the highway, or its preservation or protection. She declared that the turnpike was as safe without the taking as with it.

The statute which provides for the turnpike empowers the authority "to acquire by the exercise of the power of eminent domain . . . any fee simple absolute or any lesser interest in such private property as it may deem necessary for carrying out the provisions of the act, including any fee simple absolute in, easements upon, or the benefit of restrictions upon, abutting property to preserve and protect the turnpike . . . ."

The Supreme Judicial Court held that the taking of the easement was valid. While it is elementary that the power of eminent domain may be exercised only for a public purpose, and that private property cannot be seized ostensibly for a public use and then diverted to a private use, said the court, that does not apply where the property taken is sold or disposed of in furtherance of a public purpose. Whether the taking is for a public purpose is a subject for judicial examination. If it is for a public purpose, the necessity for the appropriation is not a judicial question, but a legislative one, irrespective of whether the determination was by the Legislature or by public officers to whom the Legislature delegated the power.

The court said if the easement here were viewed in the abstract, no public purpose would appear. Such an approach, however, would be closing the eyes to reality. The laying out of the turnpike and the acquisition of numerous sites essential to that objective were attributes of one huge undertaking. Procuring an easement and creating a right-or-way for the benefit of parcels of land incidentally deprived of all or of some means of access to an existing way were but a byproduct of that undertaking. The court reasoned that the Authority must have judged that the course of the turnpike as laid out and constructed through Stockbridge was for the best interests of the Commonwealth and its inhabitants.

Texas: This was a condemnation action in which the City of Dallas and the Texas Turnpike Authority condemned certain property for the purpose of constructing a part of an interchange between U.S. Highway 77, U.S. Highway 80 (Commerce Street) and the Dallas-Fort Worth Turnpike Project.[7]

The property condemned belonged to Rochelle Aronoff and her husband, Nathan Aronoff, and it was subject to the leasehold estates of Federal Sign Company of Texas and Davis-McPhail Electric Company.

The jury found the value of the property, including the leasehold interests, to be $26,389. This sum was apportioned among the various condemnees all of whom appealed to the Court of Civil Appeals of Texas, Texarkana, challenging the right, power and authority of the City of Dallas and the Texas Turnpike Authority to condemn the subject property.

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[6] Luke v. Massachusetts Turnpike Authority, 149 N.E. (2d) 255, April 1958 (See Memorandum 101, July 1958, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 366).

[7] Aronoff v. City of Dallas, 316 S.W. 2d 302, 1958.

The appellate court decided, among other things, that the evidence clearly showed that the acquisition of the property was necessary to the public purposes of both condemners. The use to which the condemned property was put was amply stated both in the pleadings and in the testimony of witnesses, to-wit: "A freeway project which will connect said U.S. Highway 77 with said Dallas-Fort Worth Turnpike Project." The court thought it was also undisputed in the record that the Texas Turnpike Authority had deemed the property necessary for road and right-of-way purposes of the Dallas-Fort Worth Turnpike and that sufficient proof showing the authority of the Turnpike Authority to condemn was properly made.

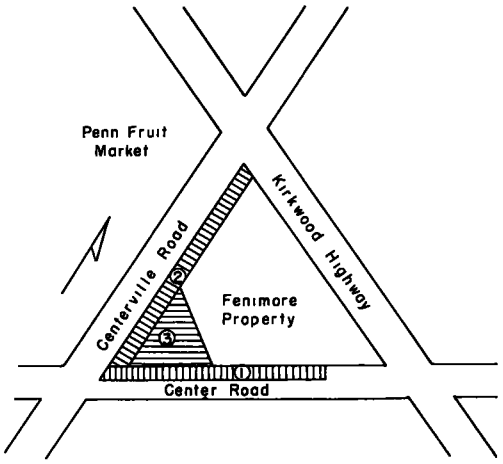

Figure 1. Delaware: 0.24148, 0.23831 and 8.12277 Acres of Land, Etc. v. State, 145 A. 2d 388, 1958.

In the opinion of the court, the evidence also clearly showed that the condemned land together with other adjacent property, was to be used for the construction of a ramp leading from Highway 77 into Commerce Street in Dallas, as a part of the interchange. The property taken was needed not only to permit motor vehicles to go from Highway 77 into Commerce Street, but also to prevent those traveling South on Highway 77 from being, "trapped" into paying a toll if the driver preferred to travel to Fort Worth on Highway 80 rather than via the Turnpike. Clearly the property was a necessary and proper part of the interchange and approach facilities to the Dallas-Fort Worth Turnpike.

One of the main points of the appeal was to the effect that no bona fide effort to agree with the condemnees as to the amount of damages had been made as a necessary prerequisite to the condemnation action. The court held that evidence undisputedly showed that the Turnpike Authority did make such an effort to agree with the owners and did make a bona fide offer before the institution of the condemnation proceedings. However, the record showed that the Aronoffs not only refused the offers but resisted and challenged the authority of the condemners to condemn the land. The court held that, in accordance with well settled law, no attempt to agree need be made where such an attempt would have been futile.

Another holding by the court stated that since the property was to be used for an interchange between Highway 77 in the City of Dallas and the Dallas-Fort Worth Turnpike and would serve both facilities, the city and the Turnpike Authority were mutually and dually interested in the acquisition of the subject condemned property, and, therefore, either could condemn the property.

The judgment condemning the land was affirmed.

Delaware: A current problem confronting the State Highway Department involves the taking of land for future use. This particular case has been in litigation since 1954. It arose in connection with the State's planned street-widening improvement of Centerville Road and adjacent Center Road in Christiana Hundred, New Castle County (Fig. 1).

According to the reported history of the case, in 1955, the State Supreme Court sustained the landowner's contention that the amount of land to be taken was excessive and that no public use of the property sought to be condemned was contemplated within a reasonable time.[8] The right to condemn was denied because the State had not established a present need.

Late in 1956, by slightly revising the pleadings, an entirely new suit was presented

[8]State v. 0.622033 Acres of Land, Delaware, 112 A. 2d 857.

before the Superior Court of Delaware.[9] This time it was alleged that there was a changed condition in the area—a large public market with parking facilities which caused traffic congestion. Moreover, the State presented a new plan: within 12 months of the time of the taking, Centerville Road would be under construction to become a new four-lane highway which would relieve the congestion. On this showing, the Superior Court entered an order of immediate possession and directed a hearing to fix compensation.

On appeal to the Supreme Court, the land owners conceded the right of the State to acquire title to Parcel No. 1, since it in fact comprised part of the bed of Center Road over which there existed a public easement. The Supreme Court, therefore, affirmed the judgment of the Superior Court granting condemnation with respect to Parcel No. 1.

However, the real issue raised by the owners was the right of the State to acquire parcels 2 and 3. For purposes of clarity the Supreme Court elaborated on the facts. It noted that almost immediately after the Supreme Court had handed down its prior decision (112 A. 2d 857 see above), the professional staff of the Highway Department and the department's attorney in New Castle County held a meeting. It was decided at this meeting to commence a new action for condemnation by the filing of a revised complaint redescribing the land as three separate parcels, instead of only one parcel as was previously done. This decision was not submitted to the Highway Commissioners for approval or authorization. As far as the record showed, the decision to start again was made solely by the Chief Engineer and his assistants. In regard to this, the court said:

It is obvious from the record before us that the Department has neither approved specifically the acquisition of Parcels 2 and 3 nor approved an over-all road construction project which would require the acquisition of Parcels 2 and 3 for its completion.

The high court declared that the action by the Chief Engineer and his associates must be regarded as an obvious attempt to avoid the result of the original judgment of the Superior Court; that such a transparent attempt would not and should not be permitted.

To establish approval of the project, the State Highway Department pointed to its approval of Contract 1300 for the improvement of Centerville Road from a point to the south to its intersection with Center Road. The Supreme Court noted, however, that Contract 1300 did not provide for widening Centerville Road by construction on Parcels 2 and 3, and since the need for the additional width of right-of-way could be justified only by a "nebulous idea of possible future construction of a four-lane highway," there existed no present public necessity for the taking, since the land was not needed for the then planned road construction.

The judgment of the superior court permitting the taking of Parcel No. 2 and 3 was reversed.[10]

Missouri: In this case[11] the State Highway Commission condemned the whole of the landowner's property in connection with improvements being made on U.S. 66. The condemned property was located in the town of Eureka, St. Louis County, about 20 miles west of the City of St. Louis. It consisted of 12½ acres with a frontage of about 490 ft on the north side of the highway. A restaurant-motel business was conducted upon the premises. The Circuit Court awarded the landowner a sum of $26,475 for the taking. That amount was paid into the registry of the circuit court by the commission in 1955, and thereafter the landowner accepted it from the clerk of that court.

On appeal the landowner did not question the award of damages, but challenged the validity of the condemnation proceedings as a whole. The State Supreme Court, however, said that since the landowners had accepted the award, they were not in a position to question any matter except those relating to the amount of damages.

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[9]State v. 0.24145, 0.23831, and 0.12277 Acres of Land, Civil Action No. 391, February 1958, Superior Court of the State of Delaware in and for New Castle County (See Memorandum 100, April 1958, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 365).

[10]0.24148, 0.23831 and 0.12277 Acres of Land, Etc. v. State, 145 A. (2d) 388, September 1958.

[11]State v. Howald, 315 S.W. (2d) 786, 1958.

By way of explanation, the bench quoted at length from the opinion of Chicago Great Western R. Co. v. Kemper:[12]

> Such act (acceptance of the award) upon his part is a concession by him that the plaintiff is entitled to take the property under the proceedings, upon the payment of full and adequate compensation thereof. If he expects to question this proceeding, he should not take down the allowance of the commissioners, which for the time stands for just compensation. In other words, he should not place himself in the attitude of claiming all his original interest in the land, whilst having adequate compensation thereof in his pocket. A litigant should not be permitted to accept the fruits of a proceeding, and at the same time question the regularity thereof, for his own further self-aggrandizement. By taking down the money he estops himself from questioning the regularity of the proceeding up to that point . . . .

Consequently, the judgment of the trial court was affirmed.

Compensation for Damages

Condemnation cases seldom reach the high courts merely because the condemnor thinks the award is too high or the condemnee thinks it is too low. There must be a substantial basis for such a claim, such as an element of damage not considered by the trial court, an award for damages usually considered non-compensable, introduction of evidence which the appellant considers non-admissible, and many others. There were a number of court decisions handed down during the year 1958 involving appeals from awards of trial courts, most of them quite dissimilar in nature, but all of interest as indicating the thinking of the various State courts at the present time. Short resumes of these cases are included in the following subsections.

Compensable and Non-Compensable Damages.—In at least three States, appeals taken involved questions as to the compensability of certain items of damage. In two States (New Hampshire and Ohio) the courts held that removal and relocation costs of machinery were not compensable. In Florida, the District Court of Appeal held, contrary to the general rule, that damage to a business of more than five years standing is compensable.

New Hampshire: The history of this case revealed that on September 8, 1955, the State condemned a tract of land located on the west side of the Merrimack River in Manchester for the purposes of establishing a controlled-access highway. On this tract was a building known as the "River Warehouse." It was a brick building 1,073 ft long and 68 ft wide, 4 stories high and containing 290,000 sq ft of floor space. All of it was used for industrial purposes as an integral part of the owner's textile manufacturing operations for spinning, weaving and finishing textiles. The jury returned a verdict in favor of the property owner who took exceptions to the verdict.

The record showed that the plant was originally purchased for $159,368. Before the taking of the warehouse, the owner had invested nearly ten million dollars in the acquisition and development of its properties, $7,282,000 of which represented investments in machinery.

The owner contended that the taking of the warehouse made it impossible to continue the operation of what was known as the top mill, and since no warehouse of suitable size was available, the top mill installation was reduced to liquidation value. The owner was therefore entitled to severance damages.

The owner's theory of valuation, as understood by the Supreme Court, was that the integrated plant was a unique industrial property in operation and that injustice would result in applying rules of valuation developed at a time when most properties condemned were undeveloped. The owner alleged that the court ignored its theory of valuation.

Both sides were widely separated in respect to value of the property taken. The

[12] 256 Mo. 279, 166 S.W. 291, 1914.

owner's witnesses testified, among other things, that the loss occasioned by the taking, using both the summation and capitalization methods, would amount to between $900,000 and over $1,000,000. The State's witnesses, using the comparative sales approach and capitalization methods, testified the loss was between $110,000 and $125,000.

The court stated that analysis of the owner's offer of proof showed that the figure of $165,000 (which was part of the total figure submitted by the owner), offered as the difference between the before and after value of the top mill, actually represented the total of the cost of transporting and installing the machinery in the mill, the cost of equipping the mill to handle materials and the cost of humidifier systems; the valuation placed on the machinery was merely added to this figure to establish the value of the top mill before the taking, and subtracted again to arrive at the amount "that the taking of the River Warehouse . . . reduced the value of the top mill installation."

According to the court, the record did not reveal that the owner's theory of valuation was ignored nor was the owner unduly restricted in advancing its theory. On the contrary, the record showed that during the course of the trial the court permitted the owner to introduce evidence of reproduction and replacement costs, integrated operations of the top mill with other departments, the properties with machinery in place, severance damage and in general practically everything advanced by the owner with the exception of the cost of removal of the machinery, all over the vigorous objections of State's counsel.

Moreover, the court stated that although it was well settled that it is the owner's loss and not the gain of the condemner which is the measure of damages, not all losses suffered by an owner are compensable. He is allowed the fair market value but the Constitution does not guarantee a return on his investment. Neither is the owner entitled to compensation for the destruction of his business even though it could not be established elsewhere.

The court concluded that evidence of the reduced value of the mill, based on the cost of transporting and installing machinery in the mill, as well as the cost of equipping the mill to handle materials, and the cost of the humidifier system, was properly excluded as an element of damage caused by the severance.[13]

Ohio: In this case the Director of Highways sought to condemn a parcel of land in the City of Youngstown. The land was owned by the Joseph Evans Ice Cream Company, Inc., but leased to the Evans Dairy Company which conducted an ice cream manufacturing business requiring heavy machinery on special substantial foundations which could not be removed and used elsewhere. The lease had 6 years to run. On trial of the case, the jury returned a verdict of $32,000 for the land and the building out of which the Evans Dairy Company was to receive $5,000. After the Court of Appeals affirmed the judgment, the director appealed to the Supreme Court of Ohio and won a reversal.[14]

Several questions were considered by the court, the most serious of which, according to the court, being whether the trial court erred in admitting evidence of the removing, moving, and reinstalling of personal property and the expense of establishing new quarters, and whether it was proper to permit the jury to determine the lessee's compensation for its leasehold interest as a separate item in the total compensation for the land and building taken. The Supreme Court ruled that the trial court erred altogether in these respects. The court said that the prevailing view was stated in a former Ohio case[15] to the effect that any evidence as to the value of an outstanding leasehold interest in the real estate is incompetent in a proceeding to have a jury determine the compensation for property being condemned.

Quoting from another Ohio case[16] the court said that the reason a taking by eminent

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[13] Amoskeag-Lawrence Mills, Inc. v. State, 144 A. 2d 221, July 1958.

[14] In re Appropriation for Highway Purposes. Thormyer v. Joseph Evans Ice Cream Co., 150 N.E. 2d 30, April 23, 1958 (See Memorandum 103, September 1958, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 368).

[15] In re Appropriation for Highway Purposes, 142 N.E. 2d 219, 1957.

[16] Lucas v. Carney, 149 N.E. 2d 238, 1958.

domain does not include the personal property lying on the premises taken and that damages for injury to such personal property or the expense of removing it from the premises taken are not a proper element of compensation is that "in an appropriation proceeding the specific property taken is designated and all other property is excluded, so that one may have compensation only for the property taken and for any damage to residue."

Justice Taft of the Supreme Court of Ohio, in a separate opinion, said that he concurred with reluctance "because of the desirability of unanimity in establishing a definite rule—in Ohio." He said that "no sound reason has ever been advanced for denying compensation for at least part of the cost of removing personal property from real estate upon which such personal property is lawfully located at the time such real estate is taken pursuant to exercise of the power of eminent domain, especially where, as here, its location thereon could and would have lawfully continued for a substantial time except for the appropriation of that real estate."

Florida: As a general rule business losses are not compensable in condemnation cases. To avoid the harshness of such a rule, the State of Florida, by statute, permits compensation for business losses under certain conditions. During the year the District Court of Appeal was called upon to give this statute judicial construction in the following interesting fact situation:[17]

The State Road Department sued to condemn certain lands, including the property upon which the landowners operated a business. It appeared during the trial that while the business had been at the particular location for over five years the landowners had purchased it only about a year prior to the instigation of the condemnation proceedings.

The landowners attempted to introduce evidence as to the extent of damage done to their business as a result of the taking, relying on § 73.10(4) of the Florida Statutes, 1957. This statute provided that the jury must consider the probably effect the denial of the use of the property might have upon "an established business or more than five years standing owned by the party whose lands are being so taken, located upon adjoining lands owned or held by such party."

The road department objected to such evidence on the ground that the business had not been owned by the present landowners for the five years preceding the suit, and after argument by counsel the trial judge sustained this objection. The property owners appealed from the judgment.

The appeal resulted in a reversal and the granting of a new trial. The appellate court decided that under the statute, it was not necessary that the owner of the lands should have personally operated the business for five years. The only requirement was that the business of the property owner be in existence for five years before the property was taken.

The judgment of the Circuit Court was therefore reversed and a new trial granted.

Adaptable Uses.—Generally speaking a condemnee is entitled to have his property valued on the basis of the highest use to which it is adaptable. Evidence of such adaptability, however, must be of a substantial nature, and not conjectural or based on some indefinite plan for the future. Decisions involving controversy as to whether valuation of particular parcels of land might be based on their use for certain purposes were handed down during 1958 in four States, Arkansas, New Jersey, Delaware and Wisconsin, as noted below.

Arkansas: The highway commission condemned 15.51 acres of land outside Little Rock in connection with the construction of a new superhighway. Evidence presented at the trial showed that the best and most valuable use that could be made of this land was for residential purposes. The landowners, in attempting to show the suitability of the land for this purpose, offered as evidence an exhibit of a plat which showed the subject land and the adjoining land to be laid off in lots, blocks, and proposed streets. The commission objected to this exhibit and the trial court refused the evidence when it was shown that the area had not in fact been platted as indicated. Later in the trial, however, the court did permit, over objections, the oral testimony of a witness about

[17] Hooper v. State Road Department, 105 So. 2d 515, October 1958.

the number of lots the land would be divided into, the value of each lot, and a comparison of this value to the value of lots in the Lakewood Addition to North Little Rock, apparently a high value area nearby. The jury awarded $45,000.

On appeal, the Supreme Court of Arkansas held that this evidence should not have been permitted.[18] Such evidence, said the court, allowed the jury to compare the value of the subject land without any knowledge of numerous factors that would have to be considered in order to make the comparison fair and equitable. The court said that with the evidence admitted the jury's verdict would necessarily be based on conjecture and speculation. The court pointed out that evidence of this nature is "universally condemned," and adopted the majority view that the measure of compensation is not the aggregate of the prices of the lots into which the tract could best be divided because there is thus no consideration of the many various expenses involved in subdividing—cleaning off the land, laying streets, advertising, etc. "The measure of compensation is the market value of the land as a whole, taking into consideration its value for building purposes if that is its most valuable use." (Nichols, Eminent Domain, Third Edition, Chap. 12, Sec. 3142(1).)

New Jersey: Admissibility of evidence as to the possibility of a change in zoning classification and its bearing on the value of property being condemned was at issue in a recent New Jersey Case, involving condemnation of land by the State Highway Commission for highway purposes. The trial court made an award of $11,415.84, from which the landowners appealed. The Superior Court, Appellate Division, reversed the trail court's decision, and remanded the case for a new trial, on the ground that the charge of the court, directing the jury's attention to the zoning situation as of the date of taking, together with improper exclusion of a zoning ordinance enacted after the date of taking, which changed the classification of the land from residential to commercial, was prejudicial error (State v. Gorga, 133 A. (2d) 349, June 25, 1957). This decision was upheld by the State Supreme Court in a decision handed down on February 17, 1958.[19]

In affirming the judgment, the Supreme Court noted that it was generally agreed that if, as of the date of taking, there was a reasonable probability of a change in a zoning ordinance in the near future, the influence of that circumstance upon the market value as of the date of taking might be shown. The true issue, however, the court continued, was not the value of the property for the use which would be permitted if the amendment were adopted, but the price a willing buyer would be willing to pay a willing seller, as of the date of taking, for the property as then zoned, taking into account the probability of amendment of the zoning ordinance in the near future. In other words, if the parties to a voluntary transaction would give recognition to the probability of a zoning amendment in agreeing upon the value, the law would recognize this fact.

Although an amendment to an ordinance which came into effect after the date of taking should not be excluded solely because of the time sequence, such evidence should be carefully confined to its proper role, said the court. The fact would still remain that on the date of taking the property was otherwise zoned, and the value as of that date must still be reached on the basis of facts as they then would have appeared to and been evaluated by the mythical buyer and seller.

The State argued that the amendment should be excluded because it did not include the property in question. The owners contended that the land was excluded because the State had instituted condemnation proceedings and the municipality saw no purpose in rezoning land acquired by the State. The State further urged that the amendment would not have been adopted if the condemnation proceedings had not been instigated. According to the court these contentions required factual proof. No prediction could be made as to whether the facts would deprive the zoning amendment of all probative value as a

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[18] Arkansas State Highway Commission v. Watkins, 313 S.W. 2d 86, May 1958 (See Memorandum 104, November 1958, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 373).

[19] State v. Gorga, 138 A. 2d 833 (See Memorandum 99, March 1958, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 361).

matter of law or merely bear upon the jury's consideration of it.

Subject to these views, the judgment of the Appellate Division was affirmed.

Delaware: The facts of this case revealed that since 1936 the landowners owned a tract of land, now composed of 2.52 acres, near the City of Wilmington. Part of this tract was taken by the State for highway improvement purposes. The property consisted of a single lot having a frontage on New Castle Avenue of 154.5 ft and a depth of approximately 550 ft.

Condemnation proceedings were instituted on July 30, 1956, and the State took a 25-ft strip covering the whole width of the lot and containing 0.089 acres of land. At the time of the taking, the rear of the property was being used for motel units or apartments, leaving a 90-ft setback from the avenue. There was a driveway or entrance in the center of the lot leading from the avenue to the motels and trailers. After the taking of the 25-ft strip of land, the vacant portion of the lot had a setback at one end of 64.35 ft and at the other end of 25.35 ft.

To substantiate the landowners' contention as to the loss they sustained, they offered expert testimony to the effect that the property as a whole before the taking was worth $120,000 and the value after the taking was $99,280, or a loss of $20,720. In rebuttal one expert witness for the State testified that the land before the taking had a value of $34,000 and a value after the taking of $33,600 or a loss of $400. Another witness for the State testified that the value before the taking was $35,600 and after the taking it was $34,900, or a loss of $700. During the trial the owners had testified that they had not built on the front portion of the lot because they desired to use it for commercial purposes. A zoning change from residential to commercial had been approved shortly before the taking. Witnesses for the State testified that the highest and best use of the property was for commercial purposes and that it was especially adaptable to its present use of maintaining and operating motel units. In these witnesses' opinion the property was not desirable as a gasoline station, as contended by the owners, because of its size and its interior location, and in fact such use would have an adverse effect on the value of the motel units.

After hearing the above testimony, the condemnation commissioners returned an award of $1,000 in favor of the landowner. The landowner was not satisfied with the amount and made a motion to set aside or modify the award. The motion was denied on the ground that there was a conflict of testimony as to the most profitable use which could be made of the property. Thereupon the landowners appealed to the State Supreme Court, alledging error on the part of the court because it failed to instruct the commissioners to consider as two separate properties the rear portion of the lot on which the buildings were erected and the undeveloped strip in front of the buildings.

The rule followed by Delaware, according to the high court, in awarding damages in condemnation proceedings, is that the condemnation commissioners shall determine the fair market value before and after the taking. In making this determination they shall consider the value of the property for all available purposes, including its best and most valuable use. In the case of a partial taking compensation to which an owner is entitled is related to the damages to the property as a whole.

The Supreme Court decided that the landowners acted contrary to this rule when they attempted by the use of an imaginary line to separate the improved portion of the lot in the rear from the unimproved portion in the front. Moreover, the jury apparently accepted the testimony offered on behalf of the State that the lot was more valuable as a whole and for the purpose for which it was being used, namely: for motels and apartments.

The verdict was thought by the Supreme Court to be correct, because compensation would not be allowed the landowners in excess of their actual loss on the basis of an imaginary, unnatural or theoretical subdivision of their property when it was not, in fact, subdivided, or on the false basis of the ownership of only a portion of the lot when, in fact, the lot in question constituted only a part of a much larger lot.[20]

Wisconsin: Certain landowners had a corner lot at the intersection of a county Trunk Highway and a State Trunk Highway (100) in Milwaukee County, on which were a house,

[20] 0.089 of an Acre of Land, Etc. v. State, 145 A. 2d 76, October 1958.

a tavern, and a concrete-block garage. For the purpose of widening the roads and increasing visibility at the intersection, the county took 0.139 acres of the land, leaving 0.088 acres in the shape of a triangle. The house and tavern had to be removed, but the garage was left (Fig. 2). The trial court evaluated the property before the taking at $27,500 and the value of the remaining property at $3,000. The landowners appealed, but the Supreme Court affirmed.

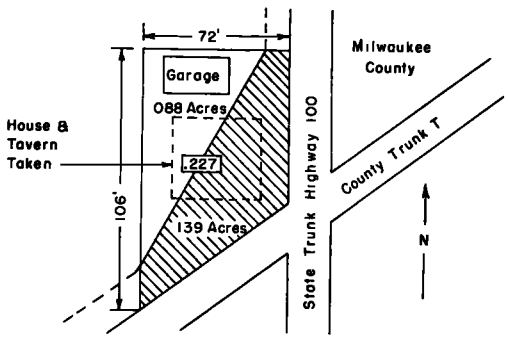

Figure 2. Wisconsin: Smuda v. County of Milwaukee, 89 NW(2d) 186, 1958.

The big question was as to the value of the remaining parcel. The landowner contended that it was practically worthless and that the trial court erred in not granting their motion to change the jury's evaluation of $3,000 to zero. Two experts for the county appraised the value of the triangle at about $5,000, pointing out among other things that the property could be used for billboards or for small roadside retail establishments, such as fruit stands. The landowners, on the other hand, contended that the appraisals were based on false assumptions as to the availability of the property for retail purposes and for signboards. For instance, there was a 50-ft setback line proposed for off-street parking, which would leave scarcely any of the triangle available for building. But to this the court said that such set-back line had not been shown to have been actually adopted or that it was inevitable; the mere proposal did not require the jury, as a matter of law, to disregard the testimony of the county's expert witnesses. The court noted that the $3,000 verdict seemed to give due weight to this possible drawback. Also, as to the possibility that the triangle had value for signboard purposes, the landowners contended that a signboard on the premises, so near an intersection, would produce a safety hazard on the highway and would therefore be prohibited under the billboard statute. But an expert on outdoor advertising testified that the signs on which he based his estimate of rental value would not create any safety hazard, since they could be placed on the roof of the garage; and there was testimony that the garage could remain in its location notwithstanding the zoning ordinance, because it was a nonconforming use existing prior to the zoning ordinance.

On cross-examination of the landowner, counsel for the county asked the landowner whether he had, about four months after the taking, purchased an adjoining acre of land from a neighbor for $3,000. The landowner's counsel immediately asked for a mistrial. The judge merely instructed the jury to completely disregard the question. The high court said that this was not prejudicial error. While the question itself "may have been inartistic" it was not enough to cause a mistrial. The court said that where land value is in issue, comparable sales of similar lands in the same locality may be proper subjects of evidence, after, however, a sufficient foundation is laid with respect to the comparable character of the adjoining tract. [21]

Special Benefits. —Although in many States it is permitted to offset special benefits resulting to remaining property from damages thereto, when only a portion of a landowner's property is being taken for highway purposes, the accent is generally on damages. Special benefits are overlooked, in part because of the difficulty in isolating elements which might be considered as such, and in distinguishing between benefits which are general in nature from those which may be considered special to the particular property involved. Recognition of these special benefits by the condemning agency can operate to reduce costs of public improvements substantially. One of the States which has recognized the possibilities in this direction is Oregon, as illustrated by the following summary of a court decision in that State.

Oregon: In a condemnation action by which the State Highway Commission sought to acquire land for a section of the Oregon Coast Highway, a controlled-access facility,

[21] Smuda v. County of Milwaukee, 89 N.W. 2d 186, April 1958.

the trial court awarded the landowners $22,000 plus interest, and the State appealed, assigning as error the court's refusal to admit testimony as to special benefits resulting to the landowners from the highway improvement. [22]

Oregon law provides that special benefits may be set off against damage to the remainder but not against damage to the part actually taken. The landowners claimed that the benefits regarding which the State wished to testify were general and not special.

Prior to institution of the condemnation proceedings the landowners' property, according to the state, was located more than three miles from a paved, all weather highway, with access only by means of a narrow, crooked, inadequate and poorly improved county road. Parts of this county road were impassable for vehicular traffic of any kind. Other parts were incapable of sustaining heavy vehicular traffic. Limited access to the new highway, according to the highway commission, would be granted to the landowners. The state also claimed that three of the four parcels involved would be further benefited in that they would become adaptable, suitable and available for a higher and better use—residential and subdivision. The fourth parcel would be adaptable for the establishment of commercial ventures and those catering to the traveling public.

The landowners based their claims to damages on the limited access character of the taking, the loss of use of certain portions of the old county road, the resulting necessity to build fences and barns, and the inconvenience of the taking.

The Supreme Court noted, after reviewing the evidence, that without a view of the premises and further evidence concerning the lay of the land, it would be impossible to know to what extent, if any, the reserved rights of access did or could benefit any of the parcels. The court held, however, that the commission was entitled to present evidence of circumstances tending to show what if any special benefits accrued to the four parcels by reason of the access and crossing rights reserved to the landowners, and what, if any, effect said reservations had upon the market value of the land not taken.

The court, in short, held that evidence would be admissible on behalf of the landowners to show "the manner, nature and extent" of the taking for a controlled access highway, separation of their land into different tracts and added inconvenience, if any, in going about and managing the property, and similar circumstances so far as they cause a depreciation in the fair market value of the land not taken. In like manner, evidence would be admissible on behalf of the Commission to show the beneficial effects, if any, of the rights of access and crossing which tended to minimize the damage, if any, which would accrue if the severance by a controlled-access highway were absolute and complete.

The court was further of the opinion, and found substantiation for its belief in other court decisions, that if the land was adaptable for subdivision, after completion of the improvement, the fact of such adaptation might be taken into consideration in estimating compensation. However, although the circumstances showing adaptability might be shown, evidence that the property could be subdivided into a certain number of lots of certain dimensions and separately valued as to sales prices would as a matter of law be speculative and inadmissible.

The court concluded that presumptively the proposed construction would result in some special benefits and that the existence and extent of such benefits were normally questions for consideration of the jury upon all of the evidence and under proper instructions. Only when the court could say as a matter of law that evidence offered to prove special benefits was so remote and speculative as to show no substantial basis for such a finding could the court reject the evidence offered. The court remanded the case for a new trial. (State v. Bailey, 319 P. (2d) 906, December 1957)

Attorney Fees.—Florida admittedly falls in line with the minority view on the problem of awarding attorney fees in condemnation cases. This idea was given emphasis

[22] State v. Bailey, 319 P. 2d 906, December 1957 (See Memorandum 98, February 1958, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 359).

in a significant Dade County decision which was handed down during the year by the District Court of Appeal of Florida, Third District.[23]

In March 1957, Dade County condemned 90 parcels of land to be used in connection with establishing "The Palmetto Feeder Road" as a controlled-access highway. After a long trial, a jury award was made to the numerous landowners, which included their attorneys' fees. Before the entry of final judgment, landowners Dratch and Argee Ranch, Ltd., appealed, maintaining that the award was inadequate both as to compensation for the land appropriated and the amount allowed for attorney fees.

In order to determine whether the landowners were adequately compensated, the district court reviewed the expert testimony admitted in the case, and decided that since the verdict for the landowners was higher than the lowest figure submitted by the county, there was no prejudicial error in that portion of the judgment relating to the value of the property taken, and the trial of the case was fair. The court therefore affirmed the award given for the value of the landowners' parcels.

However, as to the part of the judgment which concerned the amount given for the attorney fees, the court reversed. In regard to this point the court commented that although neither the Federal Government nor forty-one of the States allow attorney fees to defendant landowners, and six other States allow them only in certain cases, Florida has provided for the awarding of attorney fees by enacting the following provision:

> All costs of proceedings shall be paid by the petitioner, including a reasonable attorney's fee to be assessed by the jury, except the costs upon the appeal taken by a defendant, in which the judgment of the circuit court shall be affirmed.[24]

The court concluded that awards of only $175 and $225 to attorneys for owners of parcels of land taken by the county in eminent domain proceedings, for which compensation in the amount of $13,500 and $23,000, respectively, was awarded, were so grossly inadequate as to require a reversal with directions to the trial judge to proceed further on the problem.

Verdict Not Supported by Evidence.—An interesting Missouri decision resulted when the trial court, having instructed the jury that it was the sole judge of the credibility of witnesses and of the weight and value of the evidence, granted the landowners a new trial on the ground that the verdict was against the weight of the evidence.

Missouri: The landowners had been awarded $26,000 by the condemnation commissioners for the taking of part of their property, and both parties appealed to the court. A jury trial in the circuit court resulted in a verdict awarding the landowners $9,275. The landowners had asked for $57,550 and had introduced evidence to support that claim. A motion by the landowners for a new trial was sustained on the specific ground that the verdict was against the weight of the evidence.

The proceeding was instituted by the State Highway Commission to acquire property for the construction of a four-lane, controlled access highway on US 71 in Jackson County from Route 150 northward. The property in question lay on the east side of original US 71, extending north and south of intersecting 136th Street, a 50-ft east and west street, to which the property owners would have unlimited access by means of a frontage road. The front 300 ft of the property was zoned commercial, the remainder residential. The State took 250 ft of this commercial frontage.

The State had introduced evidence tending to support an award of from $2,873 to $14,466, and appealed the order granting a new trial. The State argued that the lower court had delegated to the jury the authority to weigh the evidence by giving an instruction to the effect that it was the sole judge of the credibility of the witnesses and of the weight and value of the evidence. Having done so, the State claimed, the trial court could not set aside the verdict and award a new trial on the ground that the award was against the weight of the evidence.

The Supreme Court stated that the trial judge in giving its instruction did not delegate or surrender its discretionary power, after verdict, to grant a new trial on the

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[23] Dratch v. Dade County, 105 So. 2d 171, June 1958.
[24] Fla. Stats. 1957, § 73.16.

ground the verdict was against the weight of the evidence. It was the province of the trial court to determine the relative weight of the conflicting evidence, continued the court, so it could not be held in this case that the trial court abused its discretionary power in granting a new trial. The order granting a new trial was thus affirmed.[25]

Immediate Possession

Important cases relating to various aspects of the right to take immediate possession of land being taken for highway rights-of-way were decided in Florida, Georgia (2), Illinois, Kansas and New York. The Florida case held that a trial judge was without authority to order payment of the amount fixed by court appraisers when the amount of estimated compensation had not been included in the declaration of taking. The first Georgia case upheld the constitutionality of the State's statute which established a new condemnation procedure designed to expedite possession of property appropriated by the State. The second Georgia case held that the condemner must pay the assessor's award, in accordance with the State's immediate possession law, before it could appeal for a jury trial. The validity of Illinois' new immediate possession law was also upheld. The New York case upheld the State's statute specifically limiting the payment of interest when claim therefor is not made within six months of the accrual date. Finally, in Kansas, the State's attempt to abandon a condemnation proceeding was frustrated by the State Supreme Court which held, among other things, that since title and possession immediately vested in the Kansas Turnpike Authority when it deposited the amount of the appraised value in the court, the proceedings could not be abandoned.

Florida: The State Road Department brought condemnation proceedings in the circuit court to acquire property owned by one Olcott, among others, for highway right-of-way purposes, and pursuant to a State statute became vested with the title prior to final judgment. The declaration of taking did not contain a statement of the sum of money estimated by the condemning authorities to be just compensation for the land taken. The court-appointed appraisers valued the Olcott property at $10,175, and the condemning authorities had to deposit twice that amount before taking possession of the property.

Later Olcott asked the court to grant an early trial on the question of just compensation for his land or in the alternative that he be paid the amount fixed by the court appraisers together with attorney's fees. Olcott claimed as a basis for this request that he was unwilling to accept the court's appraisal as the true value of his property, that he was inconvenienced and suffered hardship by the appropriation, that his right to damages for the use value of the compensation deferred was not adequately protected by the order of taking, and that the proceedings operated to deprive him of his property without due compensation or due process of law as guaranteed by the State and Federal constitutions.

The circuit court judge then ordered the clerk of the court to pay Olcott $10,175, the amount of the court appraisal, out of the deposit. The State Road Department then appealed to the District Court of Appeals to prevent the carrying out of this order of the lower court.

The court of appeals noted that the trial judge in such cases has statutory authority to order the sum of money set forth in the declaration of taking to be paid the property owner. This authority must be strictly construed, however, said the court, and since the declaration of taking did not include such an estimate, the trial court was without authority to adopt any other basis for payment to the parties entitled to any part of the security deposit.

The court concluded that the trial judge exceeded his authority in fixing the amount of payment to the Olcotts on the basis of the court appraisal.[26]

Georgia: (1) This case arose when O.K. Inc. petitioned the court to enjoin the State

[25] State v. Belvidere Development Company, 315 S.W. 2d 781, 1958.

[26] State v. Wingfield, 101 So. 2d 184, March 11, 1958 (See Memorandum 101, July 1958, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 366).

Highway Department from proceeding with its attempt to condemn the corporation's land in Fulton County.[27]

The act questioned[28] provided that the condemning body could petition the Superior Court of the county to appoint a special master[29] who in turn sets a time for a hearing of all interested parties. Notice must be sent the owner and all interested parties of their opportunity to be heard. The award made by the special master is then filed with the clerk of the Superior Court. Upon payment of the compensation awarded, judgment is entered and fee simple title vests in the condemner. Either party may ask for a jury trial. Tender, payment or acceptance of the amount awarded would not prevent either party from prosecuting an appeal. If the award of the special master is less than that found by the jury, the condemner is bound to pay the additional amount, with "lawful" interest on such amount from the date of the order of the special master. If the verdict of the jury is less than the master's award, the owner must refund the difference, plus lawful interest thereon from the date of such payment. The refund is to be collected by levy.

Among the objections put forth by the condemnees were the fact that they did not have an opportunity to be heard on the appointment of the special master, that the act limited the class of persons who might be appointed as special master to competent attorneys without reference to their knowledge or experience in the field of real estate values, etc. They also contended that the requirement that the condemnee pay 7 percent interest on the overage rendered it impossible for the owner to accept the amount of the award in any case where an appeal was filed except at the peril of having to return at some future time an unknowable portion of such award with interest thereon at a rate which he could not earn upon any safe and secure investment.

The Georgia Supreme Court upheld the constitutionality of the law, stating that the method of ascertaining what is just and adequate compensation was subject, within certain limitations, to legislative discretion. It could not be said in this case, according to the court, that the 1957 act was in anywise an abuse of legislative discretion, since it fully and adequately protected the constitutional rights of the property owner in that it provided for just and adequate compensation to be first paid before the property was taken.

Georgia: (2) The second case in this State questioned the right of a condemner to appeal for a jury trial from an assessor's award without first having tendered the amount of the award to the landowners or paying the sum into the registery of the court.[30]

The facts reported in the opinion showed that the City of Atlanta filed a proceeding to condemn certain land owned by one Woodside and others in connection with the construction of the North-South Expressway in Atlanta. Assessors were duly selected and an award was made after the parties had been fully heard. The city, being dissatisfied with the amount determined by the assessors, appealed to a jury. The landowners moved to dismiss the appeal on the ground that the city had not tendered them the amount of the award nor paid such amount into court prior to or at the time of filing the appeal, and that such tender or payment had to be made before the city could appeal. The landowners also alleged they sustained a loss of substantial property rights in consequence of the pending condemnation proceeding. The motion to dismiss was denied, and the landowners appealed to the Supreme Court of Georgia.

The high court, in reversing the lower court's holding, held that the "taking" of property for which compensation must be paid according to the constitution is not confined merely to a physical taking, but it may also consist of an interference with the rights of ownership, use and enjoyment, or any other right incident to property. The court decided that a condemnation proceeding which had gone as far as this one, did

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[27] O. K. Inc. v. State Highway Department, 100 S. E. 2d 906, November 8, 1957 (See Memorandum 99, March 1958, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 361).

[28] Laws of 1957, p. 387.

[29] The special master must be a competent attorney at law of good standing with at least three years experience in the practice of law.

[30] Woodside v. City of Atlanta, 103 S. E. 2d 108, March 1958.

interfere with and greatly restrict the owners' property rights in and to their land and to a large extent deprived them of their right to use and enjoy it.

"The assessors' award," the court said, ". . . is a judgment by a tribunal competent in law to fix the rights and liabilities of the parties to the proceedings with reference to the matters and things involved . . . . And respecting such a judgment, the condemner cannot dismiss his condemnation proceeding and by such act destroy its legal effect." In this stage of the proceeding, the court said, compensation for the property was fixed by judgment at the condemner's instance, and the condemner could not excuse its failure to pay for it on the ground that its value was unascertained. The court held that since the recorded award adjudicated value of the property, tender of payment to the landowners or payment into court was a condition precedent to its right of appeal to a jury. The city could not refuse to pay the amount so awarded and at the same time insist upon its right to take it.

Three justices dissented primarily on the ground that by a previous ruling of the court (Hurt v. City of Atlanta, 28 S.E. 67(1896)) there was no "taking" of property. In the cited case the court had held that a "taking" meant a physical, tangible appropriation of the property of another. One dissenting justice pointed out that the owners in the instant case were in complete possession and use of the property and the city had not taken possession of any of the property and had not in any way interferred with possession by the owners. Another dissenter said: "If the word 'taking' is defined as meaning one thing in 1896 . . . and a different thing in 1958, and a construction of its meaning is to be determined by the age in which we are living, this court can, as constituted ten years from now, give the word its meaning in the age of space, rather than its meaning in the age of atomic energy or in the horse and buggy era."

Illinois: In March 1958, the State Supreme Court upheld Illinois' new "immediate possession" law. The Department of Public Works and Buildings in 1957 filed an eminent domain petition to acquire 32 parcels of land for the widening and improving of Route 55.[31] After the filing of the petition, the department made a motion for immediate vesting of title to two tracts pursuant to the provisions of the 1957 "quick taking" amendment to the Eminent Domain Act. A hearing of the motion was set and the owner of the two tracts filed an objection on the ground that the amendment was unconstitutional. The trial court ruled in favor of the owner.

The statute in question provided that a motion might be filed, subsequent to the petition for condemnation, requesting the immediate vesting of such title as may be required. At a hearing on the motion, evidence is heard for a preliminary finding of just compensation; the court may appoint three appraisers to evaluate the property and then make a preliminary finding of the amount. After 125 percent of the amount found by the court is deposited with the court, an order is issued vesting title in the petitioner and fixing the date he may use the property. Later, a final determination of just compensation proceeds as in the normal eminent domain case and any excess of the preliminary amount is returned or deficiency paid to the owner.

The landowners claimed among other things that the amendatory act was a violation of the Illinois constitution in that it authorized the possession and vesting of title to private property prior to the final ascertainment and payment of just compensation therefor; that the act makes no provisions for damages resulting from the decrease in value of the land that remains after the government cuts off what it takes; and that it violates the due process clause of both the State and Federal constitutions by failing to make adequate provision to secure and effect payment of just compensation as finally determined.

The landowner's argument was based mainly on the court's decision in the case of Department of Public Works and Buildings v. Gorbe et al.,[32] which questioned the constitutionality of a 1947 amendment to the Eminent Domain Act, which attempted to ac-

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[31] The Department of Public Works and Buildings v. Butler Company, 150 N.E. 2d 124, March 1958, Rehearing denied May 23, 1958 (See Memorandum 100, April 1958, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 365).

[32] 409 Ill. 211, 98 N.E. 2d 730 (1951).

complish the same thing as the 1957 amendment under review, but which made no provision for a judicial determination of the estimated amount of compensation. The court in that case held that in Illinois it was firmly established that the constitutional guaranty against the taking of private property for public use without just compensation prohibited the possession and use of private property until just compensation had been fixed and paid, and that the payment of estimated compensation as provided for in the amendment (1947) fell short of payment in full of the amount of just compensation determined by a court or jury. So the law authorized the taking of private property before compensation was determined and paid and consequently, the court held, was unconstitutional and void.

In the present case the State Supreme Court held that the constitution of Illinois does not prohibit the taking, possession, and use of private property by the State prior to the fixing and payment of compensation, provided that the authorizing statute adequately safeguards the right of the owner of such property to just compensation therefor, and to this extent overruled the decision in the Gorbe case. Due process, the court held, is not violated in the 1957 amendment merely because condemnation precedes the ascertainment of what constitutes just compensation. The statute requires a judicial preliminary determination of the adequacy of just compensation, a deposit of 125 percent of the amount so found, and the additional safeguard that if that amount should prove inadequate when the value is finally determined, the payment of the deficiency. The court said that the procedure provided by the act, with these safeguards, does not put an unreasonable hazard upon an owner that he will not receive just compensation.

As to the landowner's argument that the act does not provide for damages resulting from the decreased value of the land left after the taking, the court said that just compensation includes the damages, if any, to that part of the tract not taken and the trial court will not ignore that question in arriving at the final amount.

The landowners claimed that the act was an unlawful delegation of legislative power because standards for ascertaining the necessity of the quick taking are not spelled out. The court found no validity in this argument. The statute does require that the motion for immediate possession state the necessity for the taking and a finding by the court of reasonable necessity for such taking. Also the motion must show the formal plan of operation for the execution of the project and the situation of the property with respect to the plan. So the courts do have standards by which they may review the steps leading up to the filing of condemnation proceedings, and the function of a court under the act is to see that all steps necessary to be taken before the exercise of the power granted to the Department (i.e., the power to determine when to use the power of eminent domain and so also the discretion to determine when to expedite that power) have been taken.

The court concluded that the 1957 amendment to the Eminent Domain Act had ample safeguards against violation of any landowner's constitutional rights. The court pointed out that 15 States with constitutional provisions similar to those of Illinois have similar "quick taking" acts which have been upheld.

New York: This case tested and upheld the validity of the State statute specifying a time limitation for the accrual of interest on a claim for compensation due to the taking of property by eminent domain.[33]

The facts of the case indicated that on June 1, 1953, the State filed with the clerk of the county in which the land was situated a description of the premises and a map thereof, which action, according to the Highway Law, vested title in the State. Copies of these two documents were served on the claimants in April 1955. A claim was filed by the landowner in April, before the above mentioned service. In December 1956, the trial court awarded compensation of $4,000 plus interest from June 1, 1953. The State objected only to the figuring of the interest accrual and appealed on that ground. The pertinent statute reads:

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[33] La Porte v. State, 172 N.Y.S. 2d 249, March 1958 (See Memorandum 104, November 1958, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 373).

If a claim which bears interest, is not filed until more than six months after the accrual of said claim, no interest shall be allowed between the expiration of six months from the time of such accrual and the time of the filing of such claim.

By this statute, the State claimed that the interest should accrue from June 1, 1953, to December 1, 1953, and from April 1955, to the date of judgment. But the trial court held the statute unconstitutional in that it offended the due process clause of the Federal Constitution because claimants were not served until after expiration of the six months from the taking of title, and that it violated the State Constitution because property was taken without just compensation if uninterrupted interest were not paid.

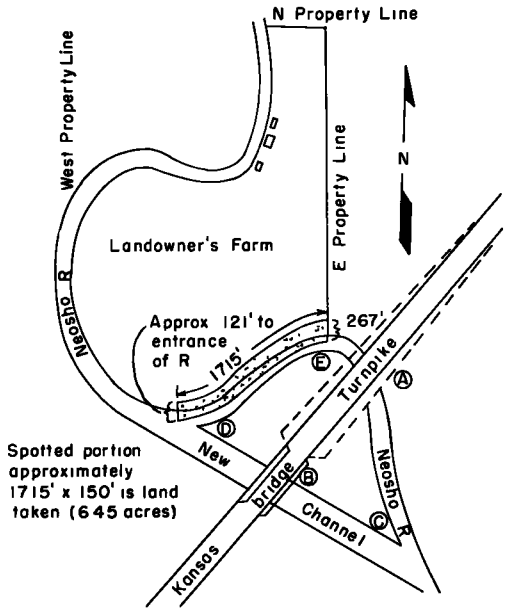

Figure 3. In re Kansas Turnpike, 324 P. 2d 147, 1958.

The Supreme Court, Appellate Division, reversed the lower court and modified the judgment. The court said that the filing of the map and description in the first place amounted to constructive notice that the State had taken the property. The claim was in fact filed before the personal service, so it was not the service that notified the claimants. They either had actual notice or their use and enjoyment of the property was not disturbed. It was the delinquency of the claimants and not of the State which deprived them of interest. The obvious purpose of the act, the court announced, was to insure some degree of promptness in filing a claim and having the amount of "just compensation" adjudicated when the parties were unable to agree on the amount. It was in effect only a time limitation, according to the court, and did not deprive the property owner of just compensation; it was not unreasonable nor did it do violence to any constitutional rights of the owners.

Kansas: One of the few drawbacks ever mentioned in connection with immediate possession statutes is the fact that once the machinery has started working, i.e., possession has been taken either figuratively or in reality, the project cannot be abandoned. A decision bearing on this point was handed down by the Supreme Court of Kansas during the year.[34]

As shown by Figure 3, the landowners' farm was shaped by the circuitous route of the Neosho River and contained 60 acres. The land taken (spotted portion on map) amounted to 6.45 acres and left a remainder of approximately 53.55 acres. In making a fill to raise the grade for the roadbed of the turnpike the authority created a permanent dam across the natural channel of the Neosho River at point "A" on the map. The authority cut into the natural channel of the river at "D" and straightened it into the new channel which was bridged at "B." The new channel then rejoined the natural channel at "C." Thus the natural channel from "D" to "E" became a still instead of a running river. The original plans of the turnpike provided for the taking of the 6.45 acres to fill in between the banks forming this segment of the old channel.

The trial court rendered judgment in favor of the landowners, whereupon the authority moved to abandon the proceeding. This motion was turned down by the court, which also refused to permit a new trial. Upon appeal, the State Supreme Court affirmed the judgment of the trial court.

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[34] In re Kansas Turnpike, 324 P. 2d 147, April 1958 (See Memorandum 101, July 1958, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 366).

The Supreme Court noted that the landowners' testimony tended to show that by reason of the fill, the flood hazard in the Neosho River valley and the remaining land of the Renhuffs was enhanced. The authority complained that the landowners were allowed to prove damages to their remaining land by reason of a taking of land other than that belonging to them. However, the court said, the authority failed to prove its point that its substantial rights were prejudiced thereby so as to justify reversal, since there was no way of knowing whether the jury placed much, if any, credence upon this evidence, or whether any damage therefor was included in the general verdict returned. The court was therefore bound by the rule that in the absence of a request for special findings of fact, a general verdict such as the one under consideration here resolved all controversial issues in favor of the prevailing party.

The high court also found that under the Toll Road and Turnpike Act, title and right to possession immediately vested in the authority when it deposited with the clerk of court the amount of the appraised price. Therefore, the trial court did not err in overruling the authority's motion to abandon the condemnation proceedings.

Reservation of Right-of-Way

Use of the official map device is becoming more and more prevalent, to preserve and protect the bed of mapped streets which are included in the master plan of a city. This device permits no new construction in the areas included unless the owner is able to show resultant financial loss. Enabling legislation exists in quite a few States, including New York and Wisconsin. A number of cities and towns in those States have enacted ordinances to permit operation under the provisions of these acts.

Wisconsin: In a significant decision handed down on December 3, 1957, the Supreme Court of Wisconsin upheld the validity of the official map law adopted by that State in 1947.[35]

The official map authorized by the Wisconsin law (Wisconsin Stats. Sec. 62.23(6)) shows existing streets, highways, parkways, parks and playgrounds and the exterior lines of planned new streets, highways, parkways, parks or playgrounds. For the purpose of preserving the integrity of the official map, no permit may be issued for any building in the bed of any street, highway or parkway shown on the map. A landowner desiring to construct a building in the bed of a mapped street must apply to the city for a permit. If denied, he may apply for a variance, and if he can prove that his land is not yielding a fair return, the board of appeals may grant a permit for a building which will as little as practicable increase the cost of opening the street. The permit is to be denied where the applicant will not be substantially damaged by placing his building outside the mapped street, highway or parkway. More than 30 Wisconsin cities and villages have adopted official map ordinances pursuant to the enabling statute.

The landowner in the present case purchased a tract of land in Green Bay in 1953 with a 384.17-ft frontage on Velp Avenue. Shortly after purchase, he leased a tract with 200-ft frontage on Velp Avenue for a service station. This left him with 92.17 ft of street frontage to the west thereof and 92 ft of street frontage to the east.

The official map showed the location of a proposed street, 80 ft wide, extending in a general northerly direction from Velp Avenue. Eighty of the 92 ft of frontage to the east of the service station lay within the bed of the mapped street. The landowner's application for a permit to erect a drive-in service lunch stand on the property lying to the east of the service station was denied by the building inspector. Upon appeal, challenging the constitutionality of the enabling statute, the board of appeals sustained the building inspector's denial of the application for a building permit. The circuit court subsequently upheld the constitutionality of the act and the owner appealed to the Supreme Court.

The Supreme Court stated that one of the objectives of the statute was to promote orderly city growth and development in order to prevent haphazard erection of build-

[35] State v. Manders, 80 N.W. 2d 469 (See Memorandum 98, February 1958, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 359).

ings and the installation of service facilities bearing no relationship to future streets, and noted that there were practical reasons why municipalities should have the right to enforce such planning in advance of the actual acquiring of title to the land in areas undergoing improvement and development. The court concluded that an objective seeking to achieve better city planning lay within the concept of promoting the general welfare.

The court noted that protection of the financial interests of taxpayers of the city was a second objective of the enabling statute as manifested by the provision authorizing the board of appeals to grant a permit to erect a building within the lines of the proposed street "which will as little as practicable increase the cost of opening such street." The protection of economic interests of the general public, said the court, falls within the scope of promotion of the general welfare, and thereby affords a basis for exercise of the police power.

Finally, the court was of the opinion that the saving clause included in the enabling act directed the board of appeals, in substance, to grant a permit if the applicant would be substantially damaged were it denied. If the board should deny a permit under circumstances which would result in substantial damage to the landowner applicant, the enabling statute authorized the aggrieved applicant to secure court review. Without so construing the saving clause, said the court, it would be impossible to sustain the constitutionality of the enabling act.

With respect to the present case, the court found that the applicant had failed to establish that the Green Bay official map ordinances, as applied to his property, were unconstitutional. However, the court did not rule out the possibility that under certain circumstances such an ordinance might be invalid as applied to particular lands.

Exchange of Land

The authority of a government agency to acquire land to be conveyed to a landowner in exchange for a portion of her property needed for street purposes came before the Texas Court of Appeals during the year.[36]

Texas: This was an appeal from a judgment which approved and validated a certain deed and a certain ordinance passed by the City Council of Memphis, Texas. The ordinance in effect vacated and abandoned a portion of a street and authorized the exchange by a deed of the portion of the street abandoned to Lou Ella Rogers to be used as right-of-way for the construction of a changed portion of U.S. Highway 287 being rerouted through the city.

Roberta F. Rogers, acting as executrix for the estate of Lou Ella Rogers, sought to have the city ordinance and the city deed resulting from the ordinance declared valid. In support of this request, the city alleged that its action had been taken in the best interests of the public, that the city council had determined and found that the portion of the street in question had been accepted or used by the public for vehicular traffic, but had only been used as a parking space for trucks, equipment and cars. The remaining portion of the street was 40 ft wide and had a sufficient width to accommodate all traffic on and over the street, for which reason the portion of the street in controversy was ordered closed and vacated as a public street by the city council before being conveyed in exchange. Consequently, the city asked that the landowner's request be granted. The district court upheld the validity of the ordinance and deed whereupon the case was appealed by Jim and Robert Roark.

The Court of Appeals held that the city had authority under the statute[37] to enact ordinances vacating and abandoning a portion of a certain street and to execute a deed conveying that portion of the street to decedent, as the only owner of property abutting that part of the street that was being vacated and abandoned, in exchange for property of decedent which was to be used as right-of-way in rerouting a highway in the city. The enabling statute reads as follows:

The governing body of any incorporated city or town in this State, however, incor-

[36] Roark v. Rogers, 316 S.W. 2d 325, September 1958.
[37] Vernon's Tex. Civ. Stats. 1948 art. 1017.

porated, may sell and convey any land or interest in land owned, held or claimed as public square, park or site for city hall or other municipal building, and abandoned parts of streets and alleys, together with all improvements on any such property owned by any such city or town. The proceeds of any such sale shall be used only for the acquisition and improvement of property for the same uses as that so sold . . . Such sales shall be made by an ordinance passed by such governing bodies which shall direct the execution of conveyance by the mayor or city manager of any such city or town.

The court upheld the lower court's judgment declaring valid the city ordinance and execution of the deed was affirmed.

Public Hearings

Section 116(c) of the Federal-Aid Highway Act of 1956 specifically provided that any State highway department submitting plans for a Federal-aid highway project involving the bypassing of, or going through any city, town or village must certify to the Commissioner of Public Roads that a public hearing has been held, or an opportunity for such a hearing has been afforded. An interesting report of a Missouri court's interpretation of this provision was submitted during the year by Robert L. Hyder, Chief Counsel of the Missouri State Highway Commission. The hearing in point concerned the State's plans to construct a bypass of US 40 south of the City of Boonville. Somewhat along the same line is a Michigan decision, concerning a public hearing conducted in that State to determine the necessity for a relocation of US 12 in Benton Harbor. These cases are summarized in the following paragraphs.

Missouri: The State Highway Department contemplated a relocation of US 40 and selected a tentative bypass location about two and one half miles south of the City of Boonville. A hearing took place in the city, which in the opinion of the local Division Engineer of the Bureau of Public Roads, complied with the requirements of the Federal-Aid Highway Act of 1956. After the passage of the 1956 act, the Mayor and others appeared before the State Highway Commission to exercise their views and formal request for a hearing was made. Due to the fact that the character of the project had changed—an interstate route was now contemplated—a more formal and extensive hearing took place.

The project was explained at the hearing, as well as the reasons therefor, including the economic reasons. Interested persons were given an opportunity to be heard, and counsel for the city was given an opportunity to argue the case. He declined to do so. The hearing was then closed and the matter progressed to the point where a project covering a portion of the disputed location was let.

The city and a group of citizens filed suit to enjoin the commission from locating the bypass too far from the center of town. They agreed that there was a valid public hearing, but that the preponderence of evidence was to the effect that the city would be economically damaged.

The State Highway Commission took the position that the location of highways is a legislative function on the part of a branch of the Executive Division of the Government—The State Highway Commission—and is not subject to judicial review except for fraud or abuse of discretion amounting to fraud.

The decision of the circuit court was merely a dismissal of the city's action, which Mr. Hyder interpreted as having the following effects:

1. The highway commission has the sole right to locate any route in the absence of fraud or abuse of discretion amounting to fraud.
2. The public hearings held by the commission under Section 116(c) of the Federal-Aid Highway Act of 1956 require only a consideration by the commission of all the views of interested parties, including those on the economic effect of the location.
3. In accordance with rules and regulations of the Bureau of Public Roads, the local Division Engineer of the bureau is the person who must be satisfied with the results of the hearings.

4. No findings of fact or conclusions as a result of the hearing are required on the part of the State Highway Department.[38]

Michigan: In a decision handed down during the year the State Supreme Court held that the condemning authority's determination as to the necessity for taking land would not be reviewed by the courts unless that body was deemed to have abused its discretion.[39]

This case resulted from the State Highway Commissioner's plans involving a relocation of US 12 through the City of Benton Harbor. Proper notice was served that a public hearing was to be held on the necessity for taking the land.

The State Highway Commissioner, on January 3, 1956, entered an order reporting the holding of the hearing, determining that the improvement was necessary, and that the taking of the lands referred to in the statement attached to the notice of hearing was likewise necessary.

Following the order of determination, the owner of certain lands to be taken (New Products Corporation) requested review of the proceedings by the circuit court, with particular reference to the conduct of the hearing on necessity. On November 26, 1956, an order was entered by the court affirming the determination of necessity. The New Products Corporation appealed to the Supreme Court of Michigan.

New Products Corporation contended that necessary requirements with reference to due process of law were not observed in the holding and in conducting the hearing.

The court noted that the statute prescribing requirements as to administrative procedure before State agencies, relied on by New Products Corporation, specifically excepted necessity hearings by county road commissions and the State Highway Commission required by a statute enacted in 1925.[40] The court thought it clear that the legislature intended that the adoption of procedural rules should be governed by the 1925 act. The court agreed with the commission's argument that a so-called necessity hearing did not involve adjudication of a contested case, but was rather in the nature of an inquest, as the basis for a determination of matters at issue, i.e., the making of the improvement and the taking of specific property therefor. It was a fair inference, according to the court, that such was the view of the legislature in providing that the rules of procedure prescribed for administrative agencies need not be adopted for use on necessity hearings.

The Supreme Court noted that the trial judge determined on the basis of the proofs before him that the plan to improve the trunkline as a limited access highway was formulated after the city had adopted a resolution approving the project and indicating the route of the relocated highway. By this action the court said, the city gave its consent to a relocation of US 12.

New Products Corporation also objected to a statement attached to the notice of hearing on the question of necessity which disclosed that the commission intended to take more land than was necessary for the contemplated improvement. The Supreme Court called attention to statutory provisions relating to the establishing and maintenance of limited access highways, wherein condemning agencies were specifically authorized to take private property in excess of the amount needed for right-of-way proper, if the public interest would be best served by such taking. The court thought this was in accord with sound principles of public policy, and also consistent with the holding of the court in a previous case.[41]

The final argument of New Products Corporation was to the effect that there was no competent evidence on which to base the finding of necessity for the improvement and for the taking of property therefor. The Supreme Court noted that US 12 was an important interstate thoroughfare. That it should be improved to meet the necessities of

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[38] Velma Ebersole, et al. and the City of Boonville v. State Highway Commission of Missouri, Circuit Court of Cole County, Missouri, April 1958 (See Memorandum 100, April 1958, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 365).

[39] New Products Corporation v. Ziegler, 88 N.W. 2d 528, March 1958.

[40] Compiled Laws of Mich., §§ 213.171 to 213.199.

[41] In re Huron-Clinton Metropolitan Authority, 10 N.W. 2d 920, 1943.

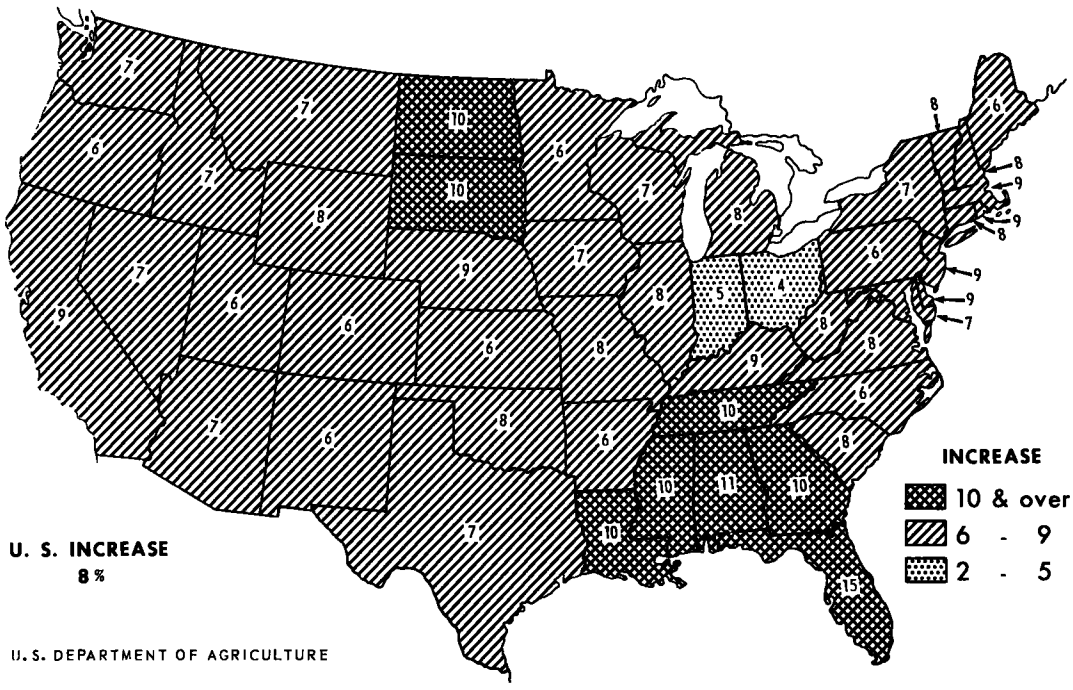

Figure 4. Change in dollar value of farmland, based on index numbers of value per acre, including improvements; percentages, March 1958 to March 1959.

increased traffic to the end that it might be of adequate service to the public generally was not open to question. The principle that public authorities charged with the laying out and maintenance of highways might act with reference to probable future requirements had been repeatedly recognized, according to the court. The trial judge had concluded, after considering the proofs, that there was a proper basis for the determination of necessity as made by the commissioner. The Supreme Court held that the conclusion of the trial court was a proper one and thus affirmed the commissioner's determination.

Right-of-Way Costs and Land Values

Since farmland values generally have a definite influence on prices paid for right-of-way in rural areas, it is interesting to note that the Department of Agriculture estimates that such values throughout the United States increased an average of eight percent during the period from March 1958 to March 1959 (see Fig. 4). This is two percent more than the increase reported for the period from March 1957 to March 1958.[42] There were no States where decreases were noted, and in North and South Dakota and six of the Southern States, values increased ten percent and over. Market values in all States except South Dakota were at a record high level as of March 1, 1959.

The department attributes these advances in part, at least, to increase in farm income during 1958 and the recovery of the general economy, especially during the latter half of 1958. Additionally, the attitudes of people generally toward farmland as an investment and the demand from operators for additional land have contributed to the rise in value.

The consensus of reporters in the March 1959 survey was to the effect that prices of land would continue to increase during the summer of 1959.

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[42] Current Developments in the Farm Real Estate Market, Agricultural Research Service, U.S. Department of Agriculture, May 1959.

CONTROL OF HIGHWAY ACCESS

As mentioned earlier in this report, all of the States, with the exception of Arizona, now have specific statutory or constitutional authority to control access. This authority is still new, however, and probably for this reason, the taking of access rights is frequently the subject of litigation in State courts. Although there were no court decisions during the year testing the States' authority to control access as such, there were a number involving various aspects of the problem, such as the authority to barricade streets intersecting expressway facilities, when alleged impairment of access represents compensable damage, whether or not the provision of frontage roads may be considered in mitigation of damages, and various others. A review of these court decisions comprises the following sections.

It will be noted that a number of court decisions in which the taking of land for controlled-access highways was involved have been discussed under other headings in this report. Only those in which some point peculiar to this type of facility was considered by the courts are included in this section.

Denial of Access to Planned Expressway

Authority to plan for future expressway improvements was sanctioned by an Indiana court during the year when a landowner abutting a conventional highway, which by resolution the State had declared a controlled-access facility, was denied a permit to construct a gasoline filling station on his property.

Indiana: J. Floyd Huff and Harriet C. Huff owned a parcel of real estate 175 ft square at the intersection of State Highway No. 100 and 56th Street in Indianapolis. On March 26, 1956, the Huffs filed a petition with the State Highway Department to open a driveway into State Route 100 on the east side of their real estate, in order to operate a filling station. The real estate had been zoned for this purpose by the proper local authorities. The department denied the petition and later denied a further petition to reconsider the first denial. It so happened that in November of 1955, the State Highway Department had adopted a resolution, in connection with State Route 100, to the effect "that the traffic conditions on said highway then and in the future justified the designation and establishment of a portion of this highway for approximately 9 miles . . . as a limited access facility . . ." and by this resolution limited access to and egress from the highway to certain designated intersections. No access was provided for the place in controversy. This action was authorized by the State's controlled-access law.

The Superior Court of Marion County rendered judgment against the Huffs, in an action to review the order of the State Highway Department. On appeal, the Supreme Court of Indiana affirmed this judgment.

The Huff's main contention was that nothing was done to accomplish the purpose of the limited access resolution except that signs were ordered posted in compliance with the resolution. To this the court said: "We would not be warranted in giving such a narrow construction to the act that the department would be required to extinguish all easements of ingress and egress forthwith, and proceed at once with the construction of the highway to bring it to a completion as planned. Unless highways are planned for the future, millions of dollars will be wasted. They can only be constructed as money becomes available. Appellants are in error in asserting in substance that the action of the department was void because the highway as planned for limited access was not under construction."

The court recognized that the owners' right of ingress is a property right which may not be taken from him without compensation, and, as a matter of fact, it was not contended that the highway commission had in any way prevented the Huffs from exercising their ordinary right of access to the highway. But, the court said, a refusal to grant a permit for a right of ingress and egress for a new filling station is quite another matter. The court pointed out that the effect of the owners' contention would be to force the department to grant the permit and then seek to extignuish it later by a condemnation proceeding. This would permit the owners to augment the damages that would have to be paid by the State in every case where the State sought to establish a limited access facility. Also, the court said, the State has the right under the police

power to regulate the nature of an easement for ingress and egress. It said that it could not be held that anyone, wherever his land might be situated, had a constitutional right to a way of ingress and egress for a public filling station along a State highway which had been declared a limited access facility. If such unlimited constitutional right did exist the land along the right-of-way could become so overloaded with filling stations or other business places that the cost of extinguishing the easements would be prohibitive.[43]

Barricading Streets

A majority of the States having controlled-access highway legislation have authority to eliminate intersections at grade in order to preserve the effectiveness of the expressway. Two court decisions handed down during the year involved this matter of closing streets at their intersection with expressway facilities. In one State, Ohio, where the controlled-access statute includes no provision for barricading streets, the court turned down the State's attempt to close two existing township roads. The other case, in North Carolina, touched only indirectly on this problem, but is interesting because of the fact that the courts held that a contract entered into with a landowner whereby the contracting city agreed not to close certain streets was void, inasmuch as the city could not bargain away the governmental function of opening, closing and maintaining streets.

Ohio: The Director of Highways in his plans to construct a controlled-access highway in connection with the relocation of US 25 and 68, planned to close two existing township roads. Abutting landowners along these two township roads brought action to enjoin the director from closing the roads. They were not interested in access to the new highway but desired that the two township roads be kept open by means of overpasses or underpasses.

The question presented to the courts was whether the director has the authority to vacate or close intersecting highways under the statute authorizing him to construct a limited-access highway. Nothing in the statute specifically gives him this authority, but he contended that he was impliedly authorized to close such a road. The Supreme Court upheld the Court of Appeal's ruling that there was no specific grant of authority in the statute nor any such grant of authority by implication. The Court of Appeals said that if any authority exists for vacating such intersecting roads it must be found in some other provision of the statutes. The Supreme Court went further and said that nowhere in the statute relating to the vacation of public roads is there any grant of authority to the Director of Highways to close or vacate any county or township road, but that the authority for this rests entirely with the Board of County Commissioners. The court said that if the State Legislature should determine as a matter of legislative policy that this important authority should be vested in the Director of Highways, it would seem that the grant should be in unambiguous language. The court upheld the lower court's granting of an injunction.[44]

North Carolina: The setting for this case was in the City of Greensboro where the Bessemer Improvement Company owned a tract of land approximately one mile square which it planned to subdivide.[45] The streets had been plotted, marked and paved so as to provide convenient access to different parts of the city as well as to various parts of the property. Subsequently, the city's planning department proposed the construction of broad thoroughfares to carry traffic from one part of the city to another. To accomplish this purpose the city proposed to use Benbow Road, one of the private roads con-

[43] Huff v. Indiana State Highway Commission, 149 N. E. 2d 299, April 11, 1958 (See Memorandum 103, September 1958, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 366).

[44] Hulbert v. Linzell, 148 N. E. 2d 675, March 1958 (See Memorandum 101, July 1958, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 366).

[45] Bessemer Improvement Co. v. City of Greensboro, 101 S. E. 2d 336, January 1958.

structed by the improvement company on its land. In furtherance of these plans, the company contracted with the city to convey a right-of-way 120 ft wide along Benbow Road and to pay the city $50,000 for maintenance of all the streets in the subdivision. The contract also stated that the company reserved the "right to cross all streets, within that part of the property . . . which is now zoned for industrial purposes, with railway tracks and industrial sidings at such points as may be reasonably necessary to serve such properties, except Benbow Road, which shall be crossed at only one point." It was also agreed that by mutual agreement between the company and the city certain streets could be closed or changed "in accordance with the statutes and ordinances in such cases made and provided."

At the time of this conveyance it was specifically agreed that the city would construct a boulevard along Benbow Road in accordance with existing plans. Later, the city abandoned its plan for the boulevard and entered into a contract with the State Highway Commission for the construction of a controlled-access highway through the company's property. In pursuance of this new plan the city transferred to the commission the right-of-way along Benbow Road, and the commission subsequently constructed the controlled-access highway along Benbow Road. The improvement company's property abutting on the highway was denied access, and as a result thereof it was claimed the value of this property was substantially reduced.

On appeal from a decision of the Superior Court, the State Supreme Court ruled that the opening and closing of streets is strictly a governmental function, and that a contract purporting to restrict the statutory discretion vested in the governing body of the municipality is to the extent of such limitation void and can furnish no right of action for noncompliance. However, the court said that while no liability could be imposed for noncompliance with a void contract, properties acquired as a consideration for the contract cannot be retained without making compensation therefor. The fact that the municipality is an agency of the State does not affect the obligation to make fair compensation for the property transferred and retained. The court said that the city was within its rights in electing not to carry out its agreement in the manner originally decided upon, but that this did not relieve it of its obligation to pay fair and just value for the property rights it acquired by virtue of its unenforceable promise.

Frontage Roads

The question as to whether provision of a frontage road may be considered as mitigating damages to which a landowner is entitled for loss of access continues to be answered in a different manner by the courts of the several States. Although a number of court decisions handed down during the past year discussed this matter, no clear cut trend in the courts' thinking can be discerned. Analysis of these court decisions, as summarized in the following paragraphs, leads to the conclusion that at least as of the present, the part played by the frontage roads in estimating compensation must be established on the merits or each individual case. This conclusion is particularly pertinent in examining four Mississippi cases, all of which involved frontage roads.

Mississippi: In March 1958, the State Supreme Court in effect ordered compensation for depriving an abutter of direct access but said that if the highway department should provide indirect access by building a bridge and extending a frontage road (the court would not so order) this would be enough compensation. The next case, in June, involved an existing highway converted into a controlled-access facility which the court held deprived the abutter of his right to have "an easy way of access to the main highway," such abutter being entitled to compensation for his inconvenience in having access to his property so limited. One week later the court handed down two more pertinent decisions. In one it held that a median strip merely caused inconvenience to an abutter and was not compensable since it was a reasonable exercise of the police power, and that evidence of a frontage road to be provided was necessary in the determination of damages. And, finally, on the same day the court held that when a controlled-access highway was constructed on a new location an abutter was not entitled to direct access—that by an exercise of the police power the construction of frontage

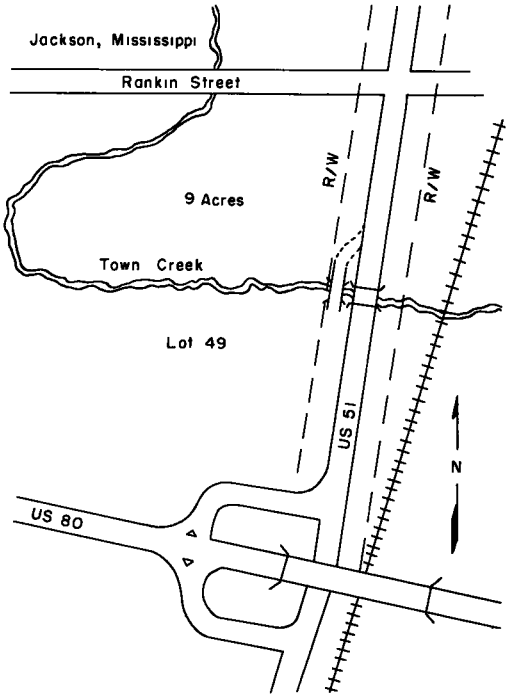

Figure 5. Mississippi State Highway Commission v. Spencer, 101 So. 2nd 499.

roads would provide reasonable access and this would suffice.[46]

(1) Landowners, E.O. Spencer, and others, sought a mandatory injunction requiring the Mississippi State Highway Commission to allow them access to their property. From an adverse holding in the chancery court, the commission appealed to the Supreme Court of Mississippi.

The land involved was located on the west side of South State Street (US 51) in Jackson, bounded on the south by US 80 and a cloverleaf, and on the north by Rankin Street. The land was divided by Town Creek running from west to east. The commission denied access to Highways 51 and 80 to the land south of Town Creek for the reason that ingress and egress would create additional traffic hazards to the public, and that access to Highway 51 could be had from the land north of Town Creek (see Fig. 5).

The landowners contended that the property constituted two separate economic units, and the orders of the commission, which denied access from the land south of the creek, were arbitrary and unreasonable, constituting a cloud on the landowners' title; that the landowners were entitled to the mandatory injunction, because denial of the access right would be a confiscation of their property without due compensation in violation of the Mississippi Constitution. The landowners asked that in the event the court determined that they had only limited access, the court should determine the location of such access, enjoin interference therewith, and award the landowners damages as to that frontage on which access was denied.

In the opinion of the lower court, the properties north and south of Town Creek constituted two separate economic units. The court held that the abutting property owners had a special right of easement to the highway for access purposes, which was a property right that could not be taken without due compensation. The commission briefed its case on the opposite theory that the land south and north of the creek comprised one unit. Hence its contention that this was a regulation of access and not a denial thereof.

The final decree of the lower court held that the landowners had a vested property right of access to the land south of the creek and had not conveyed that right away; that the commission had no right to deny such access without first purchasing it, and that the commission's denial constituted a cloud on the landowners' title. The court went on to say that since public safety demanded denial of access south of the creek, it was so ordered, but on condition that the commission build a bridge across Town Creek on its right-of-way, with a frontage road from Highway 51 north of the creek to the bridge. The landowners would thus be adequately compensated and the cloud on their title removed.

The Supreme Court thought the lower court's findings were correct. Access to the

[46] Mississippi State Highway Commission v. Spencer, 101 So. 2d 499; Carney v. Mississippi State Highway Commission, 103 So. 2d 413; Muse v. Mississippi State Highway Commission, 103 So. 2d 852; Harreld v. Mississippi State Highway Commission, 103 So. 2d 852 (See Memorandum 105, November 1958, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 374).

land north of the creek did not afford access to that lying south of the creek, for the creek was a natural barrier between the two tracts of land, and as far as access was concerned, the two tracts would have to be treated as if they were not contiguous. The decree of the lower court had the effect of compensating the landowners for their loss of direct access by requiring the commission to provide indirect access to the south lot, and to that extent was affirmed.

The Supreme Court held, however, that the chancery court was without jurisdiction to order issuance of a mandatory injunction requiring the commission to construct the bridge and frontage road. This was a matter within the discretion of the commission. The high court remanded the case for determination by the chancery court of damages to the landowners resulting from the total denial of access to the highway from the land south of the creek, in the event the commission elected not to construct the bridge and service road.

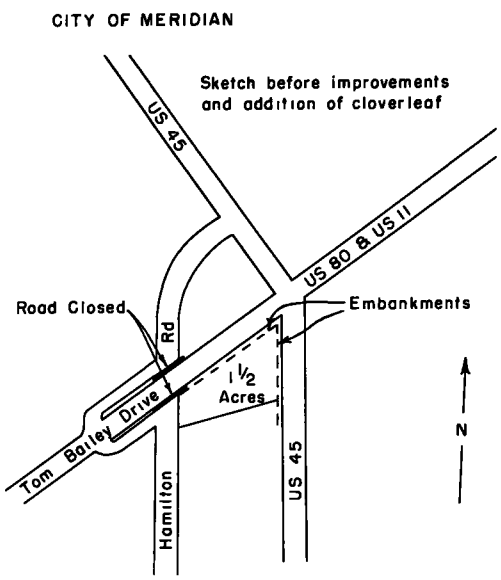

Figure 6. Carney v. Mississippi State Highway Commission, 103 So. (2d) 413.

(2) The land in question in this case was needed for the construction of a cloverleaf at the intersection of US 45, which ran north and south, and the combined US 11 and 80, which ran east and west, otherwise known as Tom Bailey Drive. One Ben Carney owned 1.5 acres of land just southwest of the intersection. The State Highway Commission had acquired most of the necessary right-of-way but found that it was in need of a small additional strip of Carney's land, containing 0.26 acre, which extended a considerable distance along the east side of his land. The construction caused a fill or embankment, between 16 and 27 ft in height, the base of which was practically against Carney's land. The embankment of Tom Bailey Drive which abutted the property on the north also reached a considerable height (see Fig. 6).

From a judgment of the county court, Carney appealed to the circuit court, which reversed the judgment of the county court and also granted a new trial of the case. Carney being dissatisfied with the amount of the award appealed to the Supreme Court of Mississippi. (Carney v. Mississippi State Highway Commission)

The trial court instructed the jury that the law gave the commission the right to construct on its present right-of-way an interchange leg from Tom Bailey Drive to Highway 45 without payment of any damages to the landowner. The Supreme Court said that this instruction was manifestly wrong and should not have been given, since it in effect told the jury that the commission had the right to construct the embankment without payment of any damages to the landowner, so long as it remained on its own right-of-way. It was undisputed in this case, continued the court, that prior to construction of the embankments, the owner could have entered Tom Bailey Drive directly from his property and, in fact, the commission had at one time granted him a permit to enter the drive. Later, apparently when it was decided to build the cloverleaf, it revoked this permit, and the owner had to use an entrance by way of Hamilton Road which lay immediately west of his property. However, at the time of the trial, Hamilton Road had been closed by the City of Meridian at the point where it crossed Tom Bailey Drive, and the only way Carney could get from his property into any highway was to go north on Hamilton Road to the point where it had been closed, then turn west and travel a distance of 300 ft and then north and go across the right-of-way so as to enter the highway. In case he should decide to go into the City of Meridian, which was north of Tom Bailey Drive, he could follow "this service road" on across the highway and then travel back 300 ft to reach Hamilton Road.

The trial court also instructed the jury that the landowner was not entitled to damages resulting solely from inconvenience, if any, entering and leaving his remaining property, provided they believed the public at large suffered the same inconvenience. The Supreme Court held that the lower court erred in granting this instruction and to substantiate its holding cited a previous decision in which the court held that a landowner was entitled to compensation for construction work done on other property, if it made his property less valuable and less accessible to the highway, particularly where the approach to the highway was rendered more inconvenient.

The court held that when Tom Bailey Drive adjacent to Carney's property was made a controlled-access highway, this was the equivalent of an appropriation of his right to have an easy way of access to the main highway, and remanded the case.

The court specifically stated that the holding in this case dealt with highways in existence before the condemnation of land for the cloverleaf.

(3) The Mississippi State Highway Commission brought condemnation proceedings to acquire a strip of land owned by Mrs. Winnie Robbins Muse. The county court awarded the landowner $2,500. The circuit court affirmed the judgment and the landowner appealed to the Supreme Court.

The land involved was located along the west side of US 51 North, about 1¾ miles north of the City of Jackson. It consisted of 0.61 acre, abutting the highway for 565 ft. This strip was to be used in the relocation and reconstruction of a segment of US 51, which had been designated in 1956 as a controlled-access facility. There were to be extra lanes, one on each side of the highway, to be used as frontage roads designed to provide two-way traffic. The highway was to be divided by a 30-ft median strip (see Fig. 7).

The landowner also contended that the lower court erred in admitting testimony relative to construction of the frontage road along the east side of the land remaining after the taking. The Supreme Court found no error here, stating that if the trial court had excluded all reference to the frontage road, the case would have been tried as a "landlocked" case, and the jury would have been required to award damages based upon a false assumption that the taking of the strip of land would leave the landowner without any access to the highway.

The landowner conceded that the rule in Mississippi was that when a tract of land was taken for public use, the owner should be awarded damages in the same amount equal to the difference between the fair market value of the whole tract immediately before the taking, and the fair market value of that remaining immediately after the taking, without considering general benefits or injuries, resulting from the use to which the land taken was to be put, that were shared by the general public. However, she contended that since the damages to be paid to the property owner must be ascertained as of the im-

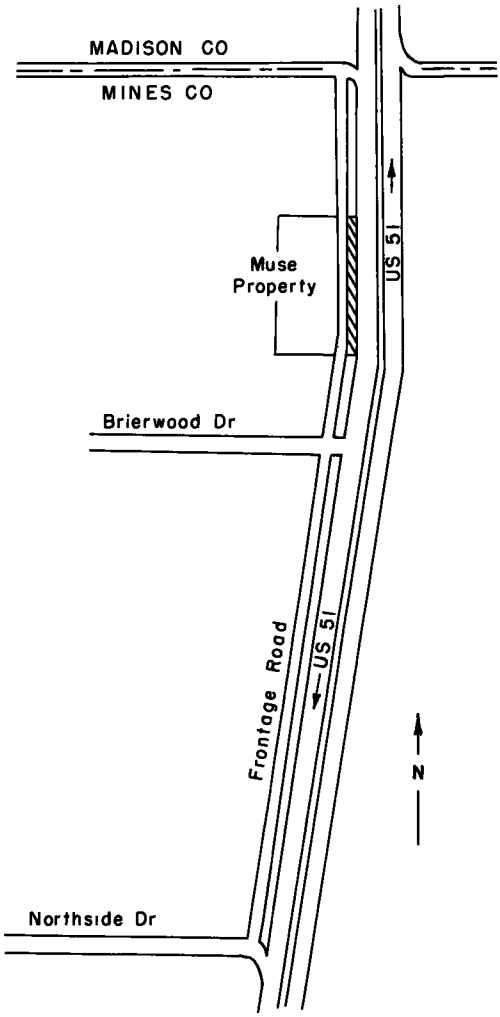

Figure 7. Muse v. Mississippi State Highway Commission, 103 So. 2d 839.

mediate time of taking, compensation could not be offset or diminished by reason of supposed benefits arising from the improvement. The Supreme Court noted that the courts had generally held that any fact tending to reduce damages otherwise accruing to the owner, such as restrictions on the appropriator's use of the property and reservation to the owner of some right therein, might be considered in assessing damages.

One point argued by the landowner's attorneys as ground for reversal was that the commission had no right to provide for a median strip between the north and south bound lanes, thereby restricting the landowner's right of access to the main traveled portions of the highway in either direction, without payment of just compensation. The Supreme Court held that the commission did have such right by virtue of its police powers, provided crossovers were made available at reasonable intervals to permit passage of vehicles from one side of the highway to the other. Although the median strip might cause some inconvenience to the abutting property owners, such inconvenience was shared by the general public as an incident to a proper exercise of the police power. (Mississippi State Highway Commission v. Hillman)

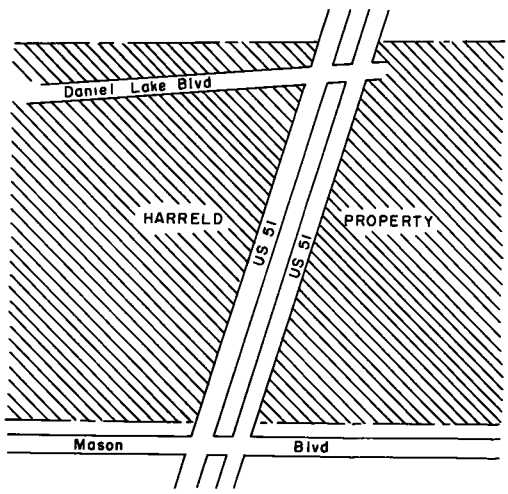

Figure 8. W. E. Harreld v. Mississippi State Highway Commission, 103 So. 2nd 852, June 9, 1958.

(4) W. E. Harreld and the Harreld Chevrolet Company brought suits for a total of $404,270 against the Mississippi State Highway Commission for alleged damages claimed to have been sustained on account of anticipated closure of direct access to their property at two points on relocated US 51 south of the city of Jackson.

The facts in the case disclosed that in 1953, certain property belonging to the Harrelds had been condemned by the State Highway Commission for a relocation of US 51, as a controlled-access facility. The remaining Harreld property was located on either side of the expressway. During the course of construction of the new highway, Harreld obtained from the commission a temporary permit for direct access to the main traveled lanes of the new highway at two points, one where Daniel Lake Boulevard intersected the highway, and the other just south of his property at the intersection of Mason Boulevard (see Fig. 8).

The trial court found that the proposed improvement plans were shown to Harreld at the time of acquisition of the right-of-way through his land, and it was clearly indicated that he was to have access to the highway only on a temporary basis. Harreld, himself, testified that he knew the highway department had the right to control access to main highways in the State and that the highway department could at any time require the change of any access road from private property abutting the highway.

Prior to enactment by Congress of the Federal-Aid Highway Act of 1956, Harreld had negotiated with one or more persons for the sale of plots of ground adjacent to the new highway, then under construction, and had approached certain officials of the State Highway Commission concerning the matter of whether direct access to the new highway at the two points previously mentioned would be allowed to remain. The commission was unable to give him such assurance, since in the event the Federal act was passed, access would be by means of frontage roads, with no direct access to the main highway. In spite of having no assurance from the commission, the landowners went ahead with their efforts to improve their property for commercial purposes.

Shortly before the new highway was opened, the landowners brought suit for damages alleged to have been sustained on account of the anticipated closure of their direct access to the highway, asking for an injunction to prohibit the commission from closing the entrances to the main traveled lanes. The trial court denied the injunction, but did

grant the landowners an injunction to the extent of requiring the commission to keep the said entrances open until frontage roads had been constructed. Both the commission and the landowners appealed.

The Supreme Court stated that it should be emphasized in this case that there was no question involved of the commission cutting off the direct access that the abutting property owner might have had to a pre-existing highway, and to which access he might have acquired a vested interest or easement for the purpose of ingress or egress to an existing highway. The highway here involved was located wholly outside the right-of-way of old Highway 51, and was being constructed as a link of the proposed new US 51 in the National System of Interstate and Defense Highways on which system the Federal Government is to bear 90 percent of the cost.

The court noted that this link of new highway had not been accepted as a part of the National System of Interstate and Defense Highways at the time of the trial of this case in April 1957, but evidence disclosed that it was intended to have the link accepted when the highway was constructed to meet the requirements of the Bureau of Public Roads, which requirements the Commission was endeavoring to comply with.

The Supreme Court held that where a controlled-access highway was constructed on new location, abutting property owners were not entitled to require the State Highway Commission by injunction to maintain direct access from their property to the through lanes of the new highway, where frontage roads were being substituted in lieu of such access to afford the abutting property owners reasonably safe and convenient access. Such action on the part of the State Highway Commission, continued the court, was a reasonable exercise of the police power of the State in the interest of the protection of human life and the regulation of public traffic.

Illinois: A recent case reached the State Supreme Court on appeal by the condemner, the Department of Public Works and Buildings, who took exception to the award on two grounds: (1) certain testimony for the landowners was inflamatory and should not have been admitted; and (2) an instruction by the court to the effect that all existing access had been eliminated was prejudicial since frontage roads were being provided.[47] Only the second of these complaints is of interest here.

The State sought to condemn some twenty front feet from several lots for the purpose of converting State Route 13 to a controlled-access highway. The existing highway was a two-lane facility, and the State planned construction of two additional lanes separated by a median. A cross-over would be provided some 250 ft west of the westernmost lot and 750 ft from the easternmost. Testimony introduced at the trial ranged from $245 to $7,000 for land taken from one of the lots, and from $1,200 to $41,500 for damages to this same lot. The jury awarded $5,000 for land taken from this lot, and $24,000 for damages thereto.

The State complained of an instruction tendered by the landowners, referring to the elimination of any and all existing rights and easements of access without specifically mentioning the right of access remaining by way of frontage roads called for in the plans and apparently considered during the course of the trial. The court ruled that while a reference to the frontage roads "more properly should have been included in the instruction, certainly on the basis of the record before us we feel that the jury was very mindful of the existence of such an access or frontage road and the omission of reference thereto in the instruction could not operate to the prejudice of the State."

Missouri: The facts of this case showed that in Hazelgreen, the condemnation of some land adjacent to US 66 was sought by the State Highway Commission[48] in connection with the construction of a limited-access highway. James R. and Ruth M. Knapp owned 49 acres and operated a motel thereon. The land taken consisted of a strip on which were located the motel buildings, a filling station and a cafe, all of which had to be removed. There remained a small residence north of the land taken. The original plans for the highway contemplated access at one end only of the remaining property.

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[47] Department of Public Works and Buildings v. Anastoplo, 151 N.E. 2d 337, June 1958.
[48] State v. Wright, 312 S.W. 2d 70, April 1958 (See Memorandum 104, November 1958, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 373).

Commissioners appointed by the court found damages of $30,000 which amount was deposited in court by the highway commission so that possession could be had and the road constructed.

Because of a change in the plans, the roadway was constructed with a frontage road along the highway adjacent to the remaining property. Before the trial the State Highway Commission asked the court for permission to amend its petition so as to reflect this change. But upon objection being made, the trial court denied permission and the condemnation case was tried on the theory that the frontage road was not in existence, resulting in a jury award to the Knapps of $50,000. The State Highway Commission appealed.

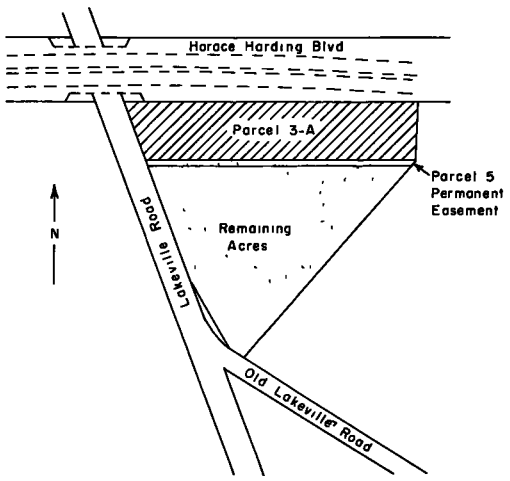

Figure 9. New York: Morton v. State, 167 N.Y.S. 2d 506.

The Knapps claimed that the allowance or denial of amendments to pleadings in eminent domain cases was a matter within the discretion of the trial court and that it would have been inequitable to allow the amendment in this case after the improvements had been removed.

The State Supreme Court reversed the trial court's ruling, holding that the amendment should have been allowed. It found that the land not taken was of little value. It was rocky and rough, and in fact there was a ravine between the west line of the property and the point where the motel had been located, so that the access at the west of the property would have been of no use to the Knapps. However, the Knapps were allowed to introduce evidence as to the cost of constructing a roadway from this access point to the dwelling. On the other hand, the "side road" constructed by the State was a convenient road for access to the dwelling remaining on the property.

As to the Knapps' contention that the amendment would have been inequitable after the improvements had been removed, the court said that it would have been necessary in all events to remove the buildings because that portion of the property was taken for the roadway. It was admitted that the property not taken was so located that it was not suitable for the operation of a motel.

The court further held that the ruling of the trial court was an abuse of discretion (as maintained by the State). It noted that the amendment did not pertain to any future, uncertain action nor to a promise of something not of binding effect, but that the amendment sought to present to a jury the actual condition as it existed. The court also found that the road as constructed was of some benefit to the Knapps. By the amendment, the State did not seek to appropriate more land than originally planned.

The court decided that to best remedy the situation, the case would have to be retried rather than correct the trial court's error by a remittitur, stating that "it would be mere speculation on our part to say what damages a jury would have assessed had the case been tried on the true facts."

New York: This case involved a claim for damages due to appropriation of two parcels of land by the New York State Department of Public Works for the improvement of Horace Harding Boulevard, a controlled-access highway.[49]

The claimants owned a plot of land in the shape of an irregular triangle and containing about 23 acres. The northerly boundary ran along the south line of the boulevard, as it existed before the improvement, for about 1,547 ft. The western boundary extended southerly along Lakeville Road for about 970 ft, and some 349 ft southerly about 67 ft on Old Lakeville Road.

[49] Morton v. State, 167 N.Y.S. 2d 506, November 1, 1957 (See Memorandum 99, March 1958, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 361).

The State appropriated the fee of about 10.122 acres lying along the northerly line of claimants' property, including about 304 ft of frontage on Lakeville Road (Parcel 3A). A permanent easement (Parcel 5) "for the purpose of constructing, reconstructing and maintaining thereon, excavations and slopes where necessary" was also appropriated. This consisted of a strip about 11 ft wide running along the entire southerly line of the fee appropriated as Parcel 3A.

The appropriation left a plot of land roughly triangular in shape, containing about 13 acres with the northerly 11 ft for a total length of about 1,410 ft subject to an easement, and with access only for about 666 ft on Lakeville Road and 67 ft on Old Lakeville Road. On the north it abutted a right-of-way for a State highway in excess of 300 ft in width (see Fig. 9).

The claimants' testimony as to value was based on the premise that no right of access to the controlled-access facility existed. The court found the proof supported this position. Apparently plans for the improved facility included a frontage road, and the court stated that although the State could have preserved a right of access for the claimants to the frontage road, it did not do so. The State's plans and arguments, which the court stated fell short of any stipulation or admission that the claimants had a right of access, constituted nothing more than a statement of intention, which was hardly a saleable attribute of the land at the time of taking.

Furthermore, the court pointed out that even if a right of access to the frontage road existed, the extent of the permanent easement taken left the physical exercise of that right to determination by the Superintendent of Public Works, since the easement left the use of the northerly 11 ft of the property subject to the public right to maintain slopes and excavations. Any use by the property owners of that property, including access to the frontage road, would always be subject to discontinuance in accordance with the paramount public right appropriated.

The court, taking into consideration all competent and relevant proof of fair market value, and having viewed the premises, found that prior to the appropriation, claimants' property had a fair market value of $191,000. After the taking, the remaining property had a fair market value of $87,400.

Change in Grade

Damages resulting from a change in grade, where no land is taken, are generally considered non-compensable in the absence of a statute providing otherwise. This is not an iron-clad rule, however, as illustrated by analysis of the following three cases, two in Louisiana and one in Mississippi. Although no land was taken from the complaining landowner in any of these cases, the Louisiana Supreme Court held that the resulting loss in value of the properties involved was compensable, while the Mississippi State Supreme Court held that it was not. The Louisiana decisions seem to be based on the premise that damages incurred, although based on the change in grade, were of such a nature as to entitle the landowner to compensation.

Mississippi: A landowner, one Collins, brought suit against the City of Laurel and the State Highway Commission to recover damages he alleged he would sustain when the State relocated US 10 in the city, according to plan.[50] He claimed the relocation—and the necessary construction of a 27-ft high bridge and embankment—would damage his nearby property (1) by shutting off light, air and view from his residence, (2) by closing an alley which would limit his use of it, and (3) by diminishing the value of his property as a whole in the amount of $9,218.

The evidence submitted during the trial of the suit described the landowner's property as Lot 6 of Block 2 of the Boulevard Addition to the City of Laurel (see Fig. 10). The plat, which was presented to the court, showed that the block was composed of 20 lots. Lots 1 to 11, inclusive, commencing from the north, fronted east and abutted on Ellisville Boulevard, which was immediately west of and parallel to the New Orleans and N. E. Railroad. West of and adjacent to these lots was an alley, 20 ft wide, which ran north and south through the entire block. West of and adjacent to this alley were the remaining nine lots, numbered 12 to 20, inclusive, fronting on South Magnolia

[50] Collins v. Mississippi State Highway Commission, 102 So. 2d 678, May 12, 1958.

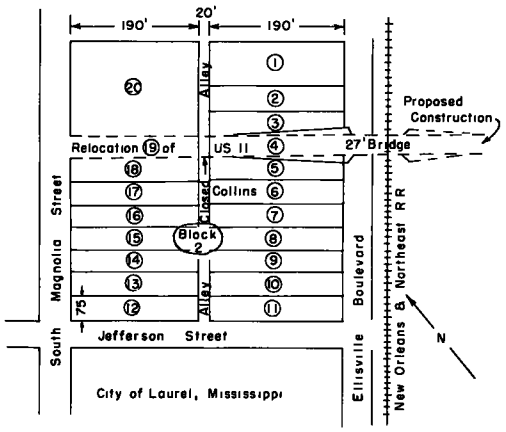

Figure 10. Collins v. Mississippi State Highway Commission, 102 So.(2d) 678, 1958.

Street. All of the lots, except Lots 1 and 20, were of uniform width and depth, that is, 75 by 190 ft.

The suit was dismissed by the circuit court and the landowner appealed to the State Supreme Court. The high court held that since the embankment was to be constructed on property presumably acquired by the State for this purpose and not on a street on which landowner's property abutted, the landowner was not entitled to damages for interference with light, air, and view.

In other words, the property owner, in order to be entitled to damages for interference with air, light and view, must have a right in the nature of an easement in the street where such interference occurs.

The court further noted that Mississippi statutes authorized municipalities to close and vacate any street or alley, or any portion thereof, but that compensation must be first made to the abutting landowners. In this case, however, it was not charged that the alley had been closed at the time of filing the suit. The court thought the law was so clear and well settled in this respect that it must be presumed that the city would not utterly disregard the law and close the alley until it had first made due compensation to the abutting landowners. This was not an injunction suit, continued the court, but a suit for damages in anticipation that the city would close the alley in violation of the statute and the State Highway Commission would enter upon the alley and obstruct it by the direct embankment. Since no damages had yet resulted, the court found the action premature.

The decision of the lower court, dismissing the suit, was affirmed.

Louisiana (1): Mr. and Mrs. Cerniglia operated a drug store on a corner lot in the City of New Orleans. The city constructed an underpass which cut off ingress and egress from the property, although no part of the property was taken. As a result of the construction, the property was in effect set apart and isolated. Whereas before the construction there were several parking places on the highway in front of the store and the store was easily accessible to both vehicles and pedestrians, after the construction the parking spaces were eliminated and in order to get to the store from the highway an outbound vehicle would have to make a U-turn or a trip around the block and an inbound vehicle would have to make a trip around the block. Advertising features for motorists and pedestrians were destroyed because the road in front of the store was 6 ft lower with a grassy slope leading up to normal level.

The Cerniglias brought suit against the city for damages. They presented expert witnesses who estimated that the property had diminished in value by $14,000 to $15,000, or by approximately one-half its worth previous to the construction of the underpass. At first the court concluded that although the store owners had suffered grievous damage, such damage was of a type not compensable under the law, but upon a rehearing of the case the former judgment was set aside and a judgment granted in the amount of $3,000, on the ground that some of the damages were compensable. The city appealed and the Cerniglias asked for more damages.

The Supreme Court of Louisiana said that the city's agrument that the Cerniglias had no cause of action was not well founded. The suit was not based on mere traffic diversion, inconvenience, etc., but on the cutting off of ingress and egress and the isolation of the property. These factors, the court said, are sufficient to state a cause of action.

The court distinguished the present case from those where inconvenience caused by narrowing of a street or diversion of traffic due to construction of an overpass were disadvantages common to all the other property owners within the same vicinity. The

court recognized that in the present situation there were elements of damage which, as shown by photographs and supported by testimony, were not common to all other property owners in a like situation. This was due to the peculiar location of plaintiffs' property with reference to the lowered one-way thoroughfare. The high court said that it was not disposed to disturb the award of the trial judge because the latter found that some of the elements of damage in this particular case did not fall within the doctrine of damnum absque injuria, or injury without compensation.[51]

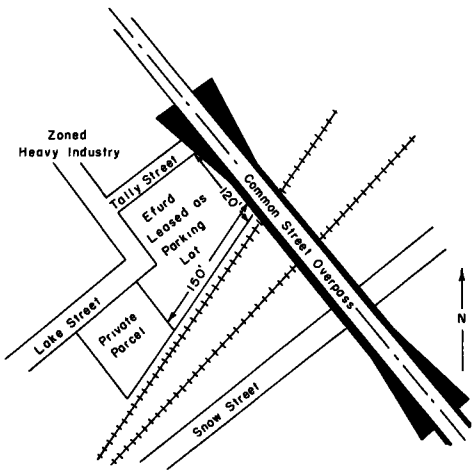

Figure 11. Louisiana: Efurd v. City of Shreveport, 105 So. 2d 219, 1958.

Louisiana (2): The property involved in this case was located in the City of Shreveport, had a 120-ft frontage on Common Street, and a depth of approximately 150 ft. It was bounded by Common, Tally and Lake Streets and by a privately owned parcel of land. The area was zoned for heavy industry and could be used for almost any commercial purpose. Prior to and since the construction of the overpass the property had been leased for use as a private parking lot (see Fig. 11).

The landowner claimed that construction of an overpass on Common Street produced the effect of a concrete wall across the entire frontage of the property, rising from a height of three to four feet at the northerly edge to approximately 17 ft at the southerly edge of the property. All access to Common Street was permanently blocked off and destroyed.

The city appealed from a judgment of the district court which awarded damages in the sum of $10,000. The city contended that the property had not suffered any diminution in market value but only suffered consequential injury arising from discomfort, inconvenience, traffic diversion, loss of corner influence and street parking which conditions, under the law, fell in the realm of a loss without injury in the legal sense (damnum absque injuria).

On the other hand, the landowner contended the property suffered a substantial diminution in rental and sale value by reason of having been entirely deprived of its street frontage, its right of access to the street, and its being isolated from the street upon which it formerly fronted and deprived of the use thereof.

The trial judge concluded that the fair market value of the property was $30,000. On the basis of the record, including the photographs showing the complete blocking of access to the public street in front of the landowner's property and the destruction or elimination of ingress and egress, the trial judge was justified in finding that the elements of damage in this case did not fall within the doctrine of damnum absque injuria. Consequently, the judge's conclusion that the landowner's property was damaged to the extent of one-third of its value and compensable in the amount of $10,000 was affirmed by the Supreme Court.[52]

ROADSIDE REGULATION

As mentioned earlier in this report, the outstanding event of the year as far as roadside regulation is concerned, was the passage of legislation by the Congress of the United States to control the erection and maintenance of outdoor advertising signs, dis-

[51] Cerniglia v. City of New Orleans, 101 So. 2d 218, March 1958 (See Memorandum 101, July 1958, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 366).
[52] Efurd v. City of Shreveport, 105 So. 2d 219, June 1958.

plays, and devices adjacent to the National System of Interstate and Defense Highways. Many of the State legislatures in their 1959 sessions considered legislation designed to permit the States to enter into agreement with the Secretary of Commerce to obtain the bonus payment of one-half of one percent available to States regulating billboards in conformity with the provisions of the Federal act and the standards promulgated in furtherence thereof, but at the date of writing this report, little if any adequate legislation had been enacted.

No legislation of particular significance pertaining to roadside control generally was enacted during the 1958 sessions, again presumably because this was an off year for most State legislatures. There were, however, some significant court decisions in the field, and these are reviewed in the following paragraphs.

Zoning for Roadside Control

Although not ostensibly designed for that purpose, zoning regulations can be used to provide effective control over the development of land adjacent to streets and highways. The validity of such control measures is often contested in the courts, as illustrated in the following decisions wherein the courts ruled on such matters as the authority of cities to refuse permits for the erection of billboards, prohibition of drive-in theaters, and a change in zoning classification to permit a motel on a bypass.

Mississippi: The State Supreme Court overruled a city council's refusal to reclassify property from residential to commercial after the State Highway Department had constructed a bypass adjacent to the property.[53] Nine lots located in the City of Hattiesburg were in question. The Highway Department in constructing the bypass had taken part of these lots, reducing their depth to 100 ft. The owners filed a petition to rezone and also a prospectus of hotel courts which they proposed to erect at a cost of approximately $250,000.

In accordance with the zoning ordinance, 20 percent of the property owners within 160 ft of the property proposed to be rezoned filed a petition against the rezoning, and a hearing took place, resulting in the City Council's refusal of the rezoning petition. The landowners appealed to the circuit court which found that when 20 percent objected as here, the council invariably rejected the petition, regardless of the proof, and on the basis solely of the 20 percent having opposed the petition. The circuit court reversed the council's order after hearing the proof and the city then appealed to the Supreme Court.

The high court outlined the proof as shown by the record: that the remaining lots were too shallow to be successfully or practically used for residential purposes, that a filling station was on the corner of all these lots and that the area generally was commercial, and "most important," that there was a distinct need in the area for sleeping accommodations. The court noted that the protestants involved produced practically no testimony that the granting of the petition to rezone would not promote the health, safety and general welfare of the community. The city offered no evidence at all and apparently made no argument to the court as to the possible affect of the zoning change on the bypass itself, whether increased commercial activity along its borders might decrease its efficiency as a facility presumably constructed to alleviate existing traffic congestion in the city. Accordingly, the court held that the action of the council was "manifestly arbitrary and capricious and was not supported by any substantial evidence . . ." and that the judgment of the circuit court should be affirmed.

Michigan: On December 24, 1957, the State Supreme Court upheld a lower court decision refusing to order the issue of a building permit for a drive-in theater.[54]

One Daniel Bzovi purchased 54 acres of land at the southwest corner of Middlebelt

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[53] City of Hattiesburg v. Pittman, 102 So. 2d 355, May 1958 (See Memorandum 104, November 1958, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 373).

[54] Bzovi v. City of Livonia, 87 N.W. 2d 110, December 1957 (See Memorandum 98, February 1958, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 359).

and Schoolcraft, in the City of Livonia, for the purpose of building a drive-in theater. He knew the provisions of the zoning ordinance under which the land he bought was partially zoned RUFB (rural urban farm) and in which the drive-in theater would be prohibited as a commercial use. The remainder of the 54 acres, paralleling the two highways converging at Middlebelt and Schoolcraft was zoned C-2 (commercial) for a depth of 300 ft. In contending that the zoning was plainly arbitrary and capricious, Bzovi pointed to a large race track built on the southeast corner of the intersection in question, and to manufacturing zoning and two industrial institutions south of his parcel of acreage along the Chesapeake & Ohio Railroad.

The city, on the other hand, pointed out that the rural urban farm zoning continued from Bzovi's property in a generally continuous line west along Schoolcraft, and to a general residential area to the north and west.

The court recognized the inconsistencies of the zoning plan, it being apparent that uses pre-existing the zoning ordinance had prevented the adoption of a wholly consistent plan. However, the court found that the rural-urban-farm zoning stretched generally to the west and north of Bzovi's property, and the trial court had found that the evidence did not indicate confiscation of any part of Bzovi's property. There was ample evidence that the property in question could be effectively developed for residential use.

The lower court found that the city council had adopted the zoning plan in the exercise of its good judgment. Every zoning ordinance, the court said, has to have a beginning and an ending and one zone has to be separated from another at one point or another. The trial court did not propose to undertake a legislative function and set up a new zoning district for the city. The high court agreed with the lower court's reasoning, upholding its judgment in dismissing the petition.

However, the court did hold unreasonable and arbitrary a provision of the zoning ordinance prohibiting drive-in theaters at any place in the city. A drive-in theater, said the court, is a legitimate business, and a zoning ordinance may not be employed to proscribe generally a legitimate business unless the prohibition has a reasonable relationship to the health, morals or welfare of the community.

New Hampshire: In November 1958 the State Supreme Court upheld the constitutionality of a comprehensive zoning ordinance which, among other things, prohibited the erection of billboards over 12 sq ft in area unless the Board of Zoning Inspectors granted a zoning variance.[55] This ordinance also divided the town into two districts. The premises in question were located in the Rural Zoning District, and they consisted of a small triangular track bounded by the Seabrook-Portsmouth toll road, a small brook and a fence. Provisions pertaining to this district prohibited billboards not existing at the time of adoption of the ordinance or during the year preceding its adoption, and provided that outdoor advertising devices not expressly permitted elsewhere in the ordinance, and no sign over 12 sq ft in area, might be erected unless the Board of Zoning Inspectors ruled that the same in a given case and location, and under conditions specified in the permit therefor was not injurious, offensive or detrimental to the neighborhood. The ordinance permitted signs pertaining to the lease, sale or use of the land or buildings on which placed, in this area.

In this case the board had refused a permit to erect on leased premises a billboard which, admittedly, would exceed 12 sq ft in area. A subsequent appeal was denied by the zoning board of adjustment, and the lessee appealed to the Supreme Court, seeking a variance and alleging that the ordinance was invalid and unconstitutional, in that the provision forbidding billboards constituted an abuse of the police power and a taking of the landowner's property without compensation. The appeal further alleged that the ordinance was unconstitutional because it was discriminatory, since other property owners could be permitted to erect signs of unlimited size to advertise businesses conducted upon premises where the signs were erected.

The court held that, construing the ordinance as a whole, the applicable provisions were not unconstitutional and that the burden imposed upon the lessee of overcoming the presumption which favors the validity of the ordinance had not been sustained.

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[55] Dockingham Hotel Company, Inc. v. North Hampton, 146 A. 2d 253, 1958.

The high court also held that according to well established principles, the separate classification as to permitted use, of signs advertising business conducted upon the premises where the signs are located, as against a prohibited use of like signs advertising products or services available in other locations, was a reasonable classification which did not as a matter of law produce arbitrary discrimination or deprive the lessee of the equal protection of the laws.

The provisions of the zoning ordinance were held to be constitutional, valid and enforceable.

New York (1): A building zone ordinance of the Town of Huntington makes one guilty of the crime of nuisance if he places a billboard in an industrial district within 100 ft of the intersection of two highways, or within 100 ft of any curve, corner, angle or turn of any highway. The Apex Lumber Corporation was charged with maintaining without permission a billboard less than 100 ft from the intersection formed by the westerly side of Broadway and the northerly side of a right-of-way belonging to the Long Island Railroad Company, which premises were zoned light industrial.

Through application a permit for a sign had been issued to the corporation by the building department but this permit was revoked by the department on the grounds that the application contained inaccuracies and misstatements, which, if known at the time, would have prevented the permit from being issued. A Justice of the Peace of the Town of Huntington rendered a judgment convicting the corporation as charged and the corporation appealed to the Suffolk County Court.

One question before the court was whether the above-mentioned right-of-way constituted a highway within the meaning and intent of the ordinance. The court noted that the right-of-way had been in general, unlimited and unrestricted public use for many years and that no signs or other markers curtailed or limited its use to the general public. Several business establishments were located on the right-of-way, including the lumber corporation. The court held that in the absence of a definition of "highway" in the ordinance such meaning should be accorded to it as will carry out the clear intention of the framers, in this instance the placing of a sign far enough from an intersection to avoid its being a traffic hazard. So the court held that the right-of-way here was a highway within the intent and meaning of the statute and affirmed the conviction.

As to the permit, the court said that even if the revocation was improper, as claimed by the corporation, the permit could not condone nor afford immunity for a violation of a zoning ordinance. One cannot acquire any rights under a permit if it goes beyond the authority contained in the zoning ordinance.[56]

New York (2): This action was brought by the City of New York to enjoin Anna M. Seel and others, from maintaining outdoor advertising signs on her property.[57] These signs had been erected under the authority of a permit issued in 1939 which made no reference to the exact location of the signs to be constructed on the property. Subsequently, in 1955, some of Seel's property had to be condemned for an improvement of Sunrise Highway. This necessitated the relocation of the signs in question. They were relocated within 200 ft of the highway, and for this reason the city claimed violation of Section 21 B of the Zoning Resolution, which provided that no advertising sign shall be erected, nor shall any existing advertising sign be structurally altered, within 200 ft of an arterial highway if such advertising sign were within view of such arterial highway.

It was noted by the court that the complaint charged the landowners with violating Section 21 B because they had "erected or caused to be erected" the advertising signs in question. There was no allegation to the effect that the landowners had "structurally" altered the signs. The evidence of record, according to the Supreme Court, indicated the landowners had not erected the signs, but had only relocated existing signs, and in so doing partially dismantled and then reconstructed them, using the same materials except for the replacement of some "two by fours which had become rotted."

The court further noted that the signs were erected prior to passage of Section 21 B

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[56] People v. Apex Lumber of Greenlawn, 174 N.Y.S. 2d 990, April 15, 1958 (See Memorandum 103, September 1958, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 368).

[57] City of New York v. Seel, 177 N.Y.S. 2d 56, May 1958.

of the zoning resolution, and therefore came within the exception contained in Section 6B thereof, which provided that:

Any use existing in any building or premises lawfully established subsequent to July 25, 1916, and not conforming to the regulations of the use district in which it is maintained, may be continued therein, except as provided in Section 21-A or in Section 21-D.

The court concluded that the city had failed to prove that the signs had been "erected" in violation of Section 21B of the zoning resolution, and dismissed the complaint.

Driveway Control

Effective control of the roadside can be achieved to some extent by requiring permits for the construction of entrances and exits. The location, number and use of driveways giving access to abutting property can thus in many instances be planned in a manner as to preserve the efficiency of the highway or street, without completely depriving the landowner of access thereto. In most instances, the courts will sustain such an attempt to regulate access, if the regulation imposed is of a reasonable nature, as illustrated by the Texas case reported below.

In like manner, effective regulation may sometimes be achieved by the construction of curbs where the abutting owner formerly had indiscriminate access to the highway or street at all points on the highway frontage. In the Georgia cases, also reported below, the court sustained the authority of the State Highway Department to construct curbing under such circumstances.

Texas: In deciding this case, the State's highest court adopted the rule that an abutting landowner does not have an absolute right to ingress and egress from a highway.[58] The lower court decision of this case was previously reported in the Highway Research Correlation Service Memorandum Number 93,[59] July 1957. In the lower court it was held that a parking lot company had the right to make a curb cut and construct a driveway for egress and ingress from its lot to the street, in spite of an ordinance prohibiting the granting of any additional curb cuts on the street in question. (The lot was on a corner and had a driveway on the other street.) It was reported that the court said that while the city could pass ordinances for the purpose of regulating the cutting of sidewalks and building driveways across them, it could not arbitrarily deny to abutting property owners such right; that if such right was entirely prohibited, it would amount to the taking of property and that that could be done only by due process of law and the payment of just compensation. The court said that the right to regulate is not the right to prohibit.

The city appealed this decision to the Supreme Court of Texas and won a reversal. The high court recognized that the general rule is that access to a public highway is an incident to ownership of land abutting thereon and that this right cannot be taken or destroyed for public purposes without adequate compensation being given therefor. But this rule does not apply, said the court, when a municipality invokes its police power for the protection of the health, safety and general welfare of its citizens. The court discovered in its research that the question as to whether an abutter has an absolute right to cross the sidewalk with driveway is one on which legal authorities do not agree. The court adopted for Texas, by this case, the view that upheld the ordinance as a valid exercise by the city of its police power.

The court reasoned that the ordinance had "merely the effect of a zoning regulation. If a municipality can lawfully invoke its police power to the extent of regulating the kind and character of business that may be conducted within a certain district when required by reasons of public health, safety, comfort and convenience, surely it would not be an unconstitutional exercise of that power in zoning a section of two streets in the center of the business district against vehicular traffic over the sidewalks."

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[58] City of San Antonio v. Pigeonhole Parking of Texas, 311 S.W. 2d 218, February 1958 (See Memorandum 103, September 1958, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 368).

[59] City of San Antonio v. Pigeonhole Parking of Texas, 300 S.W. 2d 328, April 1957.

The court, however, conceded that the parking company could attempt to show that the pedestrian travel along the street in question "is not so heavy and congested as to make the driveway hazardous to the public and a threat to the safety of pedestrians at that point." Possibly the court could be convinced that the enforcement of the ordinance in this situation would be unreasonable and unjust, and to afford the company this opportunity the court remanded the case. "The test of reasonableness to be applied is not solely one of whether the additional driveway on Houston Street is essential to the profitable operation of (the parking lot company's) business, but whether the use of the sidewalk would expose the pedestrian public to such hazard and danger as to be out of proportion to the detriment caused to (the company) by a denial of that use."

Georgia: The State Highway Department planned to make improvements on Cherry Street in Jessup, a U.S. and State highway. The proposed improvement was the construction of concrete curbs in the highway right-of-way. Abutting Cherry Street was a wholesale meat packing plant, whose owners complained that the curb would interfere with the operation of the business and sued to enjoin the construction. The owners claimed that large trucks and vans of their suppliers and customers, in order to load and unload, had to back up from Cherry Street to a platform attached to their building and, due to their length, these vehicles required an entrance direct from the paved portion of the highway. Although the owners would have access to their premises along Cherry Street by way of two 30-ft driveways, they claimed that the proposed curbs would leave only 16 ft between the building and the curb, making it impossible for any vehicle to back up from the highway to the platform. These curbs, the owners contended, would deprive them of a convenient access to their property, resulting in irreparable injury and damage amounting to a confiscation without due process of law, without compensation and without any right or necessity therefor.

The Supreme Court of Georgia said that as owners of property abutting on the right-of-way, the owners had the right to use and enjoy the highway in common with all other members of the public, as well as rights, arising from their ownership of property contiguous to the highway, which did not belong to the public generally; that is, the easement of access to and egress from their property to the highway. They were not entitled, however, the court said, to access to their land at all points in the boundary between it and the highway if the entire access was not cut off, and if they were afforded a convenient access to their property.

The court rejected the owners' argument that the proposed curbs would violate their rights as abutting owners because, the court said, curbs would be located in the highway right-of-way and the highway department had the right to appropriate the entire width of the right-of-way for highway purposes whenever, in its judgment, the public necessity and convenience required that such be done.

Moreover, the court said, it was well settled in Georgia that the courts will not interfere with a public improvement by an injunction where no part of the property of the citizen was actually taken. The court said, that in order to grant an injunction, the owners would have to show that part of their property was appropriated. Although the owners alleged that this was actually the fact, the court found that the evidence did not sustain the allegation and upheld the lower court's denial of the injunction.

In a companion case an automobile, truck and tractor dealer, also located on Cherry Street, sued to enjoin the construction of the curbs because his access would be limited. Following the decision in the Strickland case, the Supreme Court of Georgia denied the injunction.[60]

PARKING FACILITIES

Although the regulation of parking through the use of parking meters and the provision of public facilities for off-street parking are at the present time considered legi-

[60] State Highway Department v. Strickland, 102 S. E. 2d 3, and State Highway Department v. J. H. Harris, 102 S. E. 2d 7, February 7, 1958 (See Memorandum 102, September 1958, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 367).

timate governmental purposes, questions continue to be brought before the courts as to whether in particular instances the governmental body has exceeded its authority in measures taken for such purposes. During 1958, decisions handed down by the courts involved such matters as the necessity for condemning land for public parking facilities, authority to construct such facilities on leased property, the tax status of land devoted to public parking, and the validity of a zoning variance permitting a parking lot in a residential area. Other decisions were noted which pertained to the validity of parking meter ordinances, the use of metered spaces for the conduct of a business, and restrictions on the number of and rates charged for use of such spaces. The substance of these decisions is given in the following paragraphs.

Necessity for Condemning Land for Off-Street Parking Facilities

Decisions were handed down in two States, New York and Virginia, which involved authority to condemn land for public off-street parking purposes. The New York court upheld the parking authority's taking of downtown property for parking purposes, for which it found there was a public need, which the Virginia court refused to permit a privately operated parking facility to be condemned for a public parking facility because the necessity for such action had not been first proved.

New York: The Parking Authority of the City of Amsterdam sought to condemn certain land for the construction of two parking lots.[61] The owners of the property objected, claiming, among other things, that no need was shown for additional parking space and that the lots would primarily benefit not the public but private merchants whose business establishments were in the area.

The Supreme Court, Special Term, Montgomery County, however, in ruling for the Parking Authority found that there was a need for the parking lots and that it was in the public interest to have them. The court noted that the streets of Amsterdam, one of the older cities in the northeastern section of the country, were not laid out with the thought that they would be intensively used by high speed and easily maneuverable automobiles, trucks, etc., and consequently nearly every street in the business district was cluttered with parked cars. To relieve this congestion, the court said, would definitely be in the public interest.

Further, the court said, the fact that private merchants may be benefited by a condemnation does not make the condemnation illegal where the public good is enhanced. The court appreciated that condemnation nearly always results in some inconvenience to those whose property is taken, but felt that the test necessary in such cases was "the greater good for the greater number."

Virginia: On College Place in Norfolk the Stanpark Realty Corporation operated a 256-car capacity "shopper" lot, on land some of which it owned and some of which it leased. The city sought to acquire all of those parcels fronting on College Place for the purpose of widening that street by 20 ft and using the residue to provide off-street parking. The Corporation Court of the City of Norfolk granted the city full title to and right to possession of the land and Stanpark appealed to the Supreme Court of Appeals of Virginia.

One argument put forth by the corporation was that while the city alleged the taking was for a public use, the petition did not demonstrate the particulars of public use. The corporation apparently felt, according to the court, that had the petition shown that the property sought to be condemned was already being used as a parking facility, the property would not be subject to condemnation since no necessity for its acquisition could, under these circumstances, be shown. The court recognized that the lack of public necessity was Stanpark's principal objection.

The court pointed out that the Virginia Constitution states that "public uses" are to be defined by the legislature; the Code of Virginia states that public use is defined "to embrace all uses which are necessary for public purposes." Ordinarily, the court

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[61] Amsterdam Parking Authority v. Trevitt, 174 N.Y.S. 2d 832, June 3, 1958 (See Memorandum 102, September 1958, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 367).

said, the determination of the necessity of resorting to the exercise of the power of eminent domain is a legislative and not a judicial function, but the code said that as to the condemnation of land for parking facilities (among other things), the necessity must be shown to exist to the satisfaction of the court. The court noted that the lower court did find public necessity and recited this in its order. But the high court held that there was insufficient proof in the record to support the lower court's finding of necessity. The city contended that under the code only the trial court must be satisfied that the necessity existed. To this the court said that because of the statute the burden of proof of necessity, when challenged, fell on the city and that the code contemplated evidence and not merely judicial notice. If this were not true, the court reasoned, an appeal on the question of necessity would be a vain thing.

Actually, Stanpark conceded the necessity for taking a 20-ft strip to widen the street, but still claimed that there was no necessity proved for taking property for off-street parking which was already devoted to this use. And to this the court said that the trial court did err in excluding Stanpark's evidence tending to show that no necessity existed.

Another argument raised by Stanpark involved special damages. It claimed that it should have been entitled to show special damages because of the termination of its lease on the Pender property as well as damages to its remaining property owned outright and operated as a parking facility. On this point the court upheld the trial court's exclusion of evidence regarding Stanpark's income and profits from the property leased and the admission of evidence of income from the property it owned. The court said that evidence on the value of the lease was admissible for the purpose of showing the value of the Pender property but that any income or profit Stanpark made on the leased property was not material evidence since it was too remote to be a subject of damages. The court held that it was proper for the commissioners to value the leased property completely apart from Stanpark's leasehold interest and from that valuation of the property itself any damages to the leasehold estate would be taken, the remainder to go to the owner.

So the court sent the case back for retrial, concluding that if necessity should be proved to the trial court after hearing evidence thereon, the award of the commissioners (which was unchallenged) would stand. If necessity could not be proved, then an award should be made to Stanpark for the property taken only in connection with the widening of College Place.[62]

Authority to Construct Parking Lot on Leased Property

The authority of a Michigan city to construct a parking lot on leased property was questioned in a case which was ultimately decided in the State's highest court.[63]

Michigan: The City of Grosse Pointe Farms had a parcel of land used as a beach and recreation area. The Grosse Pointe Public School System had a playground on the Gabriel Richard School area. The school system being faced by the mandate of the 1956 statute concerning compulsory driver training, entered into a reciprocal lease with the city for the exchange of leaseholds covering a 65-ft strip on the playground in exchange for a part of the beach and recreation area. The 65-ft strip was to be used for a parking area by the city, and the beach area was to be used for driver training for pupils of the public, parochial, and private schools. The Gabriel Richard School District Improvement Association, a non-profit corporation, filed suit to enjoin this transfer, contending that the city has no power or authority to construct off-street parking facilities on that portion of the property leased to it by the Grosse Pointe Public School System.

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[62] Stanpark Realty Corporation v. City of Norfolk, 101 S.E. 2d 527, January 20, 1958 (See Memorandum 103, September 1958, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 368).

[63] Gabriel Richard School District Improvement Association v. City of Grosse Pointe Farms, Michigan, 88 N.W. 2d 619, 1958 (See Memorandum 101, July 1958, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 366).

The charter of the city provides that the city shall have the power, by ordinance and other lawful acts of its officers, to provide for the acquiring, establishment, operation, extension and maintenance of facilities for the storage and parking of vehicles within its corporate limits, and for such purpose to acquire by gift, purchase, condemnation, or otherwise, the land necessary therefor. The State Supreme Court held that by this provision of the charter, the city has the right to lease the property and to use it for off-street parking, upholding the lower court's denial of an injunction.

Tax Status of Public Parking Facilities

Ohio: In 1956, the City of Columbus applied to the Board of Tax Appeals to have certain real property which was used for off-street parking purposes removed from the tax list and placed on the tax exempt list. The Board of Tax Appeals denied the application and the city appealed to the State Supreme Court.[64]

The parking facilities involved were opened in 1955 by the city under the provisions of an ordinance enacted in 1954, which provided for the issuance of revenue bonds for the purpose of acquiring real estate and building thereon such facilities. The ordinance was enacted under the home-rule amendment of the Ohio Constitution which authorized municipalities to acquire, maintain and operate off-street parking facilities if traffic conditions were such as to warrant a determination by the legislative body of the municipality that operation of such facilities was necessary and that they would serve a public municipal purpose. Under such conditions, the municipality might, without the aid of statutory enactment, authorize and issue revenue bonds secured only by a mortgage upon the facilities and revenues derived therefrom.

In requesting tax exemption, the Board of Tax Appeals noted that the city relied on a general exemption section of the State statutes relating to publicly owned property.[65] However, another provision of the statutes, authorizing municipal corporations to provide off-street parking facilities, specifically denied tax exemption to real estate acquired for this purpose.[66] The Board felt that this provision expressed the general legislative intent with regard to off-street parking facilities, even though the present facilities had not been constructed under its provisions.

The Supreme Court affirmed the decision of the Board of Tax Appeals, stating that although there was no question that the property involved here was public property used for a public purpose, the intent of the legislature was made clear in Section 717.05, to the effect that real estate acquired for public parking facilities was not tax exempt. To hold that a city might avoid the effect of this legislative intent by acquiring real property for an identical use in the exercise of its home rule power, continued the court, would lead to a discrimination and legal absurdity not to be contemplated, particularly in view of the requirement of the State Constitution that all laws of a general nature should have a uniform operation throughout the State.

The court concluded, therefore, that real property acquired and used by a municipality for off-street parking purposes was not exempt from taxation, whether such property was acquired under the provisions of the statute or the home-rule power of such municipality.

Massachusetts: Under an existing provision of the Wellesley zoning ordinance, permitting "public school or other public use" in a single residence district, the town had established several municipal parking lots. But some doubt had been cast on the validity of such use by a superior court decision holding that this provision of the zoning law would not permit the State to use certain land, partly in a single residence district, which it planned to lease from a Mrs. Fraser for a municipal parking lot (Berger v. Town of Wellesley, 124 N.E. (2d) 436, 1955). A study of traffic congestion made by the Wellesley Planning Board in 1950 recommended taking a major part of the block including the Fraser land. As a result of the Berger case decision, the planning board

[64] Application for Exemption of Real Property, 147 N.E. 2d 625, January 29, 1958 (See Memorandum 99, March 1958, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 361).
[65] Sec. 5709.08 provides that public property used exclusively for a public purpose shall be exempt from taxation.
[66] Sec. 717.05.

recommended amendment of the zoning law to permit "public school, municipally owned or operated public parking lot or other public use" in "single residence districts premises." The amendment was adopted in November 1955.

Certain owners of property in the zone filed petition to determine the validity of the amendment, contending that its enactment deprived them of a constitutional right. The trial court upheld the validity of the amendment and the case reached the Supreme Judicial Court on appeal.

The high court noted that it was well settled that the "provision of off-street parking spaces is a public purpose." Furthermore, in the light of testimony as to traffic congestion in the business area in or near the proposed parking lot, the court could not say that the town was arbitrary and unreasonable in revising its zoning law to permit town parking lots even in residence zones. Whether public necessity for traffic relief extended to residence zones was a matter for legislative determination, continued the court, in the light of special knowledge of members of the town meeting of conditions in the town, as well as knowledge gained from the traffic studies previously mentioned. The fact that the town's plan for the proposed parking lot would benefit business concerns in the area constituted no objection to the legislative solution.

The petitioning landowners also contended that the amendment was invalid because it permitted only the town to maintain parking lots in residence areas. The court noted a long continued town policy of operating town parking lots, and held that by reserving to itself the privilege of operating such lots in residence areas, it retained complete control (through its town meeting, a public body) of a type of operation, which, if generally permitted in residence areas might do damage to the whole zoning scheme. The court held this special exemption in favor of the town valid.

The court also held clearly inapplicable the petitioners' contention that the establishment of parking lots arbitrarily in residential zones detracted from the value of abutting lots and took property without due process of law for the benefit of business areas. The zoning amendment was of general application, and the court would not assume that individual applications of its provisions would be made arbitrarily, particularly where it appeared that there was a reasonable basis for its enactment.

The high court thus concluded that the zoning amendment was valid.[67]

Parking Meters

South Dakota: The Supreme Court upheld the validity of the Rapid City parking meter ordinance under the general power of the city to regulate traffic.[68] In this case one William Rensch was convicted of violating the parking meter ordinance of the City of Rapid City, South Dakota, and was sentenced to pay a fine of $25.00 on each of five violations. He appealed from this judgment, challenging the validity of the parking meter ordinance, and the Supreme Court of South Dakota affirmed the conviction and judgment.

Rensch contended that when the ordinance providing for parking meters in Rapid City was promulgated, the city was without power to enact such an ordinance. While the court acknowledged that the powers of municipal corporations are only those conferred upon them by the legislature, it pointed out that long prior to the adoption of the parking meter ordinance the legislature had delegated to municipalities the power to regulate the use of streets and to regulate traffic and sales thereon, and to enact all necessary and proper ordinances to carry into effect the powers granted. These powers, the court held, clearly included the right to regulate the parking of motor vehicles on the streets and alleys. The court observed that whether this regulation is accomplished by the older method of policemen attempting to enforce the limitations on park-

[67] Pierce v. Town of Wellesley, 146 N.E. 2d 666, December 11, 1957 (See Memorandum 99, March 1958, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 365).

[68] City of Rapid City v. Rensch, 90 N.W. 2d 380, May 31, 1958 (See Memorandum 103, September 1958, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 368).

ing or the more modern means of coin-operated mechanical devices it is an exercise of the same power.

Rensch proposed that because under the ordinance a person using a metered parking space may use it as long as he inserts sufficient coins to prevent the meter from signaling a violation, the ordinance was not a reasonable exercise of the police powers of the city. He argued that the meters would better accomplish their purpose if this continuous parking were not permitted. To this the court said that the mere presence of the meters and the necessity that those using them for more than the two hours must return thereto to deposit the additional coin, will contribute substantially to the attainment of the objectives of the regulation. This requirement, the court observed, would deter some from parking in congested areas and hasten the departure of others who have parked therein.

Rensch also tried the argument that the ordinance is invalid because it is a revenue measure and not an exercise of the police powers of the city. (In the years 1953 through 1956, the city had an intake of $279,514.93 from the meters, and spent $256,137.63 of this revenue on new meters, the purchase and development of parking lots, repair of meters, and transferred a portion to the "general fund." There was a balance of $23,377.30.) The court said that even though a police regulation results in revenue to the city, it is not a revenue measure unless the income therefrom is more than is reasonably necessary to accomplish the objectives of the regulation. There was not enough evidence in the case to show that any of the revenue was going for anything not necessary to accomplish the objectives of the regulation. The court said that it was its duty to uphold the ordinance unless its infringement of constitutional restrictions was "so plain as to admit of no doubt."

Maryland: A question arose in a controversy between the Baltimore County Revenue Authority and Baltimore County over the validity of a resolution adopted by the County Commissioners in January 1957.[69] By the resolution the county undertook to bind itself not to reduce the then existing number of parking meters on the streets and highways of the county and not to reduce the rates then charged for the use thereof so long as any bonds issued by the Revenue Authority for the purpose of financing the construction, acquisition and improvement of off-street parking facilities in Baltimore County were outstanding and unpaid. It was contended in this suit, brought to resolve questions relating to bonds which the Revenue Authority proposed to issue, that this undertaking by the county constituted an attempted abdication of a part of the police powers of the municipal body having to do with the control and regulation of traffic in the county and was an invalid attempt to restrict the future legislative action of the county.

The Court of Appeals of Maryland found the resolution permissible. Two statutes were involved—one authorizing the commissioners to acquire and install parking meters on the public highways of the county and to adopt rules, orders and regulations for the use thereof, which power was exercised by a resolution providing for the use of receipts from the meters, in part to provide space or facilities for off-street parking, and another creating the Baltimore County Revenue Authority as an instrumentality of the County Commissioners, authorizing it, among other things, to acquire, construct, equip and operate parking facilities and to borrow money and issue revenue bonds to finance them.

The court said that whatever possible restriction on the exercise of the county's control over traffic there might be in the covenant was too slight to be of any substance. The resolution, the court noted, did not prevent an increase in the number of parking meters or in the rates or in the location of the meters, and did not in the view of the court involve a surrender of the police power of the county to control and regulate traffic.

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[69] Baltimore County Revenue Authority v. Baltimore County 141 A. 2d 147, May 1958 (See Memorandum 104, November 1958, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 373).

Kentucky: This case tested that part of the parking ordinance of the City of Middlesboro which made it unlawful "for any person . . . operating any kind of business, to use or occupy a parking meter or parking meter space . . . for carrying on any business . . . ."[70] A used car dealer sought a court order prohibiting the police judge from enforcing a fine of $5.00 imposed against him and from enforcing the ordinance against him in the future.

This dealer had adopted the practice of placing a large sign, advertising his used car business, on the top of an automobile, and parking the automobile during the daytime in parking meter spaces in the business section of the city. He paid the meter charge, and at the expiration of the time permitted he either deposited another coin in the meter or moved the car to another meter space. He left the automobile unattended and did not negotiate or consummate any sales from the meter spaces, but used them only for advertising purposes.

It was contended by the dealer that this practice was not "carrying on business" as contemplated by the ordinance. The Court of Appeals of Kentucky disagreed, and based its disagreement upon the following line of reasoning:

The obvious, plain purpose and intent of the ordinance is to prohibit the usurpation of meter spaces for a use primarily designed to accomplish the furtherance of a business objective, as distinguished from a use having only a casual or incidental relation to business, such as parking for the purpose of making a business visit, or for the mere personal convenience of a businessman. If the occupancy, itself, of the meter space accomplishes the business objective, rather than being merely an incident of travel for a business purpose, the ordinance is violated.

To the dealer's argument that the ordinance cannot be justified under the police power in that it is an unreasonable restraint on carrying on a lawful occupation, the court answered that the ordinance did not rest upon the bare police power, but upon the power of the city to regulate and control the use of its streets.

INFORMATION INTERCHANGE

Through the Highway Research Correlation Service, eight memoranda were sent out during the year by the committee. These memoranda included digests of current court decisions, and reports on new laws and administrative practices. The following listing gives the memorandum numbers and the month of release:

Committee Memo Number	H.R.C.S. Circular Number	Month
98	359	February
99	361	March
100	365	April
101	366	July
102	367	September
103	368	September
104	373	November
105	374	November

[70] Cherry v. Minton, 314 S.W. (2d) 566, June 1958.