police power roadside protection tools will play an important role in this consolidation program.

ACKNOWLEDGMENTS

The study reported here was made possible by a grant from the Automotive Safety Foundation whose generous support the author wishes to acknowledge. The ideas and conclusions contained herein are solely those of the author and do not necessarily reflect those of the Foundation. The author alone should be held responsible for the accuracy of the research.

Also acknowledged is the full cooperation given by the Wisconsin State Highway Commission and its District Highway Engineers in making information available.

A Comparison of Statutory and Court-Made Rules of Eminent Domain Valuation with Actual Practices

DONALD HEANEY, Graduate Student in Law, University of Wisconsin

● THE PURPOSE of this paper is to make some observations on the relationship between the law of eminent domain valuation as it exists on the books and the activities of highway administrators working under that law. It is a study of the realism of highway law. The method of presentation here will be to present a few selected propositions of law, testing them by comparing the rule to the current practice.

The paper is the result of research conducted by the University of Wisconsin Law School as part of the requirement for a graduate degree in law. At the data of this writing that research is not entirely completed nor is this a complete report of all findings made up to this point. Rather this is a summary of those findings which in the opinion of the author are of greatest interest to people engaged in right-of-way acquisition. One obvious omission should be noted. No mention of the jury system has been included since it is felt that an insufficient amount of information has been gathered at the date of this report.

In addition to the legal research necessary to isolate the applicable rules of law the method of research employed in this study was basically one of on-the-scene observation and interview both written and oral. Greatest emphasis was placed on the activities of appraisers, the procedures employed in the district offices, the policies of the Right-of-Way Division at the state level, the functions of the office of the Attorney General, the reactions of landowners and the role of the practicing attorney. Limitations of time made it necessary to center the study on one state, Wisconsin, but questionnaires were sent to all highway departments in all of the states and brief trips were made to certain other states for comparative purposes.

The author owes a particular debt of gratitude to the State Highway Commission of Wisconsin for its complete cooperation in all aspects of the study.

THE APPLICABILITY OF EMINENT DOMAIN THEORY

Among the greatest contributing factors to the difficulty of applying the law as written is the essential fuzziness of many of the concepts of valuation law. The most graphic illustration of this revealed by the Wisconsin study is in the application of the doctrine of the offset of benefits against the damages suffered by the property. The applicable Wisconsin statute provides:[1]

Special benefits accruing to the property and affecting its market value because of the planned public improvement shall be considered and used as an offset to damages, but in no event shall benefits be allowed in excess of damages.

[1] Wis. Stat. § 32.10 (1957).

Case law further defines special benefits as "the benefits resulting specially to the land taken," as differentiated from general benefits which are defined as "such benefits as accrue to the general public."[2]

The language of the statute and the Supreme Court opinion quoted above is clear and understandable. The problem is to apply such a formula to a concrete fact situation. The Supreme Court of the State of Wisconsin has provided a few additional guideposts by holding that proximity to a train depot,[3] or accessibility to a telephone line[4] are general benefits and seemingly indicating that location of land along an improved trunk highway is a general benefit while removal of a hill obstructing vision or returning land formerly occupied by an old road are special benefits.[5] This, in summary, is the law of benefits in Wisconsin.

The second to last entry on the Negotiator's Form as used by the State Highway Commission of Wisconsin in negotiation reads, "The special benefits accruing to the property by reason of the taking are valued at _____." The blank space is for a dollar value. In almost every case the figure inserted is zero. This means that damages to a property owner are rarely diminished by reason of benefits conferred on the property to be taken, in spite of the fact that the law provides for such diminution.

There appear to be two controlling factors in this situation. The first is that the general wording of the concept does not lend itself to the solution of individual valuation problems, each of which is unique. The line between special benefits which may be offset and general benefits which may not be offset has not been made sufficiently clear. This is, of course, the responsibility of the lawmakers—judges, legislators and attorneys. They have not been able to supply the highway administrator with a sufficiently clear test of what constitutes a benefit which may be offset. The problem is not easily solved. No magic formula seems likely to appear. Perhaps only a long series of specific cases can provide the necessary markers to stake out the boundaries of what benefits may be set off and what benefits may not. Such cases will not arise until condemnors begin setting off benefits which, to the best of their knowledge, fit the law as it is now written.

The second reason for the failure to offset benefits in Wisconsin probably also negates the possibility that the above suggestion will be followed. Simply stated it is that there is no accurate means of measuring benefits. This is the responsibility of the land economists. There is an increasing amount of evidence that land economists are becoming aware of this responsibility. The economic impact studies are a step in the solution of this problem. If the problem is to be solved, however, some reasonable means of measuring the benefits conferred must be developed.

The effect of the inability, in view of the present state of law and economics, to offset benefits is to increase the cost of right-of-way acquisition.

THE APPRAISER AS A LAWMAKER

The Attorney General of the State of Wisconsin informs all District Offices of the State Highway Commission as to the compensability or non-compensability of various types of damage which a landowner might suffer as a result of eminent domain proceedings. It is elementary, of course, that all conceivable damages suffered by the owner of condemned land may not be recovered.[6] Right-of-way negotiators may not like to put it just that way to property owners but it is one of the hard facts of life. The State Highway Commission of Wisconsin has assigned to the Attorney General the task of examining Wisconsin law to provide the Commission with a working knowledge of the cases and statutes needed to assure compliance with the law in valuing property. The various District Offices then pass this summary of compensable and non-compen-

[2] Nowaczyk v. Marathon County, 205 Wis. 536, 539, 238 N.W. 383, 384 (1931).
[3] Washburn v. M. & L. W.R. Co., 59 Wis. 364, 18 N.W. 328 (1884).
[4] Riddle v. Lodi Telephone Co., 175 Wis. 360, 185 N.W. 182 (1921).
[5] Townsend v. State, 257 Wis. 329, 43 N.W. 2d 458 (1950).
[6] Sackman and Van Brunt, Nichols on Eminent Domain, § 14.241 at 341 (3d ed. 1951).

sable items of damage to the appraisers assigned to a specific acquisition.

The Attorney General, relying on Wisconsin case law, has concluded that the following damages, among others, are not compensable in a condemnation action and therefore should not be considered by appraisers: damages due to a change of grade,[7] costs in moving to a new location,[8] and damages due to the diversion of surface water.[9] This does not mean that the landowner is without a remedy in these cases. However, it does mean that in the absence of a specific statute to the contrary he may not recover for them in a condemnation action.

Research has indicated that a significant number of appraisers in making appraisals for eminent domain purposes have taken into account the above items of damage and included in the final damage figure an amount for such damages where they exist.

This sort of administrative lawmaking is, of course, most prominent in appraisals prepared for use by a landowner preparatory to a condemnation action. This reshaping of the damage concept by landowners' appraisers, familiar to every right-of-way can be explained on two grounds. First, it is, of course, one of the penalties of the advocate system of resolving controversies. The system of law is based on this premise of justice through conflicting forces and certainly it is not being questioned here. Second, sheer ignorance might be pleaded. A landowner does not necessarily choose an appraiser experienced in condemnation work nor does he have a large staff of attorneys to spell out the intricacies of valuation law. The result is that oftentimes the condemnee's appraisal is prepared by a local real estate salesman without any consultation with an attorney or perhaps after a hasty conference with a busy practitioner relatively unfamiliar with condemnation problems.

However, this discrepancy between what the law provides and what appraisers do applies also in the case of state-employed appraisers. The majority of state-employed appraisers follow scrupulously the instructions provided them. However, a significant minority do not. As a result of a surprisingly candid series of discussions with some of these appraisers three distinct reasons can be isolated.

The first is that the nature of the art or science of appraisal does not permit a perfectly clear breakdown of the total value of a piece of property into the sum of its parts. It is not the easiest part of an appraiser's job to say X number of dollars in damages is due to damage item A and Y number of dollars is due to damage item B. Some appraisers will say it cannot be done with even reasonable accuracy. Others will say it cannot be done except with extreme difficulty.

The second reason is that some of the provisions of the law seem unfair to the appraisers. Therefore, they substitute their own sense of justice for that of the official lawmakers. The result is that there is concealed somewhere in the appraisal an amount for a damage which, under the existing law, should not be considered by the appraiser.

The third reason for the disparity between what the appraiser is directed to do by law and what he does do in fact is that, in spite of the procedure set up to inform him of the law, he is not sufficiently aware of the provisions of the law to apply it intelligently. This is particularly true in the more remote areas of the state where competent appraisers are hard to locate and where so little land acquisition is done that it is difficult for the local appraisers to build up a backlog of experience.

The importance of the real estate appraiser in highway land acquisition cannot be overemphasized. Just compensation which is just to the condemnor as well as the condemnee is only a term unless he performs faultlessly. It is his report which is the basis for the original offer. Under the Wisconsin system it is his report which is the basis for an award if the offer is rejected. At the trial before a jury his evidence has long been recognized as setting the limits of value within which the jury must find.[10] Therefore, his performance, in large measure, determines how realistic the law of valuation really is. The implications of his expanding the concept of what is recover-

---

[7] Zache v. City of West Bend, 268 Wis. 291, 67 N.W. 2d 301 (1954).
[8] Fiorini v. Kenosha, 208 Wis. 496, 243 N.W. 761 (1932).
[9] Leininger v. County Highway Committee, 217 Wis. 61, 258 N.W. 368 (1935); Nowaczyk v. Marathon County, 205 Wis. 536, 238 N.W. 383 (1931).
[10] Washburn v. Milwaukee & L.W.R. Co., 59 Wis. 364, 18 N.W. 328 (1884).

able are clear. The state is paying more per mile for necessary right-of-way than would otherwise be the case.

THE COST OF POLITICAL RESPONSIBILITY

In Wisconsin the first appeal which a landowner may take from an award of the Highway Commission is to the county judge of the county in which the condemned property is located.[11] Oftentimes, although not always, the state will be represented before the county judge by the district attorney of the appropriate county.

Many people intimately involved in highway land acquisition on the side of the state feel that in this set of circumstances the state is at a distinct disadvantage. County judges, who decide the controversy over value, are officials elected by the local citizens. The district attorneys who must represent the state are also locally elected. The condemnor, on the other hand, is a powerful, essentially outside intruder—the State. The critics of this system contend that there is a tendency on the part of some county judges to entertain a bias on the side of the property owner. Whether this bias is a desire to protect his own people or is a manifestation of his awareness of who keeps him in office, or both, is not clear. There is also the definite possibility that a particular judge may feel that the Highway Commission makes awards which are uniformly too low. Certainly it should be pointed out that this suggested bias is not a widespread, usual condition. An attorney who has participated on behalf of the state in hearings before the county judge indicates that in his experience he has encountered some county judges who virtually always raise the Highway Commission's award, some who almost always go along with the award, and some who sometimes accept the Highway Commission's award as about right and sometimes do not.

Definite conclusions on the degree to which county judges are affected by their feeling of responsibility to the condemnee are difficult to draw. It can be said that as a group they are extremely competent, uniformly conscientious men of unquestioned integrity. It is, of course, equally a fact that they are elected officials with local ties. What should certainly be noted by highway administrators and evaluated for what it is worth is that some judges as a matter of course regard Highway Commission awards as too low.

In a few areas of the state selected for special study, right-of-way people at the grass roots level have indicated a strong feeling that a few district attorneys have not exerted a sufficient amount of effort on behalf of the condemnor when representing the state. The reason offered was that the particular district attorneys are hesitant to be too hard on local voters. One right-of-way appraiser acting as a witness on behalf of the state reported to the author his frustration at the refusal of a local district attorney to elicit from him on direct examination certain testimony which the appraiser regarded as critical to the fair determination of the trial. Needless to say the state saw its award raised by a significant figure in that case.

A related complaint was that district attorneys were too busy to give a case proper attention, particularly in those counties where the position of district attorney is the civic duty of one of the two or three lawyers in the county and is a sideline to the private practice of law.

Sometimes the Highway Commission is represented by an assistant attorney general or a special counsel appointed from the local bar. This study has indicated a high level of representation where this has been the case.

The degree of landowner bias on the part of either the finder of fact or the acting attorney for the state cannot be measured accurately. However, to the degree that it is present, it represents a departure from the law as it is written and almost certainly raises acquisition costs both by raising awards and by encouraging litigation.

FORGOTTEN RULES OF EVIDENCE

The rules of evidence in a judicial hearing are designed, among other things, to assure compliance with the written substantive law. If it is the law that one may not col-

[11] Wis. Stat. § 84.09(2) (1957).

lect damages because the state trunk designation has been removed from the highway going past his place of business and has been placed on another highway and, therefore, fewer potential customers now reach his place of business, then it seems reasonable that one should not be permitted to introduce evidence of the loss of such business. Such testimony has no function to serve except to confuse the factfinder and lead him to conclusions at variance with the law.

As indicated previously, the initial appeal from an award of the Highway Commission in Wisconsin is to the county judge.[12] Under the governing statute no particular procedure need be followed in making the determination.[13] The appeal is regarded as one to the county judge not to the county court.[14] A hearing may or may not be held. Most county judges do hold a hearing on the pattern of the familiar court trial. Some judges will even hold the parties strictly within the rules of evidence in presenting testimony. Others will exert some control over what evidence will be accepted but avoid particularly confining technicalities. A minority dispense entirely with the rules of evidence and this procedure presents a definite possibility of a departure from the law of compensability. The following actual case is illustrative:

Witness Jones took the stand and presented testimony of the damages to the property as found by appraisers Smith and Brown. He did not testify to a "before" value or an "after" value. He did not state whether the appraisal was based on a comparable sales, an income or a reconstruction cost basis. He did not indicate whether non-compensable items such as circuity of travel or diversion of traffic were considered. He could not even testify of his own certain knowledge that the appraisers had looked at the property except to the extent that they were instructed to do so. Yet his testimony was accepted by the judge and presumably taken into consideration.

This is admittedly an extraordinary example, the most obvious possible disregard of the law before a county judge which the study has turned up. Yet it illustrates how easy it is to depart from the law of eminent domain valuation where there is a determination not subject to check by the rules of evidence. Whether this flexibility afforded the county judge is ultimately a good thing or a bad thing in the administration of justice is another matter, but it certainly makes the control of law less significant and the decisions of men more significant. Right-of-way men in the district offices visited seemed to feel that such a flexibility usually works adversely to the interests of the state and attribute some of the, to them, seemingly inordinately high awards of the county judges to this lack of firm control on what testimony may be considered.

BARGAINING THE LAW AWAY

The State Highway Commission of Wisconsin like many other commissions in the country does not engage in "horse trading." That is to say the right-of-way negotiator comes in with a firm offer based on two or three appraisals. Unless error can be shown, the negotiator is not prepared to alter that price. This appears to be the policy of a majority of state highway commissions.[15]

However, a minority still bargain with landowners in order to avoid litigation. This sort of flexibility, undoubtedly sometimes useful in making a settlement, puts a limitation on the accuracy of the law as it appears on the statute books. If compensation is to be based on the difference between the value of the property before and after the taking and such a determination has been made then a departure from such a figure is a departure from the apparent law. It is a departure created by administrative action. If this practice makes acquisition of land easier and in the long run cheaper to the state, while providing just compensation to the affected landowners, it may be a good

---

[12] Supra at p. 4.

[13] Wis. stat. § 83.07(4) (1957).

[14] Thielman v. Lincoln County Highway Committee, 262 Wis. 134, 54 N.W. 2d 50 (1951).

[15] Of 30 state highway commissions which have replied to a questionnaire sent out by the author, 21 states indicated that they follow a no-bargaining policy while only 9 indicate a willingness to bargain.

thing. In any event it emphasizes the lawmaking power of right-of-way people and even gives the potential condemnee an opportunity to make a little law of his own.

THE PROBLEM OF THE ADMINISTRATIVE AWARD SYSTEM

It is interesting to speculate how valid the rules of valuation would be in the opinion of men engaged in the right-of-way acquisition if the landowner, the potential condemnee, were permitted to award himself an amount of money for the value of his property. The state under this imaginery system would be graciously granted the right to appeal. It is not pure speculation to conclude that very little valuation law would be considered and acquisition costs would be absurdly high.

Fortunately, no state has adopted this system. However, Wisconsin, like Connecticut, Maine, Massachusetts, New York, Ohio, Pennsylvania and Rhode Island has a variation of the administrative award system which is simply the reverse of the imaginary procedure presented above. Under this system as it functions in Wisconsin the State Highway Commission can obtain possession of the property very early in the acquisition process by making a finding as to the value of the property, filing an award in the amount of that finding with the Register of Deeds in the appropriate county and tendering a check to the landowner in the appropriate amount. Having done this the state is entitled to possession of the land within 24 hours.[16] Particularly significant is the fact that no factfinder independent of the Highway Commission makes a value determination before the Highway Commission is entitled to possession, and if the landowner does not assume the burden of going forward the finding as to value made by the Highway Commission will have the effect of a final determination. This means, in effect, that the Highway Commission can be at one and the same time a party in interest to the outcome of a value determination and the agency which makes the determination. The Highway Commission as a representative of the taxpayers of the state, has a duty to get as much highway mileage per dollar as possible. At the same time it is directed by law to provide the landowner with just compensation.[17] The two roles are almost irreconcilable. The State Highway Commission of Wisconsin has set up an administrative procedure aimed at making the determination of the award as fair as possible. Independent fee appraisers are hired; the appraisals are reviewed at the district level; they are reviewed again at the main office at the state capitol; and where federal funds are involved the Bureau of Public Roads will review the appraisals also. However, it seems almost impossible for a highway commission to adopt an entirely judicial attitude when it is dealing with the disposition of its own funds even when it goes to the extreme lengths that the State Highway Commission of Wisconsin has in attempting to be fair.

The conclusion follows that an almost certain by-product of the administrative award system, as desirable as it may be for efficient road construction, is that a tremendous challenge is presented to highway administrators to be sure that what they are awarding to landowners is truly just compensation as the law provides and not merely the least that a landowner will accept.

ECONOMICS AS A LIMIT ON JUST COMPENSATION

Wisconsin, like each of the other 48 states, has a definite pattern of appeal which a landowner may follow if he regards the award of the Highway Commission as too low. His first appeal is to the county judge of the county in which the property is located.[18] If dissatisfied there either party may appeal to the circuit court, which in Wisconsin is the court of general jurisdiction, for a jury trial.[19] The final appeal is, of course, to the Supreme Court of the state.[20] This entire procedure at first glance seems adequate to protect the rights of the landowner. He has the opportunity to have a judicial

[16] Wis. Stat. § 84.09 (1957).
[17] Wis. Const. art. 1, § 13.
[18] Supra at p. 4.
[19] Wis. Stat. § 83.07(5) (1957).
[20] Wis. Stat. § 274.09 (1957).

officer, the county judge, take evidence and make an appraisal. If dissatisfied he can have a second hearing before that most sacred of Anglo Saxon factfinders, the common law jury. As a final protector he has the highest court of the state.

However, this line of appeal is largely theoretical where only a small amount of money is involved. In the case of a minor taking involving $500 or $600, a man of modest means is in fact precluded from taking an appeal because he simply cannot afford it. Attorneys fees, witness fees, appraisal costs at not one but two separate stages make justice too expensive to obtain. Dozens of landowners have time and again told me that they wished to take an appeal but knew that the cost would be greater than the return. Under these conditions a constitutional guaranty of just compensation is meaningless.

This unrealistic assumption of the law—that all men can afford to go to court—requires the right-of-way man to be aware particularly of his role as the protector of the condemnee. He can, in the relatively small taking, use the superior economic resources of the state to force the landowner into accepting a low damage figure. He can be prepared to drag the dissatisfied condemnee through every court of the state once the condemnee appeals. On the other hand he can be aware of the unrealistic assumptions of the right to appeal and be doubly on his guard to assure a fair price to the man of modest means in the relatively minor taking.

Some Highway Planning and Land Acquisition Procedures And Their Effect on Property Owners

RAYMOND D. VLASIN, Agricultural Economist, Farm Economics Research Division, Agricultural Research Service, U.S. Department of Agriculture, Washington, D.C.

● THE LOCATION and construction of Interstate highways and the relocation of state trunk highways have, and will continue to have, a multitude of impacts on metropolitan areas and urban and rural communities. It is commonly accepted that these highways will affect more than transit and transportation. Notable among the effects are changes in land use and land development patterns. These roadways will change rural land use both directly through the acquisition of rights-of-way and, in many areas, indirectly through actual or potential development of adjacent areas (1). As an indication of the possible magnitude of the impact of the roadways on land use, Professor Howard of the Massachusetts Institute of Technology stated that the new highway program "will have more effect upon all form and pattern of growth, and therefore upon the character and structure of our metropolitan areas, than all of the metropolitan planning done by city planners between 1945 and now" (2).

Many economists have undertaken comprehensive studies to determine the effects of various highway improvements on future land use and development and on future land values. In addition, some economists have focused on the immediate impacts of the highway—its effects on those individuals and communities that must give up land for highway rights-of-way and whose activities are modified severely by the highway. This latter area, and in particular problems of rural property owners and communities during highway planning and land acquisition, will be discussed.

Some of the problems that confront rural property owners and operators during highway planning and land acquisition will be cited and an indication made of how some of these problems can be reduced by modifying certain procedures used by the acquiring agencies.

The problems that rural property owners face can be seen in the kinds of questions they ask, some of the more frequent of which are: Where will the road be located? Is there anything we can do to cut down the damage from having the roadway on our property? What will I get for my land? What can I do to make sure I get all that is coming to me? What can I do after the roadway comes through? These questions evidence