Report of Committee on Highway Laws

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●DURING 1958, the Committee on Highway Laws of the Highway Research Board continued with its main project of assembling and evaluating the law pertaining to every major highway function. The committee staff is making detailed studies of State constitutions, statutes and judicial decisions in order to assist highway officials in the modernization of their highway laws.

ANNUAL MEETING

The committee held a business meeting on January 6 and an open session on January 7, 1959. Louis R. Morony, Chairman, presided at the business meeting and reported on the accomplishments of the past year. The subjects of administration and financing were recommended for priority consideration in future research.

In response to the question posed a majority of those attending the business meeting were of the opinion that model legislation should not be formulated in connection with research by the staff at this time.

PAPERS PRESENTED

The following are summaries of papers presented at the open session on January 7, 1959:

An Attorney General Looks at Highway Law

Hon. Duke W. Dunbar, Attorney General, Denver, Colorado, and a member of the HRB Executive Committee pointed out that over the years, the purpose of highways has changed from serving the abutters and local interests to serving high-speed through traffic. With this change has come greatly increased complexity in acquisition of land for highways. Mr. Dunbar commented on the development and present status of the law concerning the following important aspects of land acquisition: publication of condemnation notice, rights of access, circuity of travel, diversion of traffic, severance damages, and taking for public use.

Codification of Federal-Aid Legislation

Clifton W. Enfield, General Counsel, Bureau of Public Roads outlined the recently completed revision and modernization of the complex body of Federal-aid highway laws. Work began on the project in 1950 and culminated in the re-enactment of Title 23 of the United States Code in 1958. Cooperation with interested agencies, preparation of drafts, the submission of drafts to Congress and the action taken by Congress were all commented on in this paper. Several examples of language changes in the new law were presented and discussed.

Revision of Highway Law in Illinois

John A. Shaneman, Engineer of Planning and Programing, Illinois Division of Highways traced the development of the law and the procedure used in revising it. Several factors, including diversity of economic interests, great number of governmental units, and lack of a systematic arrangement of statutory law, were mentioned as having contributed over the years to the need for such a revision. The code proposed by the Commission was a compilation of existing law, substantive changes being made only where necessary to resolve conflicts. As a result of the proposed code, all the law concerning Illinois highway administration will be gathered together in an orderly manner for the first time in 40 years.

A Summary Discussion of the Revisions in Minnesota Highway Laws

Paul A. Skjervold, Deputy Attorney General, State of Minnesota pointed out that in 1957, the Minnesota Legislature created the Highway Laws Commission to make a complete investigation of the State's highway laws and to propose a recodification which was necessary because no general revision had been made since 1921, and changes since that time had resulted in a confusing patchwork of highway law. Mr. Skjervold's paper is primarily devoted to a presentation of several of the more important substantive changes, but he added that the systematic rearrangement of provisions and deletion of unnecessary material were also of great importance. The changes suggested by the Commission were subsequently passed by the Legislature.

How Pennsylvania Is Upgrading Its Legal Mechanism

Clare McDermott, University of Pittsburgh. The test of this talk was not available when this bulletin was printed and therefore is not included.

Revision of Highway Law in Oklahoma

LeRoy A. Powers, former Chief Counsel for the Oklahoma Department of Highways. The text of this talk was not available when this bulletin was printed and therefore is not included.

Copies of the papers summarized above are included in this bulletin.

REPORTS PUBLISHED DURING THE YEAR

The following are brief digests of the reports published during the year. The committee believes these comprehensive and well-documented studies will aid in obtaining improved and more effective highway laws.

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

This report is the second in a series pertaining to the acquisition of property for highway purposes by eminent domain. The first report was concerned with acquisition of land for future use (Special Report 27).

The following four aspects of the power of eminent domain and the manner in which State legislatures have handled them form the subject of this study.

1. Delegation of Authority to Condemn. The means of delegating the power and the scope of the authority to condemn varies from State to State. Statutes may delegate the condemnation authority in general terms or may enumerate in detail the specific purposes for which land may be condemned. Existing grants should be reviewed to determine whether the delegation is broad enough to accomplish the desired objectives.

2. Property Which May Be Taken by Condemnation. Most statutes authorize taking of property in terms of "land," "private land," "real estate" or "right-of-way." If the legislatures intend these terms to include acquisition of access rights, air, light, view, reservation rights, road building material, and public land, more specific statements of such intent would make it easier for highway departments to perform their functions.

Marginal land is property adjoining a highway but outside the right-of-way area actually required for construction. In certain instances it is desirable to take such marginal land to eliminate severance damages, to control land use, or for other reasons listed in the report. Eleven State constitutions authorize condemning of marginal land and such authority is granted by statute in eleven more States. Three States have enacted legislation to permit acquisition of land outside the right-of-way to be used as sites for relocation of buildings that are within the proposed right-of-way as a means of reducing acquisition costs.

3. Type of Legal Estate Which May Be Acquired by Condemnation. Some States limit the condemner to an easement for highway purposes and others authorize taking in fee simple. Confusion and litigation arise where the statutes are silent on this matter. To

insure the highest degree of control over the right-of-way and approaches, it is advisable to permit acquisition of a fee title. A detailed examination of the statutes in one jurisdiction revealed a surprising amount of conflict over whether the State was authorized to acquire easements or fee simple titles.

4. Designation of the Procedure to Be Followed in Condemnation. The main conclusion in this area was that the procedure to be followed should be set forth in clear, unambiguous language. If several alternative methods are provided for, the basis of selecting the method to be used in a particular situation should be specified.

A detailed list of the elements of a well drafted statute, based on a synthesis of existing legislation, is included in the summary of the report.

Condemnation of Property for Highway Purposes, Part II (Special Report 33)

This report deals with a most important aspect of condemnation; that is, the stage in the proceedings at which the condemner may take possession of the land and begin construction. The questions of possession during appellate proceedings and preferential treatment of condemnation cases by the courts are also considered. Any delay between filing of the petition to condemn and vesting of the right of entry in the State adds to the cost of the project and is otherwise detrimental to the public. The landowner, as a part of the general public, may be harmed by this delay. He may also suffer as an individual because his ability to sell or lease his land may be adversely affected when the petition to condemn is filed. These conditions and others mentioned in the report lead to the conclusion that early possession may benefit the public and the individual landowner, as well as the State highway department.

In the various States the right of possession accrues to the state either (a) prior to the commencement of judicial proceedings, (b) at the time of institution of proceedings, (c) sometime during the proceedings, or (d) after the proceedings are complete and judgment has been paid.

Where the State has the right to occupy the land immediately upon filing the petition for condemnation or instituting judicial proceedings, the interests of speed are obviously well served. However, some States feel that this procedure does not adequately protect the rights of the landowner. In fact, seven State constitutions specifically provide that there will be no entry by the condemner until compensation has been paid.

In most States it is possible for the State to take possession during appeals from the trial court's finding. In several States the law is not clear on this matter and legislation would seem to be desirable.

Several States grant some form of court preference to condemnation cases in order to get them settled as soon as possible. Since condemnation matters are so involved with the public interest, it would seem to be good policy to grant such preference.

Suggested statutory provisions included in the report are aimed at a streamlined judicial procedure rather than the more expeditious administrative method which, because of the existing body of law, might be too extreme for most States to consider at this point. The suggested "immediate possession" provision is based on a synthesis of existing State legislation.

Legislative Purpose in Highway Law, An Analysis (Special Report 39)

This report contains a compilation of statutory declarations of legislative purpose in the highway field. The report encompasses the following:

1. The assembly and analysis of statutory provisions which involve a legislative policy or purpose relative to highway activities.
2. The assembly and analysis of judicial decisions in which such provisions have played a part.
3. The ascertainment and analysis of the substantive elements that should be considered in connection with such legislation.

Highway legislation controls a vast and complex activity and is of great importance to three groups:

1. the administrators of the highway program;
2. the public with its great investment; and
3. the courts, which have to interpret the legislation.

Declarations of legislative intent affect all these groups.

The responsibility for construction, maintenance and improvement of public highways is normally delegated to highway administrators by the State legislatures. Any ambiguity in such delegation results in a less effective highway administration, confusion, and litigation. A statement by the legislature as to what effect it intended the statute to have tends to offset any ambiguity in the statute itself. Also, when litigation does arise, such a statement helps the court to arrive at a proper settlement. Declarations of legislative intent are particularly useful in determining the constitutionality of an otherwise ambiguous statute and in justifying entry into new fields of legislation.

Existing declarations fall into two broad categories—general declarations which relate to over-all highway policy, and specific declarations which deal with a specific functional area of highway activity. A few States have no declarations of legislative intent; others have either specific or general declarations; and some have both types of declaration.

Although the form of these legislative declarations depends on the method of statutory publication used in the State, it is suggested that general declarations precede the entire highway code or compilation and that specific declarations accompany the specific enactments. Proper utilization of this tool will help to achieve the realization of "better laws for better highways."

Outdoor Advertising Along Highways, A Legal Analysis (Special Report 41)

This report contains a compilation of the existing statutes in 50 states, Puerto Rico, and the District of Columbia, and a comparison of these provisions with the National Standards promulgated by the Secretary of Commerce pursuant to the outdoor advertising provisions of the 1958 Federal-Aid Highway Act. It also contains a discussion of the judicial aspects of the control of outdoor advertising along highways with reference to the nature of the property interests involved, regulation under the police power and control through the exercise of eminent domain.

Congress declared in the Federal-Aid Highway Act of 1958 (sec. 131, Title 23, U. S. C.) that it is in the public interest to encourage and assist the States to control outdoor advertising along the Interstate System. The Act provides for additional Federal-aid payments to States for Interstate projects meeting the National Standards for Regulation by States of Outdoor Advertising. The National Standards specify what degree of control will be required, what areas must be controlled, and the number and size of signs which may be permitted.

All States have some legislation to control outdoor advertising, but the degree and type of control varies widely and there are few points where the State statutes coincide with the National Standards. Some States will require extensive legislation to meet the standards. Others will be able to meet the standards through the exercise of condemnation, zoning, or the reservation of scenic easements. In three States the required width of the protected strip meets the Federal standards, but the size and spacing requirements for permissible signs do not meet the standards.

There is some disagreement among courts as to the nature of the property right involved when an advertiser pays for permission to put a sign on a landowner's property. This property right has been variously defined by the courts as a mere license (since possession stays with the owner), an easement, and a lease.

The police power is the power of the government to restrict, without compensation, the use of property by the owner. This power can only be exercised for the purpose of promoting, preserving, or protecting the public health, safety, morals, welfare, comfort and convenience. Numerous regulations of advertising devices have been upheld on health, safety and general welfare considerations. Although some courts have refused to uphold such regulations on aesthetic grounds, there seems to be a growing tendency to treat aesthetic considerations as a valid basis for police regulation. Where regulation of advertising is based on the police power, offenders are frequently given a specified time in which to remove illegal signs.

Another method of controlling advertising is for the State to acquire, through its power of eminent domain, sufficient interest in the land to prohibit the occupant from erecting outdoor advertising devices. This would amount to the purchase of a restrictive covenant that the land could not be used for advertising purposes. A State may wish to acquire the right to erect outdoor advertising or, even further, to lease or buy the entire interest in the land.

Although there is some question on the matter, it is felt that constitutional and statutory provisions which authorize condemnation of land and use of highway user taxes for "highway purposes," are broad enough to include regulation of advertising as part of the "highway purpose."

REPORTS IN PROGRESS

Research on the following reports has been completed and they are presently being prepared for publication.

System Classification, Part I, Primary State Highway System, is an investigation of the legal aspects of highway classification. This report is complete and will be available shortly.

Federal-Aid Provisions in State Highway Laws, which has been reviewed and is ready for the printer, deals with legislation enacted and authority delegated by the State legislatures to permit State cooperation in the Federal-aid program.

Intergovernmental Cooperation in Highway Matters, deals with the legal relationships between States, counties, towns and other governmental units carrying on highway programs. This report has been submitted to the States for review and will be published soon.

Constitutional Provisions Concerning Highways, which will be printed soon, deals with State and Federal constitutional provisions concerning highways, taxation, and indebtedness.

Condemnation for Highway Purposes, Part III, will consider methods of determining compensation and certain substantive rules pertaining to the fixing of compensation. This report is scheduled for printing in the fall of 1959.

FUTURE REPORTS

The following reports are scheduled for publication in the future.

1. Contracts (and Construction).
2. Administration (and Public Relations).
3. Financing, Budgeting, Accounting and Purchasing.
4. Location, Design, and Programing.
5. System Classification (Part II).
6. Others as time permits.

ASSISTANCE TO STATES

The laws staff provided considerable assistance, in the form of oral reports, memoranda and letters, to the State highway departments and other groups which requested such help during the year. Most of the inquiries centered on control of access, intergovernmental relationships, constitutional provisions and condemnation for highway right-of-way.

LITIGATION

During 1958, the Highway Research Correlation Service of the Highway Research Board issued three memoranda summarizing judicial decisions involving highway matters. Most of the cases this year pertained to State reimbursement of utility relocation costs. The more important cases are briefly summarized as follows:

Public Utilities

Georgia. An act authorizing the State to lend money to political subdivisions for removing and relocating utility facilities from the rights-of-way of State-aid roads was held unconstitutional by the Georgia Supreme Court. The court held that the loaning of money to a political subdivision for the purpose of removing and relocating utility facilities is not included in the constitutional powers of the State and its agencies. The court added that utility facilities serve no useful or desirable purpose in the construction and maintenance of the highway itself. It further pointed out that in permitting the utility to use the highway right-of-way, the State specifically provided that the utility facility would be removed when necessary without costs to the Highway Department. Mulkey v. Quillian, 100 S. E. 2d 268 (Sept. 6, 1957).

Pennsylvania. The Superior Court upheld an order of the Pennsylvania Public Utility Commission which allocated to the State a portion of the cost of relocating utility facilities from the right-of-way of a highway required in connection with a railway-highway crossing improvement. The court found that removal of the utility facilities was part of the expense of construction of the rail-highway crossing and as such was partly chargeable to the Highway Department under a Pennsylvania statute. Department of Highways v. Penna. Public Utility Commission, 136 A. 2d 473 (Nov. 19, 1957). This decision was reversed by the Pennsylvania Supreme Court which ruled that the Public Utility Commission had no authority to allocate to the State the cost of relocating non-transportation utility facilities incident to highway-railway crossing construction, relocation, or abolition. Dept. of Highways v. Penna. Public Utility Commission 145 A. 2d 538 (Sept. 29, 1958).

New York. The Court of Claims held that the New York Thruway Authority was required to pay the cost of relocation of a pipeline made necessary by the construction of the thruway.

The pipeline was installed to avoid conflict with the highway, but when the road was built it was found that the pipe had to be moved. The State urged that negligent installation of the gas line, and not the construction of the thruway, was the cause of relocation. The court held that mere knowledge on the part of the utility that highway construction was contemplated did not raise any obligation to the State that would cut off the utility's right to compensation for required relocations. Algonquin Gas Transmission Co. v. N. Y. State Thruway Authority, 168 N. Y. S. 2d 117 (November 15, 1957).

Maine. The Maine Supreme Court held that the right of a water district to locate its facilities on a public highway is subservient to the use of the highway for public travel. When highway construction necessitates the relocation of the water district facilities, no compensation is required to be paid by the State Highway Department. The water district's rights are not real estate and are subject to taking by the State under the police power. Without authorizing legislation, the State Highway Department cannot pay for relocation costs. Brunswick and Topsham Water District v. W. H. Hinman Co., 136 A. 2d 722 (Oct. 21, 1957).

In another Maine case, the Supreme Court ruled that the Turnpike Authority, as agent of the State, was exercising police power authority in requiring relocation of utilities, and, without proper legislation, could not compensate the utilities. An amendment to the Turnpike enabling act, which authorized payment to utilities for relocation costs, was not retroactive, the court held. The amendment could not apply to prior relocations because the Maine Constitution prohibits the passage of a law which impairs the obligation of contracts. First Nat. Bank of Boston v. Maine Turnpike Authority, 136 A. 2d 699 (Oct. 21, 1957).

Texas. The Texas Court of Civil Appeals ruled that the Water District and not the City of San Antonio must bear the cost of relocating the District's facilities when required under the city's street improvement program. The court held that the city has control of its streets and can regulate their use by utility companies or anybody else to best serve the main purpose for which the streets are intended. City of San Antonio v. Bexar Metropolitan Water District, 309 S. W. 2d 491 (Jan. 22, 1958).

Tennessee. A utility was required to relocate a pole line which was on the right-of-way of an existing road which was to be improved. The State could show by deed that

it had an easement on only part of the right-of-way. Where the State could show that it had a prior easement, the relocation was at the expense of the utility. On part of the line the State could not show that it had obtained an easement before the utility had, and the State had to bear the expense of relocation. State of Tenn. v. U.S., 256 F. 2d 244 (May 26, 1958).

Others

Ohio. A trucker, operating under a special permit to carry additional weight, exceeded this allowance. The statute provided that noncompliance with the weight limitations in the special permit rendered the permit null and void. The Ohio Court of Appeals ruled that such a condition in the permit was valid. Thus the fine was based on the excess weight over the allowed statutory weight without taking the special permit into consideration. State v. Weaver, 144 N.E. 2d 300 (March 22, 1956).

Illinois. An Illinois statute provides that 10 or more truck weight violations within a year is prima facie evidence of habitual violation and grounds for suspension of the operating privileges. In an action to suspend a trucking company's operating privileges, the State introduced evidence of 104 violations in six months. The court ruled that because there were 104 violations out of 17,800 total movements and because only half the violations were gross (over 1,000 lb), the violations were occasional rather than habitual. There was no suspension. People v. Interstate Motor Freight System, 150 N.E. 2d 879 (June 10, 1958).

Kentucky. The Kentucky Constitution prohibits the Legislature from authorizing a debt unless provision is made to levy and collect an annual tax sufficient to discharge the debt in 30 years. The Court of Appeals ruled that an authorization of a highway bond issue was valid even though it pledged to the bond issue the proceeds of taxes already being collected and did not levy new or additional taxes. Dalton v. State Property and Building Commission, 304 S.W. 2d 342 (June 21, 1957).

Arizona. The State Highway Commission let a contract for a greater sum than was budgeted for the project. The contract provided, however, that no work creating obligations in excess of the budgeted amount would be done during the fiscal year. The State auditor refused to encumber the budgeted sum allocated for the project. The court held that the contract was valid because, even though the total price was higher than the amount budgeted, the obligation for the year was limited to the amount budgeted and further obligation was conditioned upon further appropriations. Duff v. Jordan, 311 P. 2d 829 (May 14, 1957).

Ohio. An Ohio statute exempts from taxation all property owned by the State and devoted exclusively to a public purpose. A case arose concerning the tax-exempt status of private restaurants and gas stations located on property comprising the Ohio Turnpike which the Turnpike Commission leases to private corporations. The Ohio Supreme Court ruled that such commercial operations are part of the Turnpike operations, devoted essentially to an exclusive public use and, thus, are tax exempt. Carney v. Ohio Turnpike Commission, 147 N.E. 2d 857 (Feb. 5, 1958).