A Review and Some New Thinking on Control of Highway Access

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NATURE AND ORIGIN OF THE RIGHT OF ACCESS

●IT IS generally recognized that owners of abutting property have certain rights in existing streets and highways, the deprivation of which, even for public use, must be compensated for under the "just compensation" clauses of federal and state constitutions.[1] These rights include the right of access; the right of visibility; and the right to the flow of light and air from the street to the property. All of these may be involved in controlled-access cases, but the right of access is undoubtedly the most important. It has been described as an easement appurtenant to the abutting land,[2] which included not merely the ability of the abutting landowner to enter and leave his premises by way of the highway, but also the right to have the premises accessible to patrons, clients and customers.[3]

It is uncertain where the right of access had its birth or inception. It is generally thought to have arisen by means of judicial decisions, possibly the celebrated "New York Elevated Railway cases" (See Story v. New York Elevated RR, 90 N.Y. 122, 1882). The establishment of streets was looked upon as a trust created for the benefit of the public at large as well as the owners of abutting property. The exclusion of the public, and diversion of the streets to private use, violated the rights of the abutters, authorizing them to recover all property value losses they could trace to the breach of trust. A few years later the Supreme Court of the United States ruled that the abutters' rights are subordinate to any reasonable use of the street made by public authorities to facilitate general travel. This right of access may also have stemmed from the "natural rights" theory that access is just one of the inherent property rights arising out of the ownership and enjoyment of land. Whatever the source, the principle has evolved that the easement of access which the judiciary has declared to exist is subject to the fullest exercise of the primary right of public travel, out of which it sprang, and that any change in the street for the benefit of the public travel is a matter of public right. The extent of the right of access may be summarized by saying that an abutter has only the right to get into the street in front of his property and thence, in a reasonable manner, to the general system of streets.

The right of an owner of land abutting on public highways has been a fruitful source of litigation in the courts of all the states, and the decisions have been conflicting, and often in the same state, irreconcilable in principle. The courts have modified or overruled their own decision, and each state has in the end fixed and limited, by legislation or judicial decision, the rights of abutting owners in accordance with its own view of the law and public policy.[4]

The American courts have also shed little light on the origin of the right of access. They usually say, as did the California Supreme Court, "the precise origin of that property right is somewhat obscure, but it may be said generally to have arisen by court decision declaring that such right existed and recognizing it."[5] This is certainly a frank and convenient statement, but hardly informative. Looking behind the cases,

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[1] Bacich v. Board of Control, 23 Cal. 2d 343, 144 P. 2d 818 (1943); People v. Ricciardi, 23 Cal. 2d 390, 144 P. 2d 799 (1943); 10 McQuillin, Municipal Corporations 647 (3d ed. 1950).

[2] Rose v. California, 19 Cal. 2d 713, 105 P. 2d 302 (1942); Story v. New York Elevated R.R., 90 N.Y. 122 (1882).

[3] Longnecker v. Wichita Ry. & Light Co., 80 Kan. 413, 102 Pac. 492 (1909); 10 McQuillin, Municipal Corporations 671 (3d ed., Smith, 1950).

[4] Sauer v. New York, 206 U.S. 536, 548 (1906).

[5] Bacich v. Board of Control, 23 Cal. 2d 343, 350, 144 P. 2d 818, 823 (1943).

the right of access actually appears to have evolved from the courts' recognition of: (1) the purpose of a road, and (2) the legal obligation of the public to preserve the road for that purpose.

The Purpose: A Land Service Road.—From earliest times, through the days of the horse and wagon and model-T Ford, highways were built and utilized primarily for the purpose of giving access to farms and homes and business establishments. This is the concept of the "land service road." Usually the landowner dedicated a portion of his land for the roadway and helped build it either through direct labor or assessments. Under such a state of affairs, each of the abutting landowners was considered to have the right of access to this road which was, after all, built to give him access. To deny this access would defeat the very purpose of the road. This land service road notion is reflected in those cases which give damages when a street is improved in a manner inconsistent with its use as a thoroughfare for abutting owners, but deny damages when access is not interfered with.[6]

Recognition of the Legal Obligation.—Courts have recognized, in a variety of ways, a legal obligation to protect "land service." Sometimes this recognition is found by recourse to the "natural rights" theory that access is just one of the ownership and enjoyments of land.[7] In other cases the courts' explanations are based on the transaction by which the street is established.[8] Streets are generally opened by government subdivision of plats of land into streets and lots or by acquisition where no prior streets had been provided for.[9] Where a city subdivides and sells a lot to a private party, Story v. New York Elevated R.R.,[10] held that the grantee acquires, as part of his grant, a private right that the street abutting the lot be kept as a public street. The court felt that since the value of the lot depended greatly on its relation to the street, any other holding would enable the city to derogate from its own grant. Courts also have felt that where a city acquires a street right-of-way, as by condemnation under authority of a statute, the municipality is bound by the statute to hold the land thus acquired for street purposes alone.[11]

In Iowa one of the landmark cases recognizing that a landowner is not entitled, as against the public, to access to his land at all points between his property and the highway grew out of a tort action against a telephone company. Wegner v. Kelly, 182 Iowa 259, 165 N.W. 449. It was an action for damages against a telephone company based on their alleged negligent failure to have a telephone line strung high enough to clear plaintiff and a load of hay at a spot where plaintiff had opened the fence and was attempting to drive through. No previous ingress or egress had existed at the place of the alleged injury. In recognizing the limitation, the court stated:

"This, according to our decisions, imposed no additional burden on the estate servient to the highway easement, but might not be done without in a measure interfering with access to the land where the poles are set, and, as the owner's title extends from the center of the earth to the dome of the skies, the wires are obstructions in a lesser degree. But an owner is not entitled, as against the public, to access to his land at all points in the boundary between it and the highway, though entire access may not be cut off. McCann v. Clarke County, 149 Iowa 13, 127 N.W. 1011, 36 L.R.A. (N.S.) 1115. If he has free and convenient access to his property and to the improvements thereon, and his means of ingress and egress are not substantially interfered with by the public, he has no cause of complaint. Ridgeway v. Osceola, 139 Iowa 590, 117 N.W. 974, See Louden v. Starr, 171 Iowa 528, 154 N.W. 336."

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[6] Compare Eachus v. Los Angeles Ry., 103 Cal. 614, 37 Pac. 750 (1894), with Bigbey v. Nunan, 53 Cal. 403 (1879).

[7] In re Forsstrom, 44 Ariz. 472, 38 P. 2d 878 (1934); City of Denver v. Bayer, 7 Colo. 113, 2 Pac. 6 (1883); Rigney v. City of Chicago, 102 Ill. 64 (1882).

[8] Eachus v. Los Angeles Ry., 103 Cal. 614, 37 Pac. 750 (1894).

[9] It was also common for a private owner to subdivide a tract of land into lots and streets and then donate the streets to the public authorities. Such method produces no different results.

[10] 90 N.Y. 122 (1882).

[11] Lahr v. Metropolitan Elevated R.R., 104 N.Y. 268, 10 N.E. 528 (1887).

The Iowa Supreme Court in 1957 adopted the language of the Wegner case in Iowa State Highway Commission v. Smith, 248 Iowa 869, 82 N.W. 2d 755, stating on pages 785 and 786 of the Iowa Report:

"It seems fairly well settled that, while access may not be entirely cut off, an owner is not entitled, as against the public, to access to his land at all points between it and the highway. If he has free and convenient access to his property and the improvements on it and his means of ingress and egress are not substantially interfered with by the public he has no cause for complaint. . . . . ."

and

"In accordance with what is said in Wegner v. Kelley, supra, ... and other authorities above cited, we hold defendants are not entitled to access to their properties at any and all points along Hubbell Avenue. But they are entitled to reasonable access or, as Wegner v. Kelley and other Iowa decisions say, to 'free and convenient access' to their properties and the public may not deprive them thereof without just compensation."

REGULATION

The rights of abutting owners are subordinate to the right of the public to proper use of the highway. Thus the exercise of the rights of abutting owners is subject to reasonable regulation and restriction for the purpose of providing reasonably safe passage for the public; but regulations or limitations cannot be sustained which unduly delimit or unreasonably intermeddle with the rights of the abutting owners. The mere disturbance of the rights of the abutting owners by the imposition of new uses on the highway consistent with highway purposes must be tolerated.

It may first be noted that traffic laws and laws pertaining to the construction and use of streets are uniformly upheld although they may indirectly affect access. Thus police power may be used to establish one-way streets, [12] divided highways, [13] ordinances prohibiting U-turns or left turns, [14] and vehicle size and weight laws. [15] Such interference with access as is caused by parking meters has also been held to be within the police power. [16] The "circuity of travel" [17] and "diversion of traffic" [18] cases would seem to cover, in principle, the establishment of service or frontage roads and the limitation of access to such roads from property that previously abutted upon and had access to a main highway under police power. But in at least one case this has been held to involve compensable damage in an action of eminent domain. [19]

The police power is adequate to support reasonable denial of a request for a new means of access to a street where alternate access exists to that street or some other street. [20] In one of the best documented cases clarifying this proposition, the Court said:

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[12] Chissell v. Baltimore, 193 Md. 535, 69 Atl. 2d 53 (1949); Cavanaugh v. Gerk, 313 Mo. 375, 280 S.W. 51 (1926).

[13] People v. Thompson, 260 P. 2d 658 (Cal. Dist. Ct. 1953); People v. Sayig, 101 Cal. App. 2d 890, 226 P. 2d 702 (1951); Fort Smith v. VanZandt, 197 Ark. 91, 122 S.W. 2d 187 (1938); Iowa State Highway Commission v. Smith, 248 Iowa 869, 82 N.W. 2d 755 (1957).

[14] Jones Beach Blvd. Estate v. Moses, 268 N.Y. 362, 197 N.E. 313, 100 A.L.R. 487 (1935); Iowa State Highway Commission v. Smith, 248 Iowa 869, 82 N.W. 2d 755 (1957).

[15] Wilbur v. City of Newton, 301 Mass. 97, 16 N.E. 2d 86, 121 A.L.R. 570 (1938).

[16] Morris v. City of Salem, 179 Ore. 666, 174 P. 2d 192 (1946).

[17] Hoyne v. Wurstner (Ohio) 63 N.E. 2d 229; Andrews v. City of Marion (Ind.) 47 N.E. 2d 968; see "Circuity of Travel Doctrine" in this paper.

[18] See "Circuity of Travel Doctrine" in this paper.

[19] People v. Ricciardi, 23 Cal. 2d 390, 144 P. 2d 799 (1943).

[20] Farmers-Kissinger Market House Co. v. Reading, 310 Pa. 493, 165 Atl. 398 (1933); Town of Tilton v. Sharpe, 85 N.H. 138, 155 Atl. 44 (1931). See Breinig v. Allegheny County, 232 Pa. 474, 2 Atl. 2d 842 (1938); State ex rel Gebelin v. Dept. of Highway, 200 La. 409, 8 So. 2d 71.
Contra: Brownlow v. O'Donoghue Bros., 276 Fed. 636, 22 A.L.R. 939 (App. D.C. 1921).

"The absolute prohibition of driveways to an abutting owner's land which fronts on a single thoroughfare, and which cannot be reached by any other means, is unlawful and will not be sustained. But the public authorities have the undoubted right to regulate the manner of the use of driveways by adopting such rules and regulations, in the interest of public safety, as will accord some measure of access and yet permit public safety, as will accord some measure of access and yet permit public travel with a minimum of danger. The rules and regulations must be reasonable, striking a balance between the public and the private interest. The abutter cannot make a business of his right of access in derogation of the rights of the traveling public. He is entitled to make only such use of his right of access as is consonant with traffic conditions and police requirements that are reasonable and uniform." [21]

It should be noted that in most of the "driveway cases," requests to cut curbs for driveways were denied under ordinances authorizing only the "regulation" of new driveways. [22]

The case of Alexander Co. v. City of Owatonna [23] represents at least one instance of record wherein the denial of a request for a driveway has been upheld under an ordinance authorizing regulation only. In going beyond the traditional limits of the "driveway cases," the Court referred to evidence in the record that the requested access would be dangerous to pedestrians using the sidewalk and then emphasized the fact that the state "can never relieve itself of the duty of providing for the safety of its citizens." [24] The Court further pointed out that the abutting property could be used without vehicular access and that the driveway was merely an incident to one of many possible business uses. Since zoning laws have the same effect and are upheld so long as some use remains, the Court reasoned that the police power should apply to both cases alike. Reliance was also placed on a broad analogy to cases upholding the validity of ordinances declaring certain businesses to be public nuisances within city limits. This was put forth by way of illustrating the point that police power often restricts the use of property rather than to suggest the possibility of vehicular access amounting to a nuisance. [25] In any event, the Court made it clear that regulating the use of ordinary property does not constitute a taking per se and left it to other courts to say why the right of access should be unique.

"It is well settled that the state may prevent access to the road at certain places where public safety requires it and thus may interfere with or even prevent access at a specific point and shut it off entirely. But this is not the damage to private property prohibited by the Constitution. Access at another point must be allowed even though it may be less convenient." [26]

As is well recognized today, the use of property may be regulated to a considerable extent under the police power. Zoning regulations are everywhere upheld so long as they are reasonable. [27] But when an attempt is made to apply the zoning principle to highways, by zoning as residential a strip of land on either side of a highway, most

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[21] Breinig v. Allegheny County, 232 Pa. 474, 482, 2 Atl. 2d 842, 847 (1938).
[22] Metropolitan Dist. Comm'n. v. Cataldo, 257 Mass. 38, 153 N.E. 328 (1926); In re Singer-Kaufman Realty Co., 196 N.Y. Supp. 480 (1922); Goodfellow Tire Co. v. Comm'r., 163 Mich. 249, 128 N.W. 410 (1910).
[23] 222 Minn. 312, 24 N.W. 2d 244 (1946) (4-3 decision).
[24] Ibid., at 322, 24 N.W. 2d at 251.
[25] See Billage of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926), wherein Southerland, J., declared "the law of nuisance, likewise, may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of the (police) power."
[26] King v. Stark County, 66 N.D. 467, 266 N.W. 654.
[27] Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); 8 McQuillan, Municipal Corporations sec. 25.05 (3rd ed. 1950); Yokely, Zoning Law and Practice sec. 20 (2d ed. 1953).

courts say this is going too far.[28] The reasons given are usually mere declarations that such action is arbitrary and unreasonable, and hence not a proper exercise of the police power. Roadside zoning has been allowed to a certain extent in some cases,[29] however, and it may well be that the prevailing judicial attitude will change as the novelty of the practice wears off. Access use restriction is not as severe a regulation of property as roadside zoning. Where only the access is restricted to residential purposes, there is nothing to prevent commercial use of the property if other access is available or if a frontage road is provided. For this reason, direct regulation of access use might be received more favorably by the courts than roadside zoning.

Closely akin to the ordinary zoning cases are those upholding building height restrictions[30] and billboard regulations.[31] Building and setback lines may now be imposed under the police power[32] although in an earlier day eminent domain was required.[33] Subdivision regulations affecting, amongst other things, the number, location and manner of construction of approaches to a highway are also proper under the police power.[34] In all of such instances, as in zoning cases, only the regulation or restriction of future uses of property is permitted.

Ordinarily a presently existing property use cannot be directly cut down under the police power unless it constitutes a nuisance.[35] Where an existing use not prohibited at common law is declared to be a nuisance by ordinance or statute, the courts will determine for themselves whether it is a nuisance in fact.[36] This is largely a matter of deciding whether the use partakes sufficiently of the attributes of recognized nuisances, due regard being paid to precedent on the one hand and the legislative declaration on the other. It should be remembered, however, that to the extent a court holds to the proposition that access rights are subordinate to the rights of the traveling public, an existing use of access can be restricted whenever it impinges on those rights—and this without regard to whether or not the use constitutes a nuisance.

DIVERSION OF TRAFFIC DOCTRINE

Claims for damages have been made to various courts based on the principle that the relocation of a highway so that the main traffic is diverted away from the abutting

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[28] City of St. Louis v. Dorr, 145 Mo. 466, 41 S.W. 1094 (1897); aff'd, 46 S.W. 976 (1898); People v. Roberts, 90 Misc. 439, 153 N.Y. Supp. 143 (1915); aff'd. 171 App. Div. 890, 155 N.Y. Supp. 1133 (1915); State v. Fowler, 90 Fla. 155, 105 So. 733 (1925).

[29] Jefferson County v. Timmel, 261 Wis. 39, 51 N.W. 2d 518 (1952); Kansas City v. Liebi, 298 Mo. 569, 252 S.W. 404 (1923); See Howden v. City of Savannah, 172 Ga. 838, 159 S.E. 401 (1931); Civillo v. New Orleans, 154 La. 271, 97 So. 440, 33 A.L.R. 260 (1923).

[30] Welch v. Swassey, 214 U.S. 91 (1908). See note, 8 A.L.R. 2d 963 (1949).

[31] Murphy v. Town of Westport, 131 Conn. 292, 40 Atl. 2d 177, 156 A.L.R. 568 (1944); General Outdoor Adv. Co. v. Indianapolis, 202 Ind. 85, 172 N.E. 309, 72 A.L.R. 453 (1930).

[32] Goreib v. Fox, 274 U.S. 603 (1927); Town of Windsor v. Whitney, 95 Conn. 357, 111 Atl. 354 (1920); McQuillan, Municipal Corporations secs. 24.541, 25.138 (3rd ed. 1950).

[33] Appeal of White, 287 Pa. 259, 134 Atl. 409, 53 A.L.R. 1215 (1926); St Louis v. Hill, 116 Mo. 527, 22 S.W. 861 (1893).

[34] Ayres v. Los Angeles, 34 Cal. 2d 31, 207 P. 2d 1, 11 A.L.R. 2d 503 (1949).

[35] The leading American case holding retroactive zoning unconstitutional is Jones v. City of Los Angeles, 211 Cal. 304, 295 Pac. 14 (1930). For a discussion of the theoretical and practical limitations of the police power in the elimination of nonconforming uses see Comment, 39 Yale L.J. 735 (1930) and Comment, Wis. L. Rev. 685 (1951). The latter source, at page 689, quotes with approval from Bassett, Zoning 112 (1936) as follows: "Theoretically the police power is broad enough to warrant the ousting of every nonconforming use, but the courts would rightly and sensibly find a method of preventing such a catastrophe."

[36] In re Wilshire, 103 Fed. 620 (C.C.S.D. Cal. 1900); 39 Am. Jur., Nuisances sec. 13. See also: Huff v. Indiana State Highway Commission, ___ Ind. ___, 149 N.E. 2d 299.

Warren v. Iowa State Highway Commission, ___ Iowa ___, ___ N.W. 2d ___ (Opinion November 18, 1958).

owner's place of business or premises due to the natural public desire to use a better or new road is compensable but in each instance the court has held that any damage to the premises or reduction in value of sale price resulting from the diversion of traffic is damnum absque injuria.

In the case of State v. Linzell, 126 N. E. 2d 53, the plaintiffs brought mandamus to require the director of highways to commence condemnation proceedings against the owners of the premises on which a gas station, store and restaurant had been constructed. Most of the plaintiff's business was from persons traveling on the highway and after the construction of a new highway in order to reach plaintiff's premises it was necessary to travel two lanes leading from the new highway across lands of persons other than the plaintiff to the old highway but the main flow of traffic by-passed plaintiff's premises. The court held that mere circuity of travel does not of itself result in legal impairment of the right of ingress and egress to and from property where the result is but an inconvenience shared in common with the general public. The court said:

"It is now an established doctrine in most jurisdictions that such an owner has no right to the continuation or maintenance of the flow of traffic past his property. The diminution in the value of land occasioned by a public improvement that diverts the main flow of traffic from in front of one's premises is noncompensable. (Citing authorities.) The change in the traffic flow in such a case is the result of the exercise of the police power or the incidental result of a lawful act, and is not the taking or damaging of a property right."

In the case of Iowa State Highway Commission v. Smith, supra, the court said:

"Insofar as the regulations may divert some traffic (mainly eastbound) from defendant's filling station, they have no legal cause for complaint. They have no vested right to the continuance of existing traffic past their establishment. The requirement that defendant cross the highway only at designated places is imposed upon all members of the public. Once upon the highway, defendants are treated no differently than all other motorists."

In the case of Board of County Commissioners v. Slaughter, 158 P. 2d 859, there was a condemnation proceeding involving the taking of a strip of property for the purpose of relocating and straightening highway US 85. The abutting owner's property had been located on old US 85 and was improved by a store, restaurant, residence, filling station and tourist cabin business. The relocation placed the new route on the rear of the abutting owner Slaughter's property approximately three-eighths of a mile from the improvements. It was agreed by the parties that the actual value of land taken is ten dollars per acre or the total sum of one hundred thirty six dollars and thirty-two cents. However, the owner Slaughter contended that by reason of the rerouting of the highway, most of the vehicular traffic would be taken away from the old road and onto the new highway which was shorter and better improved, whereby her property would be damaged in the amount of eleven thousand dollars. On trial in the court below the award to the owner Slaughter was eleven thousand dollars from which the board appealed. The point involved as stated by the court was:

"In an eminent domain proceeding may a reduction in market value of land not condemned (where the actual taking for the new right-of-way from a portion of such land has not disturbed or affected the value of the part remaining), which is caused solely by a diversion of traffic formerly passing in front of a place of business, be considered in determining the amount to be paid for the portion actually taken?"

The court came to the conclusion that inconvenience or circuity of travel or reduction in value of premises or loss of business caused by rerouting or relocating a highway does not give rise to a legal damage and thus entitled the abutting owner to no damages. The court also held that there is no distinction between cases of relocating a highway in which no property of the particular claimant is taken and cases in which a portion of the claimant's property is taken for relocation purposes. The court said:

"Obviously the landowner's claim must rest or fall upon a decision whether she has a vested right in the flow of public travel, which once came by her door, but for which now, for the convenience of the general public, a shorter and more convenient route has been opened and is being employed. We hold she has no such right."

In the case of People v. Schultz Co., 268 P. 2d 117 (Cal.), there was a condemnation proceeding for construction of a freeway with a service road to be constructed. The appellant landowner objected to an instruction on the basis that it failed to award damages for lack of access to the freeway. The court said:

"Appellant will not lose, but will keep its present access right until the improvement is constructed, at which time it will gain a new access right as good or better than the one it now possesses . . . . The jury's finding that such loss did not create any severance damages is amply supported by the evidence that the completion of the proposed outer highway would afford an adequate substitute for the present roadway."

Pruett v. Las Vegas Inc., 74 So. 2d 807 (Ala.), was a suit to enjoin the relocation of a highway which would by-pass the complainant's motel business and property. The court held that no grounds for injunction were presented for the reason that economic loss and business impairment of the plaintiff or economic or tax loss of the City of Montgomery, Alabama, were not grounds for preventing the relocation of a highway.

Other cases dealing with this doctrine include:
Gardner v. Bailey (W. Va.) 36 S. E. 2d 215.
Nelson v. State Highway Board (VT.) 1 A. 2d 689.
Wilson v. Greenville County, (South Carolina,) 96 S. E. 301.
State v. Hoblitt (Montana), 288 P. 181.
Petition of Johnson (Pa.), 23 A. 2d 880.
Greer v. City of Texarkana (Ark.), 147 S. W. 2d 1004.
Attorney General v. Carrow (Arizona), 114 P. 2d 896.
People v. Gianni, (Calif.), 20 P. 2d 87.
City of Chicago v. Spoor (Ill.), 60 N. E. 540.
El Paso v. Sandfleder (Texas), 118 S. W. 2d 950.
Robinette v. Price (Utah), 280 P. 736.
Richmond v. City of Hinton (W. Va.), 185 S. E. 411.
Heil v. Allegheny County (Pa.), 199 A. 341.
McMinn, et al. v. Anderson, et al. (Va.), 52 S. E. 2d 67.
Wilson v. Iowa State Highway Commission, ___ Ia. ___, 90 N. W. 2d 161.
Warren v. Iowa State Highway Commission, ___ Ia. ___, ___ N. W. 2d ___. (Opinion November 18, 1958).

CIRCUITY OF TRAVEL DOCTRINE

Construction of a divided highway abutting a property does not legally damage the property even though the abutter may be required to travel an additional distance in his use of the highway in the same manner as any other user of the highway.[37]

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[37] Lindley v. Oklahoma Turnpike Authority (Okla.), 262 P. 2d 159.
City of Fort Smith v. Van Zandt, 197 Ark. 91, 122 S. W. 2d 187.
Annotation, 100 A. L. R. 491.
State v. Burk (Ore,), 265 P. 2d 789.
Cavanaugh v. Gerk, 313 Mo. 375, 280 S. W. 51.
Iowa State Highway Commission v. Smith, 248 Iowa 869, 82 N. W. 2d 755.
Wilson v. Iowa State Highway Commission, ___ Iowa ___, 90 N. W. 2d 161.
See also:
Cramm v. Laconia, 71 N. H. 41, 51 A. 635.
Cachele v. Bridgeport Hydraulic Company, ___ Conn. ___, 145 A. 756.
Newton v. New York, New Haven & Hartford Railroad Co., 72 Conn. 420, 44 A. 813.
Kinnear Mfg. Co. v. Beatty, 65 Ohio D. C. 264, 62 N. E. 341.
New York, Chicago & St. Louis Railroad Co. v. Busci, 128 Ohio St. 134, 190 N. E. 562.
Holland v. Grant County, ___ Ore. ___, 298 P. 2d 832.

In Beckman v. State of California, (1943) 64 C.A. 2d 487, 149 P. 2d 296, the property in question did not abut on the street on which an underpass had been constructed, but on a connecting street. The Court ruled that the necessity for circuity of travel by reason of the construction on the street intersecting the street on which complainant's property fronts, in absence of anything barring access to said intersecting street, does not furnish a basis for recovery of damages. The Court pointed out that this was not a cul-de-sac situation.

"Not every depreciation in the value of property by reason of a public improvement can be made the basis of an award of damages. (Citing authorities.) For instance, diversion of traffic is not a proper element to be considered in computing damages. (Citing authorities.) Regulations such as the prescribing of one-way traffic or the prohibiting of the left-hand turns may interfere to some extent with right of access without furnishing a basis for recovery of damages even by an abutting owner. See Note 100 A.L.R. 487, 491-493."

In the case of Holman v. State, 217 P. 2d 448 (Calif.) the state constructed a dividing strip in the highway. The dividing strip was eight inches high and six feet wide down the center of the highway and its effect is described in the Court's opinion as follows:

"That the building located on the premises of plaintiffs is especially designed for carrying on the business of servicing and repairing heavy highway trucks and equipment; but prior to the erection of said dividing strip, plaintiff's property was easily accessible by heavy truck traffic proceeding northerly on said highway but as a proximate result of the construction of such dividing strip, all reasonable access to plaintiff's property by such northbound traffic has been prevented and likewise, vehicles leaving plaintiff's property may not cross the southbound lane and immediately make a left-hand turn and proceed in a northerly direction, resulting in the depreciation of the reasonable market value of plaintiff's property."

The Court then reviewed its earlier cases involving street constructions preventing access from abutting property because of change of grade, obstructions placed in the street or placing the abutting property on a dead-end street and noted that in such cases where,

"it was held that compensation must be paid there was either physical injury to an owner's property itself or a physical impairment of access from the property to the street."

"None of these cases involve the division of a highway into separate roadways by concrete island or division strips and are all factually different from the case at bar."

The Court states:

"Damages resulting from the exercise of police power are not compensable. Simpson v. City of Los Angeles, 4 Cal. 2d 60, 47 P. 2d 474. It seems quite clear that the division of a highway is an exercise of the police power being directly intended for public safety."

"The facts pleaded herein show that the highway upon which plaintiffs' property abuts is not closed and that plaintiffs, once upon the highway to which they have free access, are in the same position and subject to the same police power regulations as every

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[37] (cont.)
Hansen v. City of Omaha, ___ Neb. ___, 59 N.W. 2d 622.
Wilson v. Kansas City, ___ Mo. ___, 162 S.W. 2d 802.
Krebs v. Uhl, ___ Md. ___, 154 A. 13.
Arcadia Realty Company v. City of St. Louis, 326 Mo. 273, 30 S.W. 2d 995.
Ponischil v. Hoquiam Sash and Door Co., 41 Wash. 303, 83 P. 316.
Olson v. Jacobs, ___ Wash. ___, 76 P. 2d 607.
City of Lynchburg v. Peters, ___ Va. ___, 133 S.E. 674.
Buhl v. Fort Street Union Co., 98 Mich. 596, 57 N.W. 829, 23 L.R.A. 392.
Gerhard v. Seekonk River Bridge Commissioners, 15 R.I. 334, 5 A. 199.
Wetherill v. Pennsylvania Railroad Company, 195 Pa. 156, 45 A. 658.

other member of the traveling public. Because of a police power regulation for the safety of traffic, they are, like all other travelers, subject to traffic regulations. They are liable to some circuity of travel in going from their property in a northerly direction. They are not inconvenienced whatever when traveling in a southerly direction from their property. The rerouting or diversion of traffic is a police power regulation and the incidental result of a lawful act and not the taking or damaging of a property right. People v. Ricciardi, supra, 23 Cal. 2d at page 399, 144 P. 2d 799."

In People v. Sayig, 226 P. 2d 702 (Calif.) the highway was a divided highway and the property owners in question upon entering the highway were required to proceed as on a one-way street in their particular cases from 500 to 1,000 ft to a point where there was a cross-over where they could make a "U" turn and proceed in the opposite direction. The California court discussed two earlier cases which recognized that diversion of traffic or mere circuity of travel

"even where they result in impairment of value, are not compensable. . . . ."

"We also know that the state, under its police power, may regulate traffic without becoming liable for damages for impairment to businesses that may be adversely affected."

The Court in this case cites with approval and follows the rule of Holman v. State, supra, the Court said:

"We also know that mere relocation of a highway thus diverting traffic from the property does not legally damage the property. Holloway v. Purcell, supra. We also know that the consideration of a divided highway in front of the property does not legally damage it. Holman case."

In Brady v. Smith, 79 S.E. 2d 851 (W. Va.) the plaintiff sought an injunction restraining the defendant State Road Commission from building a center concrete island or median strip in front of plaintiff's property on highway US 60 on which he conducted a motor vehicle repair garage, sales and service business. The construction of the proposed center strip nine inches high and twenty-four inches wide would require all eastbound traffic on US 60 to proceed about three hundred feet beyond plaintiff's property in order to turn and approach his place of business which plaintiff alleged would greatly damage plaintiff's business. The temporary injunction granted by the trial court was dissolved and the bill of complaint dismissed. The Court said:

"Nor does the bill of complaint expressly or inferentially allege that the plaintiff has suffered, or will suffer, injury from the proposed construction of the center concrete island or median strip different in kind from that suffered by other property owners similarly situated."

In Rose v. State, 123 P. 2d 505 (Calif.) there was involved a case of a construction of a viaduct which substantially impaired the adjoining landowner's right of access which the California court considered in the same light as the Iowa court decided the case of Liddick v. Council Bluffs. But the Court said that depreciation in value of the plaintiff's property resulting from diversion of traffic was not a proper element of damage. The Court cited People v. Gianni, 20 P. 2d 87 (Calif.) in which a small portion of land was taken for public highway purposes and the landowner contended that he was entitled to recover for not only that injury but the damages to his remaining land should be based upon the total depreciation in the value even though that depreciation was caused primarily by an admittedly noncompensable element of damage; that is, diversion of traffic. The Court, however, held that the test of damages must be limited to those which accrue by reason of the legal injury for which compensation was due. The Court said:

"Many courts have indicated that the diminution of value in such cases cannot be based upon elements of damage for which the landowner is not entitled to recover. (Citing cases.) This is particularly true insofar as diversion of traffic is concerned, even in states where the applicable rules do not correspond to those in this state and in situations where a taking of property is also involved. (Citing authorities.) While a

few cases have permitted a consideration of the depreciation caused by diversion of traffic, they are contrary to the weight of authority. See 118 A. L. R. 921 et seq."

In the case of Holloway v. Purcell, 217 P. 2d 665, the plaintiffs as taxpayers sought to enjoin the proposed relocation of a section of highway in the state of California. The Court recognized the necessity of payment in cases where access rights were destroyed but the Court stated with reference to relocation as follows:

"The relocation of Route 3 and the construction of the Freeway may as plaintiffs assert, injure their business. They are not, however, deprived of rights of access as abutting owners, and the construction of the highway past their places of business gives them no vested right to insist that it remain there. 'Though appellants for the ensuing twenty-five years have enjoyed the benefits of a greater volume of traffic by their lands and business establishments, than may travel thereby after the new road is opened . . . they now insist upon an extension and perpetuation of those rights and advantages so that they may have a changeless road in a changing world. In our opinion, the . . . statute (does not) prevent the construction and inclusion in the state highway system of another nearby road deemed by appellees to be in the interest of state . . . though . . . the traffic to appellants' property may be diverted and incidental loss thereby occasioned.' (Citing authorities.)"

None of the cases specified generally how long a circuity of travel is permitted under the police power without requiring the payment of damages but one case holds that five miles is not unreasonable. In the case of Jones Beach Boulevard Estate v. Moses, 197 N. E. 313, 100 A. L. R. 487, the abutting owner complained because a center dividing strip was placed on a heavily trafficked highway for the purpose of eliminating grade crossings and traffic lights and on which highway complete or "U" turns, except around designated plazas were prohibited and also left-turns were prohibited except in response to traffic direction signs. In order to proceed toward the left from his property the abutting owner was first required to travel five miles in the opposite direction in order to reach a turning place. The abutting owners' petition for an injunction preventing enforcement of such regulations was denied. The Court said:

"The plaintiff once upon the highway is treated no differently than is any other member of the traveling public."

The court held that the right of access to the highway means a right to enter upon it but not to use it differently or in violation of the driving regulations imposed upon other users of the highway, adopted for the purpose of speeding up traffic and eliminating danger.

However, in Nichols v. The Commonwealth of Massachusetts (1954), 331 Mass. 581, 121 N. E. 2d 56, the Massachusetts court found it necessary to award damages for injury to one's access even though it was shown that a circuitous means of travel was available to the petitioner in reaching the new highway. A Massachusetts statute was so worded and interpreted as to require payment for damages for loss of access, even when, evidently, an indirect means of access was present.

Recent Development in Iowa on Circuity of Travel

On November 18, 1958, the Iowa Supreme Court handed down its decision in the case of Warren v. Iowa State Highway Commission, ___ Iowa ___, ___ N. W. 2d ___. It crystallized the Iowa law on the question of damages in circuity of travel cases. The plaintiff, Lelia Warren, owned two tracts of land abutting on an east-west county road. The Iowa Highway Commission constructed a north-south fully controlled access interstate highway, closing off at the boundary line of the interstate highway the county road between the two parcels owned by Lelia Warren. Neither parcel was closer than three hundred feet from the right of way lines of the interstate. The Warrens, operating the two farms as a unit, were required to travel a circuitous route of approximately three and one-half miles between the two parcels. The lower court concluded that the plaintiff suffered a special damage which was compensable. The Iowa Supreme Court reversed the lower court. Portions of that opinion were as follows:

" . . . . . It is evident that the closing of the road will put her to a considerable amount of inconvenience, additional effort, and expense. On the other hand, it is apparent that if intersecting secondary roads and city streets cannot be closed without payment to those who may suffer such inconvenience, who may be forced to travel by circuitous routes instead of the direct ways they formerly had, the expense to the general public will be tremendous. . . . . .

"Many Iowa cases have dealt with some facet of the question presented here. To the casual reader they may appear to be in confusion, and some in conflict with others. But we think the seeming contradictions are more apparent than real, and that upon careful analysis of the cases the true rule appears with reasonable certainty. It is that one whose right of access from his property to an abutting high way is cut off or substantially interfered with by the vacation or closing of the road has a special property which entitles him to damages. But if his access is not so terminated or obstructed, if he has the same access to the highway as he did before the closing, his damage is not special, but is of the same kind, although it may be greater in degree, as that of the general public, and he has lost no property right for which he is entitled to compensation. . . . . .

"Livingston v. Cunningham, 188 Iowa 254, 175 N.W. 980, is factually much like the instant case. The plaintiff's property did not abut on the road proposed for vacation, nor was his means of access in any way hampered. But the closing of the highway meant that in carrying on his business, which required him to obtain ice from the Des Moines river, it would be necessary for him to travel in his hauling operations some four miles by the next available public road instead of forty rods over the closed road. He asked that the closing of the highway be enjoined. In affirming a dismissal of his petition, we said, page 257 of 188 Iowa, page 981 of 175 N.W.: 'It is not sufficient that the injury is greater in degree than that suffered by the public. It must appear that the kind of injury sustained is different from that suffered by the general public.' And at page 258 of 188 Iowa, page 981 of 175 N.W. is this: 'It is not shown that the obstruction of this highway in any way affects ingress or egress to his place of business, or to any lands owned by him. . . . . That he can reach the river by other routes open to travel is not disputed. It is the matter of convenience to him that is the gravamen of his complaint.' . . . . . .

"The principle evolving from the foregoing authorities is that one whose property abuts upon a roadway, a part of which is closed or vacated has no special damage if his lands do not abut upon the closed or vacated portion so that his right of ingress and egress is not affected. If he has the same access to the general highway system as before, his injury is the same in kind as that suffered by the general public and is not compensable. It is damnum absque injuria. . . . ."

CUL-DE-SAC DOCTRINE

Stanford Law Review, February 1951, Volume 3, Number 2, page 307, states the problems in this area as follows:

"The states are sharply divided on the question of whether the owner of property abutting on a street turned into a cul-de-sac is entitled to compensation.[38] Some courts hold that the right of access extends in both directions to the next intersecting street.[39] This view not only rejects the possibility of police power action, but redefines the historical extent of the right of access in order to accord with a feeling that the property owner should be compensated. The states taking this position limit compensation to owners on the first block. Owners of property in the next block are not entitled to compensation although their loss in dollars and cents is substantially the same. There is, however, considerable authority that even the owners on the first block are not entitled to compensation, either because the right of access has not been impaired, or because

[38] See cases cited in Bacich v. Board of Control, 23 Cal. 2d 343, 144 P. 2d 818 (1943).
[39] Bacich v. Board of Control, 23 Cal. 2d 343, 144 P. 2d 818 (1943).

impairment has been accomplished through exercise of police power.[40] The latter view is more consistent with the underlying rationale of right of access."

In New York, C. & St. L. R. R. Company v. Busci, (1934) 128 Ohio State 134, 190 N. E. 562, the owner of property abutting on a certain street was held to suffer no damage when the City of Cleveland and the defendant railroad vacated one terminus of this street for the purpose of constructing additional tracks, because he still had access to the system of streets via the remaining terminus. It should be noted that in this case as well as the other cul-de-sac cases to be mentioned, the property claimed to have been damaged did not abut on that part of the street which was vacated. The Court held that the legal status of the property owner fell within the category of damnum absque injuria.

A similar holding under somewhat parallel facts may be found in Krebs et al. v. Uhl et al. (1931) 160 Md. 584, 154 A. 131. A road on which complainant's property abutted was vacated at a dangerous railroad crossing thus cutting off complainant's prior route of travel to a village only a matter of a few hundred feet to the east. The present road branches off from its former position at a point to the southwest of complainant's property, passes south of his property, crosses the railroad tracks by means of an overhead crossing, and rejoins the old road at a point east of the tracks and beyond much of the village. Complainant's property is now (by road travel) one-half to three-quarters of a mile distant. He attempts to recover for the resulting cul-de-sac and loss of convenient access. In the words of the Court:

"Owners of property along the highway near the crossing probably all suffer from the surrender of the public easement at that site. And it seems a loss which many who have customarily traveled that way must suffer in some degree. The surrender is made by officials empowered to act on behalf of all the public, including those who, like the complainants, depend more or less upon the use of the crossing in their daily occupations. It could not be said that the property of any of these users, at least property not actually deprived of all access, is to be taken, unless it can be said that the location of the public easement at that site gave them superimposed property rights against the public as a whole, and this we think it did not do. . . . their right has been only that secured to the public as a whole, even though by reason of the location of their properties it is of greater usefulness to them than to others of the public. The question under the Constitution is not one of comparative usefulness, or loss, to one property or the other from the shifting of the crossing, but one of taking private properties in doing it. And in the opinion of this Court, the mere surrender of the easement of crossing at the former site, whatever may be the inconvenience or loss resulting to owners of the nearby properties, cannot be regarded as a taking of these properties."

There seems to be no question but that, by means of its police power, a city may create one-way streets. Such action definitely restricts the direction of ingress to and egress from property abutting on such streets. Yet, it is generally held that there has been no compensable injury to abutting property owners. It has been urged that no distinction should be drawn in the resulting effects in creating a one-way street or a cul-de-sac. (It is realized that one-way streets are generally the result of the exercise of the police power where compensation need not be paid.)

In the City of Lynchburg v. Peters, (1926) 145 Va. 1, 133 S. E. 674, it was held that the right of ingress and egress from and to his lot by an abutting landowner by way of the street is a private right, the taking of which must be compensated only if no other way of ingress and egress is left open.

The cases[41] cited so far were not involved with the creation of cul-de-sacs as a result of limited access facilities. However, since generally no reasonable basis can be offered to show why distinctions should be drawn between the factual situations giving rise to any cul-de-sacs (as a means of determining when damages should be paid), these cases may be considered of a comparable nature to the following examples.

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[40] New York, C. & St. L. R. R. v. Bucsi, 128 Ohio St. 134, 190 N. E. 562 (1934); Freeman v. City of Centralia, 67 Wash. 142, 120 P. 886 (1912).

[41] See also: Buhl v. Port St. Union Company (1894), 98 Mich. 596, 57 N. W. 829; Glasgow v. City of St. Louis (1891), 107 Mo. 198, 17 S. W. 733.

A widely discussed cul-de-sac case is Bacich v. The Board of Control of State of California, (1943), 23 Cal. 2d 343, 144 P. 2d 818 (also see 128 P. 2d 191). Plaintiff brought action to recover damages to his property arising from the creation of a cul-de-sac. One of the two entrances to the street upon which plaintiff's property abutted was closed when the next intersecting street was lowered fifty feet in the construction of a limited access way. The court held that plaintiff's easement of access permitted him not only to get onto the street immediately in front of his property, but also to have access to the next intersecting street in both directions. The court said:

"There is more than merely a diversion of traffic when a cul-de-sac is created. The ability to travel to and from property to the general system of streets in one direction is lost. One might imagine circumstances . . . . . in which recovery should not be logically applied, but we are here concerned with the particular facts of this case and do not purport to declare the law for all cases under all circumstances."

California had, prior to this case, made an addition in the eminent domain clause in its constitution (Article I, Section 14) of "or damaged" to the word "taken" indicating an intent to extend that clause to embrace additional situations. (The dissenting opinion of this case is often cited.)

See also Schnider et al. v. State of California (1952) 38 C. 2d 439, 241 P. 2d 1, 43 A. L. R. 2d 1068, wherein plaintiffs obtained a judgment for damages due for loss of access to a next intersecting street.

In Warren v. Iowa State Highway Commission, ___ Iowa ___, ___ N.W. 2d ___, (Opinion of November 18, 1958) the plaintiff's home, because of the closing off of an east-west county road at the boundary line of a north-south interstate highway, lay in a cul-de-sac so that plaintiff could travel only east instead of both east and west. The Iowa Supreme Court seems to have settled the cul-de-sac doctrine in Iowa by stating:

"It is apparent that the plaintiff here will suffer considerable inconvenience in being shut off from her previous direct access to her lands lying west of the point of closing the secondary road at its intersection with highway No. 35. Her home property on the east of the intersection will lie in a cul-de-sac, and her travel can be only to the east instead of both east and west. Nevertheless her means of access to the general highway system is not impaired; that is to say, she has the same means of ingress and egress to and from her lands as before. Her damage is greater in degree than that suffered by the general public; but it is not different in kind, which is the ultimate test. The greatest good of the greatest number is the criterion which the authorities having charge of the building, alteration, and maintenance of the highway systems in the state must follow. In the absence of any showing of fraud or bad faith their judgment is final. It cannot be reviewed by the courts."

EMINENT DOMAIN VERSUS POLICE POWER

Is the control of access a compensable taking or is it a non-compensable proper exercise of the police power of the State?

Two powers have been employed to restrict and limit access rights; one, the police power and the second, the power of eminent domain. The police power is the power of government to act in the furtherance of the public good, either through legislation or by the exercise of any other legitimate means, in the promotion of the public health, safety, morals and general welfare, without incurring liability for the resulting injury to private individuals. Eminent domain is the power of the sovereign to take or damage private property for a public purpose on payment of just compensation. Police power is the power to restrict a property right because it is necessary. Eminent domain is the power to appropriate a property right because it is useful. Whether it is the police power or eminent domain that is being exercised in a particular case is sometimes difficult to determine. This is in part due to the fact that it is extremely difficult to tell where the police power ends and the power of eminent domain begins. Some courts have suggested that the police power ends when the injury to the property owner in not being paid for his property is greater than the injury to the public in having to pay for the property. It is only by weighing and balancing the need for the prop-

erty, the injury to the property owner, and the burden of compensation upon the public that it can be decided in any case whether a right ought to be taken without paying for it. Wherever the line be drawn, it is generally agreed that the answer does not depend on legal concepts, but rather upon economic and social consideration.

Iowa State Highway Commission v. Smith, 248 Iowa 869, 82 N.W. 2d 755 (1957)

This was an action by the Highway Commission against an abutting property owner asking for a declaratory judgment to establish and determine the following:

1. That the limitations and restrictions placed upon the access to defendant's property by the Highway Commission and the city of Des Moines was not a "taking" and not compensable under the laws of Iowa.
2. That the prohibition against crossings, left turns, and U turns across the center dividing line of said highway was not a "taking" and not compensable under the laws of Iowa.

The trial court found that the limitation placed on existing access was a "taking" which must be condemned under Chapter 148 of the Acts of the 56th General Assembly, and which must be compensated for, while the prohibition against crossings, left turns, and U turns did not infringe upon the rights of the property owners and was not the subject matter of condemnation. Both parties appealed from the findings adverse to them.

The defendants were owners of property in the city of Des Moines which had frontage on Highway US 6 and US 65. They owned a garage, a cafe, and a service station on the northwest corner of the intersection of the said streets. This station had a frontage of two hundred sixteen feet on the highway, and for years had unlimited access to all of its facilities, and had catered primarily to heavy truck traffic. The same defendants owned residential property across the highway and to the southwest of the commercial property.

In June of 1955 the defendants were approached by a representative of the Highway Commission with regard to the proposal for the widening of Hubbell Avenue. No mention was made of access, driveways or dividing strips, and the representative stated that the road was to be widened two feet on each side. A contract was executed with the defendants. No claim was made by the Highway Commission that they had at any time purchased any access rights. By stipulation the defendant would have testified to the fact that he received no notice of any of the actions of the Commission or the city of Des Moines and was never consulted about the proposed location of the driveways. Prior to the action of the Commission he could cross directly from his residence to his place of business, a matter of five to six hundred feet, but following the improvement he would have to travel a mile and a quarter to get from his home to his place of business and return. That prior to the action of the Highway Commission the trucks and other vehicles could enter the defendant's property from either direction at any point along the entire frontage, but after the improvement only westbound traffic would enter the station, limited to two thirty-four foot entrance ways, and eastbound traffic would be required to proceed past the station to Forty-Second Street, make a U turn, and enter the station.

The Case for the Defendants. —The case for the defendants stated:

1. That the legislature of the State of Iowa has by statute specifically outlined the authority and method of obtaining controlled-access facilities.
   (a) The State Highway Commission has only such powers as conferred by statute.[42]
   (b) Right of access is a property right.
2. That the Constitution of the State of Iowa provides that existing rights of ac-

[42] Huxley v. Conway, 226 Iowa 268, 284 N.W. 136; Reed v. Highway Commission, 221 Iowa 500, 26 N.W. 2d 47.

cess cannot be taken without just compensation being paid therefor.[43]

3. That the vested rights of access cannot be taken without just compensation being paid therefor.[44]

4. That the substantial impairment or interference with existing access in connection with highway improvements is a "taking" under the power of eminent domain and not mere regulation under police power.[45]

In the case of Liddick v. Council Bluffs, 232 Iowa 197, 5 N.W. 2d 361, the city of Council Bluffs and the Iowa State Highway Commission claimed to have the right to build an overhead viaduct crossing in front of plaintiff's place of business and provide only limited access at grade level along the side of the viaduct. The Highway Commission took the position that they were only limiting the right of access to a small degree and, therefore, there was no injury to a property right for which plaintiff should be compensated.

"This court has many times recognized these special property rights of the abutting owner, distinct and different from those of the general public. These special rights are property having a value as certainly as the tangible property itself, and increasing the worth of the latter. (Case citations.)

"The abutting owner has a proprietary right, or easement, of access in the street along his property which is subordinate to the right of the state or of a city or town in and to said street, so that the municipality may destroy the right by vacating the street, or the state may substantially impair or interfere with that access or right of access by improving the street for the better service or safety of the public, but in either event compensation must be made to the abutting property owner for the injury sustained by him."

The opinion in the Liddick case was affirmed in Anderlik v. Iowa State Highway Commission, 240 Iowa 919. It dealt with a somewhat similar situation, except that the property was outside of a municipal corporation. A viaduct was built by the Highway Commission, and the plaintiff, Anderlik, put upon a side road so that his right of access to the highway was limited. The court in that case unanimously found that the right of access was impaired and that there was "at least a partial taking of the property in the constitutional sense." The court therefore affirmed the opinion of the district court that condemnation proceedings must be instituted to determine the value of these property rights.

The Supreme Court of Iowa in the case of Nalon v. Sioux City, 216 Iowa 1041, 250 N.W. 166, said:

"Appellant's brief and argument is devoted to this one proposition, that there was no taking of plaintiff's property within the meaning of the constitutional provision against taking property without compensation, and that any and all damages claimed by the appellee resulted indirectly from the construction of the ditch adjacent to the appel-

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[43] Article I, Section 18, Constitution of Iowa; Nalon v. Sioux City, 216 Iowa 1041, 250 N.W. 166; Long v. Wilson, 119 Iowa 267, 93 N.W. 282; Liddick v. City of Council Bluffs, 232 Iowa 197, 5 N.W. 2d 361; Anderlik v. Iowa State Highway Commission, 240 Iowa 919, 38 N.W. 2d 565; Chapter 306A, I.C.A.; Petition of Burnquist, 220 Minn. 48, 19 N.W. 2d 394; Rose v. State, 19 Cal. 2d 713, 123 Pacific 2d 505; People v. Ricciardi, 23 Cal. 2d 390, 144 Pac. 2d 799; People v. Russell, 229 Pac. 2d 920; Rothwell v. Linzell, 163 Ohio St. 517, 127 N.E. 2d 524; Hedrik v. Graham, 96 S.E. 2d 129; Gates v. City of Bloomfield, 243 Iowa 671, 53 N.W. 2d 279.

[44] Granger v. City of Des Moines, 241 Iowa 356, 44 N.W. 2d 362; Brackett v. City of Des Moines, 246 Iowa 249, 67 N.W. 2d 542; City of Des Moines v. Manhattan Oil Co., 193 Iowa 1096, 188 N.W. 921; Crow v. Board of Adjustment, 227 Iowa 324, 288 N.W. 145; Keller v. Council Bluffs, 246 Iowa 202, 66 N.W. 2d 113; Stoner McCray v. City of Des Moines, 78 N.W. 2d 843.

[45] Sweet v. Rechel, 159 U.S. 380 on page 398; Rothwell v. Linzell, 127 N.E. 2d 524; Rose v. State, 123 P. 2d 505.

lee's property and are incidental and consequential. Article I, Section 18, of the Constitution of the State of Iowa, provides as follows:

'Private property shall not be taken for public use without just compensation first being made, or secured to be made to the owner thereof.'

"Appellant cites authorities in support of its contention that there can be no taking of private property within the contemplation of this provision of the Constitution unless there is a physical appropriation of the property itself, and that, where the property is not physically taken, any damages resulting to such property because of a public improvement are indirect and consequential and, in the absence of statutory provision authorizing payment thereof, cannot be collected against a city when acting in its governmental capacity. It may be conceded that, in construing provisions such as that in our Constitution, which merely provide for compensation for the taking of property, the authorities quoted by appellant are in conformity with appellant's contention. It does not necessarily follow that there may not be, in any case, a taking of property without the actual invasion of the physical property itself. On the contrary, there is ample authority in support of the rule that, even where the provision is only for compensation for the taking of property, there may be a taking of the property by preventing or substantially interfering with the owner's access to his property from a public street.

"Prior to the case of Long v. Wilson, 119 Iowa 267, 93 N.W. 282, 60 L.R.A. 720, 97 Am. St. Rep. 315, there may have been some confusion in our decisions. Since the decision in that case, this court has become firmly committed to the doctrine that a substantial interference with a property owner's right of access to his property from a public street amounts to a taking of property and that damages can be recovered therefor.

". . . . . .

"Under the rule that a substantial interference with access to property by means of a public street does amount to a taking of property for which damages may be collected, there was evidence to carry this case to the jury, and the trial court did not err in overruling the appellant's motion for a directed verdict."

In the case of Long v. Wilson, 119 Iowa 267, 93 N.W. 282, the Court said:

"It may not be of importance to the general public whether a particular street is vacated or not. It is important to the individual owner of abutting property that he shall be able to get to and from his residence or business, and that the public shall have the means of getting there for social or business purposes. In such a case access to thoroughfares connecting his property with other parts of the town or city has a value peculiar to him, apart from that shared in by citizens generally, and his right to the street as a means of enjoying the free and convenient use of his property has a value quite as certainly as the property itself. If this special right is of value, and it is of value if it increases the worth of his abutting premises, then it is property, regardless of the extent of such value. Surely no argument is required to demonstrate that the deprivation of the use of property is to that extent the destruction of its value.

". . . . . .

"Title to the streets of a city or town is acquired by grant with the implied right of ingress and egress in the abutting lot owner; the grantor or the party making the dedication of the city or town saying to him, 'This right of ingress and egress you shall have.' Bradbury v. Walton, 94 Ky. 163 (21 S.W. 869). By accepting the street, the obligation to keep it open and afford the dedicator or his grantees, near or remote, access to abutting lots is clearly implied; and though, under the plenary powers of the legislature over all streets and highways, it may be vacated, the damages occasioned thereby cannot be said to be those shared with the public generally, as in the case of a country road, but are in large part peculiar to himself."

In Borghart v. Cedar Rapids, 126 Iowa 313, 101 N.W. 1120, the Court said:

"But here the injury complained of is peculiar to plaintiff's property, and not such as is shared by the public generally. Insofar as the street or public ground was neces-

sary to the free and convenient way for travel to and from the lot, her right to its use for that purpose was appurtenant to her premises, and essential to their enjoyment. The abutter has a right, in common with the community, to use the street from end to end for the purpose of passage; but, in addition to this common right, he has an individual property right, appendant to his premises in that part of the street which is necessary to free and convenient egress and ingress to his property. That this latter right is private and personal and unshared by the community, and cannot be taken away without answering in damages, is held by substantially all the authorities."

In Liddick v. Council Bluffs, supra, the Court said:

"We now hold that the destruction of the rights of access, light, air, or view, or the substantial impairment or interference with these rights of an abutting property owner in the highways or streets adjacent to his property, by any work or structure upon such highways or streets, intended for the improvement thereof, done by the state or any governmental subdivision thereof, is a 'taking' of the private property of said owner within the purview and provisions of Section 18, Article I of the Iowa Constitution.

". . . . . .

" '. . . an abutting owner's easement for the passage of light and air over a public highway cannot be taken or damaged without just compensation. So, also, an owner's right of access to his premises is a valuable property right. The construction of an impassable barrier around property, by which the owner's access to it would be destroyed, would be no less a taking of it in the sense of the Constitution than would be the owner's expulsion from the premises.' 18 Am. Jur., Eminent Domain, 789, section 158."

The holding in Liddick v. Council Bluffs was affirmed by Anderlik v. Iowa State Highway Commission, supra, wherein the Court stated:

"Upon the evidence above summarized the trial court held there had been a taking of plaintiff's properties under our decision in Liddick v. City of Council Bluffs, 232 Iowa 197, 232, 233, 5 N.W. 2d 361, 379:

" 'We now hold that the destruction of the rights of access, light, air, or view, or the substantial impairment or interference with these rights of an abutting property owner in the highways and streets adjacent to his property, by any work or structure upon such highways or streets, intended for the improvement thereof, done by the state or any governmental subdivision thereof, is a 'taking' of the private property of said owner within the purview and provisions of Section 18, Article I of the Iowa Constitution' (Italics ours) . . . . . .

"The basis of the Liddick decision is that real property consists not alone of the tangible thing but also of certain rights therein sanctioned by law, such as rights to access (ingress and egress), light, air, and view, and when such rights are destroyed or substantially impaired by such a structure in the highway as was here made, there is at least a partial taking of the property in the constitutional sense. The record here shows such an impairment of these rights of plaintiffs."

In the case of People v. Ricciardi, 144 P. 2d 799, the Supreme Court of California stated:

"The contention that the disputed elements of damage—the taking or impairment of the right of direct access to the through highways and the taking or impairment of the right of visibility to and from the one highway (Rosemead Boulevard) in relation to the remaining property—are noncompensable as being the result of police power regulation, cannot be sustained under the facts and law applicable here. We recognize that the defendants have no property right in any particular flow of traffic over the highway adjacent to their property, but they do possess the right of direct access to the through traffic highway and an easement of reasonable view of their property from such highway. If traffic normally flowing over that highway were re-routed or if another highway were constructed which resulted in a substantial amount of traffic being diverted from that through highway the value of their property might thereby be diminished, but in such event defendants would have no right to compensation by reason of such re-routing or

diversion of traffic. The re-routing or diversion of traffic in such a case would be a mere police power regulation, or the incidental result of a lawful act, and not the taking or damaging of a property right. But here we do not have a mere re-routing or diversion of traffic from the highway; we have, instead, a substantial change in the highway itself in relation to the defendants' property; i. e., a re-routing of the highway in relation to defendants' property rather than a mere re-routing of traffic in relation to the highway. Defendants' private property rights in and to that highway are to be taken and damaged. It is only for such private property rights that compensation has been assessed. The court allowed no damages to be predicated on any diversion of traffic from the highway but it did properly allow damages to be based on diversion of the highway from direct access to defendants' property."

The Case for the Plaintiff. The case for the plaintiff stated:

1. That the question was not whether the abutting owners of property suffer injury or depreciation in value thereof, but whether or not the ordinance designating the places where the highway may be entered and left was in the exercise of the police power of the state.

2. That the regulation of the use and enjoyment of property in the interest of public safety and welfare, without depriving the owner of possession, use, or ownership was an exercise of the police power of the state and not a taking of property requiring compensation or damages.[46]

3. That the declaration by the state legislature of its policy and regulations in the exercise of the police power of the state are not subject to review by the courts.[47]

In 18 Am. Jour., Eminent Domain, Section 11, p. 639, the distinction between police power and eminent domain is stated as follows:

" 'Police power' is the power of the state to regulate, restrict or prevent the use of property in the interest of public health, morals or safety; while 'eminent domain' is the power of the state to take private property for public use."

The position of the plaintiff is well illustrated by the case of Carazalla v. State, 70 N.W. 2d 208 and 71 N.W. 2d 276. The case was first considered by the Court in 70 N.W. 2d 208, at which time the appellant, State, urged that it was error for the trial court to refuse to instruct the jury that it should disregard evidence as a result of the highway involved in the condemnation proceedings being made a "controlled-access" highway. On the first hearing, the Supreme Court of Wisconsin affirmed the trial court but on rehearing the Supreme Court reversed its previous opinion as set forth in 71 N.W. 2d 276, in which the Court recognized the rule that damage resulting to property through the exercise of the police power is not compensable and the Court also pointed out that what constitutes a taking under eminent domain is often interwoven with the

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[46] Des Moines v. Manhattan Oil Co., 193 Iowa 1096, 184 N.W. 823; Hubbell v. City of Des Moines, 173 Iowa 55, 154 N.W. 337; Ridgeway v. Osceola, 139 Iowa 590, 117 N.W. 974; Walker v. City of Des Moines, 161 Iowa 215, 142 N.W. 51; Bryan v. Petty, 162 Iowa 62, 143 N.W. 987; Higgens v. Board of Supervisors, 188 Iowa 448, 176 N.W. 268; Cecil v. Toenjes, 210 Iowa 406, 228 N.W. 874; Shenandoah v. Replogle, 198 Iowa 423, 119 N.W. 418; Boardman v. Davis, 231 Iowa 1226, 3 N.W. 2d 608.

[47] Section 306A. 1, I.C.A.; Des Moines v. Manhattan Oil Co., 193 Iowa 1096, 184 N.W. 823; Iowa Farm Serum Co. v. Board of Pharmacy Examiners, 240 Iowa 734, 35 N.W. 2d 848; Dickinson v. Porter, 240 Iowa 393, 35 N.W. 2d 66; Mays Drug Stores v. State Tax Commission, 242 Iowa 319, 45 N.W. 2d 245; State v. Town of Riverdale, 244 Iowa 423, 57 N.W. 2d 63; Keller v. Council Bluffs, 66 N.W. 2d 113; Craven v. Bierring, 222 Iowa 613, 269 N.W. 801; Burlington & Summit Apartments v. Manolato, 233 Iowa 15; 7 N.W. 2d 26; 16 Corpus Juris Secundum, Constitutional Law, Section 209; Anderson v. Jester, 206 Iowa 452, 221 N.W. 354.

See also:

Wilson v. Iowa State Highway Comm., ___ Iowa ___, 90 N.W. 2d 161.
Warren v. Iowa State Highway Comm., ___ Iowa ___, ___ N.W. 2d ___ (1958) Sec. IV.
Huff v. Indiana State Highway Comm., ___ Ind. ___, 149 N.E. 2d 299.

question of an exercise of the police power. The Court said:

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

"If relocated United States Highway 51 had not been designated as a controlled-access highway, but instead that part thereof located upon the parcel taken from the plaintiffs had been constructed on such a high embankment as to make it impracticable for passing traffic to reach plaintiffs' remaining abutting lands from such highway, the rule announced in our former opinion would be applicable. Such rule, however, is not applicable to a situation where moving traffic would have suitable ingress to, and egress from, plaintiff's abutting lands from the relocated highway except for the fact that the state's police power has been exercised to prohibit the same."

In Breinig v. County of Allegheny, (Pa.) 2 A. 2d 842, the Court said:

"But the public authorities have the undoubted right to regulate the manner of the use of driveways by adopting such rules and regulations, in the interest of public safety, as will afford some measure of access and yet permit public travel with the minimum of danger. The rules and regulations must be reasonable, striking a balance between the public and the private interests. The abutter can not make a business of his right of access in derogation of the rights of the traveling public. He is entitled to make only such use of his right of access as is consonant with traffic conditions and police requirements that are reasonable and uniform.

". . . . . .

"And highways may be so regulated by them as to limit the rights of abutting owners: See Walnut and Quintz Street Corp. v. Mills, 303 Pa. 25, 31, 154 A. 29; see also Brooks v. Buckley & Banks, 291 Pa. 1, 3, 139 A. 379."

In Anderson v. Jester, 206 Iowa 452, 211 N.W. 345, the Court said:

"Reasonableness of law or regulation depends on conditions existing when it is put into effect, not on conditions existing when the constitution was adopted or when interpretations having reference to formerly existing conditions were made. Classification or regulation will not be held arbitrary, or unreasonable, or discriminatory, unless clearly so. Id.; Des Moines v. Manhattan Oil Company, 193 Iowa 1096, 184 N.W. 823."

The case of Phillings v. Pottawattamie County, 188 Iowa 567, 176 N.W. 314, involved an existing highway which passed through plaintiff's farm and which was on high ground at the location of the plaintiff's building, and then passed down to lower ground and crossed a creek to the east of the plaintiff's buildings. The County improved the road by making a cut along the elevated part of its course and placing fill in constructing a grade across the bottom lands adjacent to the creek. The plaintiff sued to recover for encroachment due to the widening, and for the weakening of lateral support, and because the making of the cut in front of a gate, allowing access to one of his fields, destroyed all means of convenient access between the buildings and improvements. Defendant's demurrer was overruled as to the claim for encroachment outside of the road limits but sustained as to all other items of alleged injury. Plaintiff appealed. The Court noted that the case involved improvement of an existing road, and stated:

"The right so acquired by the public was not simply to travel over or upon the natural surface of the land within the limits of the road. It acquired, as well, the right to improve such way; and, in the very nature of things, this included improvement of the grades, so far as is reasonably practicable, by cuts upon the elevations and fills upon the low lands. All these things must be presumed to have been contemplated, and their effect, if any, upon the value of the land over and along which the road was laid, taken into due consideration in assessing the damages for the original taking."

This case involved a statute relating to secondary roads prohibiting the officials in charge of the work from destroying or injuring the ingress or egress to any property as a result of the construction of the highway.

With reference to the right of the public to improve a highway, the Court said:

"This being true, it seems quite clear that, in the absence of statutory regulation, no right of action for damages will accrue to the adjacent owner from the mere fact that an improvement of the grade of an established highway has rendered the use of his land less convenient than it was before."

With respect to the statute forbidding destruction or injury to ingress or egress, the Court said:

"This, we have held, is not to be construed as prohibiting all changes which may cause some inconvenience in the use of adjacent property, because such strict rule would often make improvement of the highway practically impossible, even when greatly needed, and the general public would suffer accordingly.

" 'The law was designed to protect the owner in the use and enjoyment of his property, and to prevent interference on the part of road supervisors; but it was not intended to prevent necessary improvements in the highways, when they can be made without material injury to adjacent property, even though some inconvenience might result to the owners of such property.' Randall v. Christiansen, 76 Iowa 169.

". . . . . .

". . . the liability of the state or municipality for injury to land by the improvement of a public way does not extend to or include indirect or purely consequential damages, but is confined, in judicial application, to the case of property actually taken and appropriated. . . . But roads are not provided for the sole benefit of the property over or along which they are laid. They are for the use of the general public, and the law providing for their improvement has in view their general public convenience and usefulness. When first established, under pioneer conditions, they are given comparatively slight attention; but, with the increase of population and traffic, there comes a correspondingly increased demand and necessity for road improvements. The necessity and propriety of the improvements, their kind, character, and extent, and the matter of their execution or construction, are confided to such boards, officers, or agencies as the legislature has provided for that purpose; and, in the absence of any provision for the review of their action upon appeal or otherwise, their finding and decision are final, so long, at least, as they act in good faith, and within the scope of the authority conferred upon them.

". . . . . .

"The argument most forcibly and plausibly urged upon our attention is that plaintiff has a vested right of passage between his premises and the highway; that this right is property, and, as such, is protected by the constitutional guaranty against subjection to public use without compensation."

The Court then stated that the demurrer to the petition must be affirmed, but stated:

"We hold, however, that, under the statute before referred to, plaintiff is not without right to equitable relief, if it shall appear that the grading, cutting, or filling of the road has the effect to destroy or materially impair the means of egress and ingress which are essential to the convenient use and enjoyment of his property; and, as the cause must be remanded for further proceedings upon those items of plaintiff's claim the demurrer to which was overruled, the trial court is directed to permit him, if he so elects, to amend his petition by asking for appropriate relief which shall preserve and enforce his statutory right to convenient passage between the highway and his lands bordering thereon, in such manner as will be reasonably sufficient for the purposes of ingress and egress."

In Lingo v. Page County, 201 Iowa 906, 208 N.W. 327, the plaintiff sought an injunction against maintenance of a highway embankment and to prevent the County from depriving plaintiff of the right of ingress and egress of his premises. Before the improvement complained of, plaintiff's access to a roadway was to the north from his

farm residence over a driveway which crossed a railroad track and then entered a public highway which curved to the northwest. The improvement took the curve out of the highway and constructed an overpass over the railroad tracks so that the plaintiff's driveway goes over the overpass and through the trestle work of the overhead crossing after which plaintiff had the same facilities as the rest of the public residing in that vicinity insofar as getting onto the highway is concerned. The elevation of the grade at the highest point is 26 ft. The width of the grade at some points is 100 ft and extended onto the plaintiff's premises, for which encroachment he had been paid damages and which was not an issue in the case. In order to travel east on the improved highway, plaintiff must now go about a block further, and if he desires to go west, about two blocks further than formerly. Of this situation the Court said:

"It is apparent from the foregoing statement of the facts, none of which are in dispute, that ingress and egress to and from appellant's premises were neither destroyed nor substantially interfered with by location and improvement of the new highway. The inconvenience of being compelled to travel one block farther in one direction and two blocks in another, to reach the highway, is not an unreasonable interference by the public authorities with the right of ingress and egress to and from his premises. The right of way of the railroad company to the southeast from the section line crosses a portion of appellant's premises through a comparatively deep cut, and much greater safety is secured to the public generally by the overhead crossing than was possible the way the highway formerly ran.

". . . . . .

"Naturally, appellant would rather have a convenient road to town that did not pass under the viaduct. The road shows, however, that it was practically impossible to construct the improvement in the highway so as to give immediate access from appellant's premises thereto, and at the same time accomplish the public purpose.

"Thus situated, we do not perceive in what way appellant has been deprived of any of his constitutional rights. The county condemned the land occupied for public use, and thereby acquired the right to build whatever grade or embankment was necessary for the reasonable improvement and use of it as a public highway. The exact question here presented was before us in Pillings v. Pottawattamie County, 188 Iowa 567, except that, in that case, the interference with the plaintiff's ingress to and egress from his premises was the result of a deep cut in the highway."

The plaintiff then reconciled these cases and the cases of Liddick, supra, and Anderlik, supra, relied upon by the defendant in the following way:

The Pillings and Lingo cases set forth the rule of law that construction of a highway which has the effect of altering the means of access of the abutting owner in the one instance by limiting such access to specific driveways because of construction and in the other case by slightly lengthening the distance to be traveled to reach the highway, not being unreasonable interference or a destruction of the right of access, do not give rise to damages or compensation to the abutting owner.

On the other hand, the Liddick and Anderlik cases hold that when construction of a highway does amount to a destruction of the abutting owner's right of access and destruction of his easement for light and air that there has been the destruction or taking of a property right for which compensation must be made.

There is no conflict between these rules of law or cases, the distinction being on the facts.

In the Liddick case the Court said that insofar as the pronouncements of law in the Lingo case and the Pillings case are contrary to the questions of law decided in the Liddick case such earlier cases are overruled. However, the Court also says in the Liddick case opinion with respect to the Pillings and Lingo cases:

"We have no fault to find with the result reached."

In other words, the Supreme Court of Iowa does not apply the rules of law of the Liddick and Anderlik cases until, as a matter of fact, it appears that there has been a destruction of the right of access as opposed to mere regulation thereof and until it

appears that easements for light and air have been destroyed. The Pillings and Lingo cases were decided adversely to the claimants for damages on the basis that there was not shown a substantial interference with the abutting owners' access nor was the abutting owners' right of access destroyed. In the Pillings case the matter was referred back to the trial court for a determination as to whether or not the interference with the abutting owners' access was of such an extent as to be a material interference or a destruction thereof. The Liddick case was an appeal from an action in equity seeking an injunction and therefore triable de novo and on the appeal in addition to the rules of law contained in the opinoin, it amounts to a finding by the Supreme Court on the evidence in the record that the overpass constructed in the Liddick case as a matter of fact amounted to a destruction or material interference with the abutting owner's right of access. Short of such a finding of fact by the Supreme Court, the rules of the Pillings and Lingo cases would have applied and no compensation been awarded.

Likewise, the Anderlik case was decided on the question of fact as to whether or not there was a destruction of the right of access. That action was in the nature of mandamus to compel the defendant Highway Commission to commence condemnation proceedings to assess the damages for the taking of the abutting owner's right of access. The trial court granted the relief asked and held that there was such a destruction or material interference with the rights of access as to constitute a taking. Therefore, it appears that in all of these cases it is a question of fact as to whether or not the method of construction of a highway constitutes a total destruction or substantial impairment or interference with the right of access of an abutting owner. The above cases relate only to the method of construction of the highway and not the regulation of traffic on the highway itself.

In the case of Stoessel v. City of Ottumwa, 227 Iowa 1021, 289 N.W. 718, in which the plaintiff sought to enjoin the City of Ottumwa from vacating an alley along the north side of plaintiff's property, plaintiff's property was bounded on the east by a city street and on the west by a 12-ft alley. The vacated alley was 8 ft in width to the north of plaintiff's property. The vacation and sale of the alley by the City was upheld as not being unreasonable, and the Court said:

"The appellant still has ingress and egress to his property at both front and rear, which are reasonably convenient. He improved lot 5 after the alley was closed. In our judgment the vacation of the alley does not deprive the appellant of the convenient and reasonable access to or from his property or its use, in any substantial degree. (Cases cited.)"

Extract from the Opinion. The following is extracted from the opinion handed down by the Court:

"We consider first the commission's appeal from the portion of the judgment, adverse to it, which provides the restrictions upon access to defendant's properties constitute a taking thereof which must be condemned and paid for.

"It is now well settled in Iowa, and we think in most jurisdictions that real property consists not alone of the tangible thing but also of certain rights therein sanctioned by law, such as the right to access—ingress and egress. It is clear owners of property abutting a street or highway cannot be deprived by public authorities of all access thereto without just compensation. As the commission concedes, such deprivation amounts to a taking of the property. Gates v. City of Bloomfield, 243 Iowa 671, 675, 53 N.W. 2d 279, 281, and citations; Breinig v. County of Allegheny, 332 Pa. 474, 2 A. 2d 842, 847-8; 39 C.J.S., Highways, section 141, pages 1080-82;18 Am. Jur., Eminent Domain, Section 183; 25 Am. Jur., Highways, section 154.

"There is no claim defendants have been totally deprived of access to either tract. However, we have said several times that the destruction of the right of access or the substantial or material impairment or interference therewith by the public authorities is a taking of the property. Nalon v. City of Sioux City, 216 Iowa 1041, 250 N.W. 166; Liddick v. City of Council Bluffs, 232 Iowa 197; 232-3, 5 N.W. 2d 361, 379; Anderlik v. Iowa State Highway Commission, 240 Iowa 919, 923-4, 38 N.W. 2d 605, 607-8; Gates v. City of Bloomfield, supra. Petition of Burnquist, 220 Minn. 48, 19 N.W. 2d 394, 397; Anno. 22 A.L.R. 942.

"In reliance upon what we have said in these cases defendants contend there is such a substantial impairment or interference with their right of access as constitutes a taking of their properties for which compensation must be made. This was apparently the view of the trial court. Although we have no thought of receding from these precedents we do not regard them as controlling here.

". . . . . .

"None of these precedents considers the extent of the right of access to property from an adjoining street or highway. Certainly none of them holds an abutter is entitled, as against the public, to access to his land at all points between it and the highway.

"It seems fairly well settled that, while access may not be entirely cut off, an owner is not entitled, as against the public, to access to his land at all points between it and the highway. If he has free and convenient access to his property and the improvements on it and his means of ingress and egress are not substantially interfered with by the public he has no cause for complaint. 39 C.J.S., Highways, section 141, page 1081; 2 Elliott Roads and Streets, section 882, page 1153; Wegner v. Kelley, 182 Iowa 259, 265, 165 N.W. 449; Genazzi v. Harin County, 88 Cal. App. 545, 263 P. 825; State Highway Board v. Baxter, 167 Ga. 124, 144 S.E. 796; State ex rel. Gebelin v. Department of Highways, 200 La. 409, 8 So. 2d 71; Sweet v. Irrigation Canal Co., 198 Ore. 166, 254 P. 2d 700, 717. See also Fowler v. City of Nelson, 213 Mo. App. 82, 246 S.W. 638.

"In accordance with what is said in Wegner v. Kelley, supra, at page 265 of 182 Iowa, and other authorities above cited, we hold defendants are not entitled to access to their properties at any and all points along Hubbell Avenue. But they are entitled to reasonable access or, as Wegner v. Kelley and other Iowa decisions say, to 'free and convenient access' to their properties and the public may not deprive them thereof without just compensation.

". . . . . .

"About the same result is reached by considering the commission's rights. It has the undoubted right, in the interest of public safety, to regulate the means of access to abutting property provided its regulations permit. Breinig v. County of Allegheny, supra, 332 Pa. 474, 2 A. 2d 842, 847-8; Brownlow v. O'Donoghue Bros. 51 App. D.C. 114, 276 F. 636, 637, 22 A.L.R. 939, 941; Anzalone v. Metropolitan Dist. Comm., 257 Mass. 32, 153 N.E. 325, 327-8, 47 A.L.R. 897, 902; 39 C.J.S., Highways, section 141, page 1082; 25 Am. Jur., Highways, section 154, page 449.

". . . . . .

"In determining whether limitations placed by the commission upon the number and location of access connections are reasonable the judgment of the commission is entitled to deference because of its superior knowledge of highway and traffic matters. But the commission's authority is not above that of the courts. See State ex rel. Gebelin v. Department of Highways, supra, 200 La. 409, 8 So. 2d 71.

"No hard and fast rule can be stated as to whether an abutting property owner has been denied access that is reasonable or, as we have said, 'free and convenient.' In most instances the question is one of fact, not of law, and its determination depends largely upon the evidence in the particular case. See Ridgeway v. City of Osceola, 139 Iowa 590, 595-6, 117 N.W. 974; Perkins v. Palo Alto County, supra, 245 Iowa 310, 315, 60 N.W. 2d 562, 564; Town of Tilton v. Sharpe, supra, 84 N.W. 393, 151 A. 452, 454.

"We have no difficulty in disposing of defendants' appeal from the part of the judgment holding the prohibition of crossing the highway, left turns and U turns except at designated points where there are no raised 'jiggle' bars does not constitute a taking of defendants' property within the law of eminent domain. . . . . Such regulations as are imposed here on the movement of traffic are almost universally regarded as reasonable.

". . . . . .

"Insofar as the regulations may divert some traffic from defendants' filling station they have no legal cause for complaint. They have no vested right to the continuance of existing traffic past their establishment. The requirement that defendants cross the highway only at designated places is imposed upon all members of the public. Once

upon the highway defendants are treated no differently than all other motorists."
". . . . . .

Appendix

IN THE SUPREME COURT OF IOWA

LEILA WARREN,

Plaintiff-Appellee,

v

IOWA STATE HIGHWAY COMMISSION, CHRIS LARSEN, JR., CECIL MALONE, ROBERT K. BECK, ROBERT L. BRICE AND RUSSELL F. LUNDY, JOHN G. BUTTER AND L. M. CLAUSON,

Defendants-Appellants.

Filed November 18, 1958

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49577

Appeal from Clarke District Court.—H. J. Kettleman, Judge

Plaintiff's action in equity to enjoin the defendants from closing a secondary road at its intersection with National Interstate and Defense Highway No. 35 resulted in a decree as prayed. The defendants appeal. Reversed.

Norman A. Erbe, Attorney General of Iowa; C. J. Lyman, Special Assistant Attorney General of Ames; Daniel T. Flores, Trial Counsel for Iowa State Highway Commission of Ames; and John L. McKinney, General Counsel for Iowa State Highway Commission of Ames, for appellants.

Killmar & Reynoldson, of Osceola, for appellee.

THOMPSON, J.—The defendants, the Iowa State Highway Commission and its members and certain of its officers, are engaged in building National Interstate and Defense Highway No. 35 in a general north and south direction across Clarke County. The right of way of this highway is 300 feet wide. It crosses an east and west secondary road which runs between Sections 13 and 24, in Township 72 N., Range 26 West of the Fifth Principal Meridian, which the defendants propose to close at the intersection. The plaintiff owns a 40-acre tract in Section 24, the nearest point of which is slightly more than 200 feet east of the east line of Highway No. 35 where the secondary road will be closed on that side. This tract contains the home and is the homestead of the plaintiff and her husband. She owns a somewhat larger tract situated in Section 13 about one-fourth mile west on the same secondary road, which is used in connection with the homestead and as a part of the same farming operation. The secondary road has for many years been used as a convenient means of travel between the two tracts. Cattle have been driven back and forth and farm machinery has been moved regularly by means of this road.

It is obvious that the closing of the secondary road, both on the east and west sides of the 300-ft right-of-way of the No. 35 highway will prevent the use of the road as plaintiff has used it in the past. It will be necessary in order for her to travel or to move livestock or machinery between the two tracts to go from her homestead a short distance east to another secondary road, then south across the mainline tracks of the Chicago, Burlington & Quincy Railroad to US Highway No. 34, then west along this highway one and one-half miles to another secondary road running north and south, north along it, again crossing the railroad tracks, to reach an unimproved secondary road—probably an extension of the one which the defendants propose to close at the intersection with No. 35—then east along this road to the plaintiff's tract lying in Section 13. It is apparent that with the closing of the secondary road on each side of the right of way of No. 35 plaintiff will be compelled to substitute for the direct one-quarter mile

road between her lands a route something over three miles in length, with two crossings of main line railroad, and much of the way over a considerably traveled east and west federal highway and across No. 35. This, the plaintiff thinks, constitutes a taking of her property without just compensation, in violation of the provisions of the federal and state constitutions. Her immediate access to the secondary road is not impeded; but she contends that in a broad sense her right of ingress and egress to her two farms has been interfered with and she should have compensable damages and the obstruction of the secondary road should be enjoined until the defendants have taken proper steps to have such damages determined and paid. The trial court agreed with the plaintiff, and granted an injunction as prayed.

We understand that the plaintiff is not contending that the secondary road may not eventually, and by proper procedure, be closed. We quote from her brief and argument: "In reality all she is asking for in this case is a forum in which she may file her claim for damages resulting from this road closure." It is her claim that the closing of the secondary, or county, road involved here is in effect a vacation of a portion of it, and should be governed by the procedure outlined in Chapter 306 of the Codes of 1954 and 1958, entitled "Establishment, Alteration, and Vacation of Highways." Briefly, Section 306.4 of this chapter gives to the board (in this case the Clarke County Board of Supervisors) or commission which has jurisdiction of a highway the power to "alter or vacate and close" such highway. Then follows, in Sections 306.5, 306.6, and 306.7 an outline of the procedure to be followed, which requires the giving of notice. Section 306.8 provides for objections to the proposed procedure, and also contains this language: "Any person owning land abutting on a road which it is proposed to vacate and close, shall have the right to file, in writing, a claim for damages at any time on or before the date fixed for hearing." This provision is the keystone of the arch of plaintiff's case. She asserts the secondary road cannot be closed except by following the above sections, in which case her damages could be assessed and collected.

On the other hand, the defendants' position is that they are given the authority to close the road by Chapter 306A of the Code of 1958. This entire chapter was added to our law by Chapter 148 of the Acts of the Fifty-Sixth General Assembly, which became effective July 4, 1955. The chapter is entitled: "An Act to provide for highways to be known as controlled-access facilities." The section of greatest importance here is that part of Section 306A.6 which we set out: "The state or any of its subdivisions shall have authority to provide for the elimination of intersections at grade of controlled-access facilities with existing and county roads, and city or town or village streets, by grade separation or service road, or by closing off such roads and streets at the right of way boundary line of such controlled-access facility: and after the establishment of any controlled-access facility, no highway or street which is not a part of said facility shall intersect the same at grade." (Italics supplied.) This statute the defendants claim gives them the right to close the existing secondary road at the right of way of Highway No. 35, which is admittedly a controlled-access facility, without resorting to the procedure provided by Chapter 306. They also contend that the plaintiff has no such special damage through the closing of the road, different in kind from that suffered by the general public, as to give her a right to maintain this action.

It is evident there are two principal questions to be determined here: 1. Do the defendants have the right to close off secondary roads at their intersection with controlled-access facilities under the power granted by Code Chapter 306A?; and 2. Will the plaintiff suffer such special damages as to permit her to maintain an action to recover them, or to enjoin the closing of the road until they are assessed and paid? We are of the opinion the first question must be answered in the affirmative, and the second in the negative. We shall discuss them in order.

I. It is settled in Iowa that public highways are created by statute, either directly or through power delegated to some subdivision of the state, that they may be discontinued in the same way, and no individual can acquire such vested rights against the state as will prevent the discontinuance of an established public road. Chrisman v. Brandes, 137 Iowa 433, 440, 112 N.W. 833, 835. Two methods may be used by the state to prevent access to a controlled-access facility: police power, or eminent domain.

In Iowa, it is evident the state is proceeding through exercise of its police power. Section 306A. 1, as enacted by the Fifty-Sixth General Assembly and as it now appears in the Code of 1958, says: "Declaration of Policy. The legislature hereby finds, determines, and declares that this chapter is necessary for the immediate preservation of the public peace, health, and safety, and for the promotion of the general welfare." Generally, a taking through exercise of the police power is non-compensable; through eminent domain it is compensable. The state has clearly declared here its intention to proceed through its police powers. This is not a complete answer to plaintiff's contention, however; the exercise of the police power must be a proper and reasonable one, and must not amount to a taking of property without due process of law. We shall consider this matter further in connection with Division II.

The plaintiff says Chapters 306 and 306A must be considered together; and Section 306A. 6 must be held to mean that the secondary roads may not be closed off except by the procedures provided by Chapter 306, supra. We are unable to agree with this contention. Chapter 306 contains general statutes dealing with the establishment, alteration, and vacation of highways. Chapter 306A is a special statute governing controlled-access highways. The provisions of Chapter 306A. 6 are in conflict with those sections of Chapter 306 which govern the closing or vacating of highways. It seems obvious to us that 306A. 6 was enacted for a particular purpose, and to facilitate the building of controlled-access highways. The broad road building program of the federal government requires the cooperation of the states, and speedy and effective means of acquiring rights of way, controlling access and regulation of traffic.

The plaintiff urges that Section 306A. 7 provides that authorities having jurisdiction and control over the highways of the state, as provided by Chapter 306, may enter into agreements with each other or with the federal government, "respecting the financing, planning, establishment, improvement, use, regulation, or vacation of controlled-access facilities or otherways in their respective jurisdictions." This is a broad authorization; but it does not reach the problem before us. It permits, but does not coerce, agreements concerning highways. If plaintiff's theory is sound, then before a secondary road can be closed off at its intersection with a controlled-access facility, the board of supervisors or other body, such as a town or city council, having jurisdiction must be importuned to proceed under Chapter 306. There is no way provided in which the State Highway Commission, charged with control over the facility in accordance with the regulations of the federal government, can compel any action. If the supervisors or council proved recalcitrant, the entire Interstate and Defense Highway under construction would be at the mercy of the local authorities so far as preventing access from every city street and county road is concerned. It was suggested in oral argument that the Commission might declare any secondary road to be a primary road for the purpose of vacation; but we doubt the intent of the legislature to compel taking over numbers of secondary roads into the primary highway system for this purpose alone.

In short, it was the evident intent of the legislature to give the Commission power to close intersecting county or other secondary roads, or city or town streets, at intersections with controlled-access facilities, without going through the process required by Chapter 306. Special statutes take precedence over general ones, when they cannot be reconciled. Shelby County Myrtue Memorial Hospital v. Harrison County, ___ Iowa ___, 86 N.W. 2d 104, 109; Crawford v. Iowa State Highway Commission, 247 Iowa 736, 739, 740, 76 N.W. 2d 187, 189; Iowa Mutual Tornado Insurance Association v. Fischer, 245 Iowa 951, 955, 65 N.W. 2d 162, 165. We see no way in which Section 306A. 6 can be reconciled with the provisions of Chapter 306 at this point, nor do we think the legislature intended any such result.

The power of public authorities to close off roads, when specifically authorized to do so by legislative enactment, has been recognized in other jurisdictions. The Oklahoma Supreme Court in Application of Oklahoma Turnpike Authority, ___ Okla. ___, 221 P. 2d 795, at page 799, said that the power of the state is sufficient to enable it to close off roads which are not a part of a controlled-access facility. Cabell v. Cottage Grove, ___ Ore. ___, 130 P. 2d 1013, 144 A. L. R. 286, while holding that the state

had not specifically authorized the closing of a city street at its intersection with a state highway, recognized that it might do so. It said: "The legislature, by virtue of its paramount and plenary authority, may close a street or may delegate such power to a city, though that power may not be exercised without making compensation to property owners who suffer special injury as a result." See page 1020 of 130 P. 2d. We hold that the Commission may close off state and county roads at their intersections with controlled-access facilities under the authority granted by Section 306.A.6, and without resorting to the procedure set up by Chapter 306.

II. The plaintiff asserts that she will suffer a special injury from the closing of the secondary road, that the closing of the road will be a taking of her property rights, and if she is not in some manner compensated therefor a violation of the United States and Iowa constitutions will result. It is evident that the closing of the road will put her to a considerable amount of inconvenience, additional effort, and expense. On the other hand, it is apparent that if intersection secondary roads and city streets cannot be closed without payment to those who may suffer such inconvenience, who may be forced to travel by circuitous routes instead of the direct way they formerly had, the expense to the general public will be tremendous. We are in the process of cooperating with the federal government in building several wide highways across the state, both north and south and east and west. They are a part of the National Interstate and Defense Highway system. They will inevitably cross many secondary roads and city and town streets, and numerous users of these latter ways will find themselves shut off, in part at least, from their accustomed convenient and direct means of going from place to place. Farmers, such as the plaintiff, will find they cannot reach their neighbors or shopping centers or, perhaps, other tracts of their own lands, without much additional travel. Businessmen on city streets may find customers unable to reach their establishments from one direction. Workingmen will be compelled to travel farther to reach their places of employment. Of course, the heavy expense of compensating those who suffer some special damage is not a sufficient reason for not paying such damage. Their property may not be taken without fair compensation, if compensable damage they have. The problem is of great importance both to the public in its need for efficient highways and to those who may be affected by their construction.

Many Iowa cases have dealt with some facet of the question presented here. To the casual reader they may appear to be in confusion, and some in conflict with others. But we think the seeming contradictions are more apparent than real, and that upon careful analysis of the cases the true rule appears with reasonable certainty. It is that one whose right of access from his property to an abutting highway is cut off or substantially interfered with by the vacation or closing of the road has a special property which entitles him to damages. But if his access is not so terminated or obstructed, if he has the same access to the highway as he did before the closing, his damage is not special, but is of the same kind, although it may be greater in degree, as that of the general public, and he has lost no property right for which he is entitled to compensation. We turn to a consideration of the cases relied upon by the plaintiff at this point.

The first of these, and the one evidently considered of the greatest importance, is McCann v. Clarke County, 149 Iowa 13, 127 N.W. 1011. This case professes to overrule Brady v. Shinkle, 40 Iowa 576, which held squarely that a landowner is not entitled to damages for the vacation of a section of a highway over which he is accustomed to travel, when his land abuts upon the highway but not upon the part vacated. This case was followed in Grove v. Allen, 92 Iowa 519, 61 N.W. 175, and McKinney v. Baker, 100 Iowa 362, 69 N.W. 683, which was also overruled in the McCann case. We think the court misunderstood the holding in the overruled cases, that it set up a straw man to be demolished, as shown by its language interpreting the Brady case. Actually the McCann case is not in conflict with the Brady case. It holds no more than that a highway running along the east and south sides of the plaintiff's land could not be vacated without payment of compensatory damages. It is evident that plaintiff's right of access to this highway was entirely cut off. This case was analyzed in the supplemental petition on rehearing in Heery v. Roberts, 186 Iowa 61, 73, 172 N.W. 161, in this language: "Under the McCann case, there may be a claim for damages on account of the vacation

of a highway, if that highway be adjacent to a tract of land to which the owner has no other convenient means of access; . . . ." In the McCann case roads immediately bordering plaintiff's lands were vacated, leaving him without reasonable means of access.

Other cases which plaintiff cites all come within the category of direct interference with means of access. In Long v. Wilson, 119 Iowa 267, 93 N.W. 282, decided upon the pleadings, it was averred that defendants threatened to close all of a street abutting upon plaintiff's property, the only one through which he had convenient access, except for a strip thirteen feet wide, so that his right of access would be interfered with. Borghart v. Cedar Rapids, 126 Iowa 313, 101 N.W. 1120, concerned the vacation of a tract of ground over which the only access to plaintiff's property was available. The governing rule was well stated by Judge Ladd, at page 315 of 126 Iowa, page 1120 of 101 N.W. : "The abutter has a right, in common with the community, to use the street from end to end for the purpose of passage; but, in addition to this common right, he has an individual property right, appendant to his premises in that part of the street which is necessary to free and convenient egress and ingress to his property."

In Hansell v. Massey, 244 Iowa 969, 972, 973, 59 N.W. 2d 221, 223, we affirmed the rule of the Long case, supra, in these terms: "Thus the owner of property abutting a highway may suffer special damage because of its vacation. His right of access is property which cannot be taken from him without compensation. Likewise, special damage may be caused the owner of land so situated that it can be reached by no convenient way other than the vacated road." The case does not aid the plaintiff here. Frymek v. Washington County, 229 Iowa 1249, 296 N.W. 467, also cited, holds only that plaintiff may recover damages when his right of access to his land across a strip in which he had an easement for travel was cut off by the vacation of a road. Nalon v. Sioux City, 216 Iowa 1041, 250 N.W. 166, says that a property owner whose substantial access to her lot from a public street is substantially interfered with is entitled to a jury determination as to her right to damages therefor. Other cases cited and relied upon by the plaintiff here do no more than affirm the rule quoted from the Long case, supra. None of them reach the situation in the case at bar, where the right of access to the highway was in no manner impeded, but the road itself is to be closed at some distance from plaintiff's property so that its use by her will be impaired.

On the other hand, we have in several cases affirmed the principle of Brady v. Shinkle, supra. In the recent case of Iowa State Highway Commission v. Smith, ___ Iowa ___, 82 N.W. 2d 755, we held that an adjoining property owner may not recover damage because of the placing of jiggle bars in the center of the highway adjacent to his premises, so that traffic on the opposite side of the street could not cross directly to his business establishment, nor could he cross to the other side, except by proceeding to the next intersection and making a U turn. We said (pages 761, 762 of 82 N.W. 2d): "Insofar as the regulations may divert some traffic (mainly east bound) from defendants' filling station they have no legal cause for complaint. They have no vested right in the continuance of existing traffic past their establishment."

Livingston v. Cunningham, 188 Iowa 254, 175 N.W. 980, is factually much like the instant case. The plaintiff's property did not abut on the road proposed for vacation, nor was his means of access in any way hampered. But the closing of the highway meant that in carrying on his business, which required him to obtain ice from the Des Moines river, it would be necessary for him to travel in his hauling operations some four miles by the next available public road instead of forty rods over the closed road. He asked that the closing of the highway be enjoined. In affirming a dismissal of his petition, we said, page 257 of 188 Iowa, page 981 of 175 N.W.: "It is not sufficient that the injury is greater in degree than that suffered by the public. It must appear that the kind of injury sustained is different from that suffered by the general public." And at page 258 of 188 Iowa, page 981 of 175 N.W. is this: "It is not shown that the obstruction of this highway in any way affects ingress or egress to his place of business, or to any lands owned by him. . . . . That he can reach the river by other routes open to travel is not disputed. It is the matter of convenience to him that is the gravamen of his complaint."

Bradford v. Fultz, 167 Iowa 686, 149 N.W. 925, concerned a complaint that a new

road which a property owner would be compelled to use in place of a vacated one would not be as good a road and so her convenience of travel would be impaired. Her lands did not abut on the road to be closed, and it was held she suffered only such damage as the general public, and we reversed the grant of an injunction which had prevented the closing. The facts were much the same in Bryan v. Petty, 162 Iowa 62, 143 N.W. 987, and again we reversed a decree granting an injunction, saying: "On the other hand, we have held that one cannot enjoin the obstruction of a public highway where he suffers only such inconvenience or injury as is the same in kind with that of the general public, although it may be greater in degree as to the complainant." Page 64 of 162 Iowa, page 988 of 143 N.W.

In general, these cases hold that property which does not abut upon the portion of the road vacated, and the access of which to the general system of highways is not impaired by the vacation, is not specially damaged. This is the rule adduced from the Iowa cases discussed above, and is supported by a great number of authorities in other jurisdictions. Space will not permit an analysis of these cases. Cramm v. Laconia, 71 N.H. 41, 51 A. 635, contains a thorough discussion of the principles involved; and see Kachele v. Bridgeport Hydraulic Co., ___ Conn. ___, 145 A. 756; Newton v. New York, New Haven & Hartford Railroad Co., 72 Conn. 420, 44 A. 813; Kinnear Mfg. Co. v. Beatty, 65 Ohio D.C. 264, 62 N.E. 341; New York, Chicago & St. Louis Railroad Co. v. Bucsi, 128 Ohio St. 134, 190 N.E. 562; Hollwand v. Grant County, ___ Ore. ___, 298 P. 2d 832; Hanson v. City of Omaha, ___ Neb. ___, 59 N.W. 2d 622; Wilson v. Kansas City, ___ Mo. ___, 162 S.W. 2d 802; Krebs v. Ohl, ___ Md. ___, 154 A. 131; Arcadia Realty Company v. City of St. Louis, 326 Mo. 273, 30 S.W. 2d 995; Ponischil V. Hoquiam Sash and Door Co., 41 Wash. 303, 83 P. 316; Olsen v. Jacobs, ___ Wash. ___, 76 P. 2d 607; City of Lynchburg v. Peters, ___ Va. ___, 133 S.E. 674; Buhl v. Fort Street Union Co., 98 Mich. 596, 57 N.W. 829, 23 L.R.A. 392; Gerhard v. Seekonk River Bridge Commissioners, 15 R.I. 334, 5 A. 199; Wetherill v. Pennsylvania Railroad Company, 195 Pa. 156, 45 A. 658. Many others might be cited.

The principle evolving from the foregoing authorities is that one whose property abuts upon a roadway, a part of which is closed or vacated has no special damage if his lands do not abut upon the closed or vacated portion so that his right of ingress and egress is not affected. If he has the same access to the general highway system as before, his injury is the same in kind as that suffered by the general public and is not compensable. It is damnum absque injuria. In the case before us, the plaintiff's right of access to the secondary road is not affected. She has the same means of ingress and egress as she had prior to the closing. The traveling public generally who have occasion to use the secondary road will find it much less convenient on many occasions. Some persons living along the roadway, or those who may wish to visit their lands lying along it, will be compelled to travel additional miles. Some will be shut off from their formerly direct route to the nearest city or town. They will be considerably inconvenienced in visiting these places for shopping purposes, or in taking their livestock or grain to market. Persons in the city or town desiring to visit farms along the road for business or social purposes must go farther and on other roads to reach their destinations which may lie on the other side of US Highway No. 35. But they have no recourse in damages.

This is a common injury, inevitable in the building of highways, or in handling the traffic upon them. Many owners of motels, or gasoline stations, or other business establishments find themselves left in a bywater of commerce when the route of a highway is changed so that the main flow of traffic is diverted. A merchant or other business man is cut off from prospective customers going in one direction when a street in front of his establishment is converted into a one-way thoroughfare. A divided highway, or one with jiggle bars or other obstructions in the center to prevent traffic crossing, has the same effect. But this gives the business man no claim for damages against the authority which has installed the traffic regulators which injure him. Iowa State Highway Commission v. Smith, supra; Wilson v. Iowa State Highway Commission, ___ Iowa ___, 90 N.W. 2d 161, 168.

It is apparent that the plaintiff here will suffer considerable inconvenience in being shut off from her previous direct access to her lands lying west of the point of closing

the secondary road at its intersection with Highway No. 35. Her home property on the east of the intersection will lie in a cul-de-sac, and her travel can be only to the east instead of both east and west. Nevertheless her means of access to the general highway system is not impaired; that is to say, she has the same means of ingress and egress to and from her lands as before. Her damage is greater in degree than that suffered by the general public; but it is not different in kind, which is the ultimate test. The greatest good of the greatest number is the criterion which the authorities having charge of the building, alteration, and maintenance of the highway systems in the state must follow. In the absence of any showing of fraud or bad faith their judgment is final. It cannot be reviewed by the courts. Chrisman v. Brandes, supra, page 441 of 137 Iowa, page 836 of 112 N.W.; Spitzer v. Runyan, 113 Iowa 619, 622, 85 N.W. 782, 783, and citations. If it were not so, no highway system would be possible.

We conclude that the Iowa State Highway Commission was given the definite power under Section 306A.6 to close the secondary road at its intersection with highway No. 35; and that the plaintiff will suffer no compensable damage therefrom, and is not entitled to maintain this action. The trial court was in error in its decree and judgment.

Reversed.

All Justices concur.