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

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● FOR EACH of the sixteen years the Committee on Land Acquisition and Control of Highway Access has been in operation, an annual report has been made. A review of these reports indicates the steady progress made by the committee toward its goals. During this period, the committee has functioned mainly within its three primary interests; namely (a) right-of-way acquisition, (b) highway access and roadside control, and (c) the provision of parking facilities.

The actual work of the committee has consisted of synthesizing techniques and existing laws and practices of the various States, and facilitating a systematic and timely interchange of current practices and legal techniques. The most important media used to effectuate this work have been the committee's open sessions held as a part of the Annual Meeting of the Highway Research Board, and monthly committee memoranda issued by the Highway Research Correlation Service.

During 1959, continued assistance was rendered by the committee to State highway departments and other organizations attempting to improve the legal and administrative procedures used in connection with their land acquisition, control of access and roadside regulation programs. More and more States and interested organizations are taking advantage of this important function of the committee, and the committee will remain ever ready to serve in this capacity.

The highlight of the year for the committee was the open session it sponsored during the Annual Meeting of the Highway Research Board on January 11-15, 1960 at Washington, D.C. The session was well attended by committee members, highway officials and other interested persons. Those in attendance were rewarded with worthwhile discussions on important and timely subjects of interest to the committee. All papers submitted at this session are published in this report with the exception of a study entitled, "Evaluation of Highway Impact," by A.S. Lang and Martin Wohl of the Massachusetts Institute of Technology. This paper will be made available in another Highway Research Board publication.[1]

At this session A.Rendall Dick, Senior Solicitor of the Department of Highways, Ontario, Canada, presented an excellent paper entitled "The Control of Roadside Development in Ontario," in which he comments on the rapid growth and development of the countryside through which a modern highway passes, and the dangers encountered if such development is uncontrolled. His remarks were based generally on the legislative provisions under which the province of Ontario exercises such controls, and the administrative procedures it uses to carry out what it feels is a reasonable program of regulation necessary to protect the highway facility. He indicated that one of their standards in attempting to resolve problems arising out of this controlled development program was the difficult obligation to strike a balance between proprietary rights of the individual and the welfare of the public.

Immediately following Dick's presentation, a symposium on partial taking and severance damage was held. This subject was selected by the committee because of considerable and widespread interest currently being manifested in this specialized

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[1]Highway Research Board Bulletin 268, "Some Evaluations of Highway Improvement Impacts."

type of economic impact study. These studies compare the amount of damages paid as a result of the partial takings with sales of the remainder properties after the highway improvement is completed. The impetus for these studies was a long standing belief on the part of some State highway departments that severance damages paid to many landowners, portions of whose property had been taken for highway right-of-way purposes, were not realistic. In other words, they have suspected that the value of these remainders may be many times that claimed by the owner at the time of the taking. At the present time there are at least 18 States carrying on right-of-way studies of this type.[2]

Those submitting formal papers to the symposium for discussion were George C. Little, Ohio Department of Highways; Leonard I. Lindas, Oregon State Highway Department; and W.A. Bugge, Washington Department of Highways.[3]

Little's interesting and factual paper, "Ohio Partial Taking and Severance Damage Studies," is an excellent attempt to argue the need for partial taking economic research projects. Slide projections were used to illustrate a case discussion of the newly created intersection corners on a section of highway studied outside Toledo. He stated that Ohio felt so strongly on this subject that a separate section had been established in the Division of Right-of-Way for economic research. The committee will be kept informed on the activities of this new section.

Lindas' paper, "Oregon Land Economic Study," is an analysis of certain key properties, which vividly portrays the results of one of Oregon's highway economic studies. He stated that if there is any one major conclusion to be drawn from its economic studies, it is that all future appraisals should reflect special benefits.

Bugge submitted the paper, "Land Economic Studies Being Made by the Washington State Highway Department," which is an informative outline of the particular type of economic research study thought to be most immediately useful to the Washington Right-of-Way Division in solving appraisal and acquisition problems which arise in the partial taking situations. Bugge explained that his department is already finding that the studies are producing the very results which had been anticipated, and he lists several tangible benefits directly traceable to the studies.

Close reading of these useful and thought-provoking studies is recommended in order to make better application of the mass of factual data that is currently available from 70 or more recently completed studies of the economic effects of highways in 20 States, and those forthcoming from approximately 50 studies currently being done in 30 States. The committee will continue to keep its membership posted on the developments and findings of these studies.

Two special reports, which were not presented at the annual meeting warrant wide distribution among those interested in highway land acquisition, and therefore are also included in this bulletin. One of the reports, "Use of a Commissioner System to Determine Just Compensation in Condemnation Actions," was prepared by Marc Sandstrom of the California Department of Public Works. The other report, "Construction Features in Mitigation of Damages," was prepared by Joseph F. Keely of the Idaho Right-of-Way Division of the United States Bureau of Public Roads.

Sandstrom's paper is a documented analysis and summary of his research of the possibilities and merits of using a commissioner system of determining condemnation compensation in contested acquisition cases in lieu of the jury trial procedure. He restricts his analysis to an appraisal of the particular system advocated, and only in-

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[2]California, Colorado, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Mississippi, New Jersey, New Mexico, Ohio, Oregon, Texas, Vermont, Washington, and Wisconsin.

[3]Lindas and Bugge were unable to be present, but their papers were presented by Forest Cooper, Oregon State Highway Department, and Gilbert M. Schuster, Director of the Tacoma, Washington, Department of Public Works, respectively.

directly touches upon the general question, is a jury trial better than a commissioners' hearing. He comments in some detail on possible savings and expenses if the advocated system were adopted.

Keely's paper, in effect, brings out the point that prior to the adoption by the States of the principle of control of access, the method which he called an "inspection" basis for determining the need for damage-mitigating construction features was perhaps adequate. In practice, this method required only that at some phase of construction planning it might be deemed desirable for apparently obvious reasons to construct cattle passes, machine passes, etc. However, after the adoption of the principle of access control and other Interstate criteria, construction of such damage-mitigating facilities became very expensive, and the method changed substantially from the "inspection" basis to that of adequately appraising the remainder properties in order to first justify such construction. Keely then outlines certain principles which he believes may be applied to determine whether construction is justified in particular situations.

LEGISLATION 1959

Improvement of methods and procedures for acquiring highway rights-of-way has become a primary need in some of the States, in order to keep pace with the accelerated highway program. During the year Maine and Oregon enacted legislation providing for studies of their right-of-way acquisition procedures. In Alabama and Texas, such studies are currently in progress. Other States concentrated their efforts on legislation designed to streamline particular aspects of right-of-way acquistion and control.

Outdoor Advertising

The increase in legislation to control outdoor advertising can be traced to the Federal-Aid Highway Act of 1958 and the Federal standards with which the States must comply in order to participate and receive a share of the bonus Federal funds set aside for such purposes.

The Federal-Aid Highway Act of 1959 amended the outdoor advertising provision included in the 1958 Act, so that agreements entered into between the Secretary of Commerce and State highway departments must exclude segments of the Interstate System which traverse commercial or industrial zones within the presently existing boundaries of incorporated municipalities wherein the use of real property adjacent to the Interstate System is subject to municipal regulations or control, or which traverse other areas where land use, as of the date of approval of the act, is clearly established by State law as industrial or commercial.

Thirty-seven States introduced legislation in an attempt to bring State regulation of outdoor advertising into conformity with Federal standards. At least 11 States passed such legislation. Connecticut and Wisconsin passed comprehensive laws which are considered adequate to conform to Federal standards; Maryland amended a previously enacted statute to bring it into conformity with the standards. A new North Dakota law authorizes acquisition of roadside advertising rights adjacent to the right-of-way of Interstate highways so that State is now eligible for reimbursement to the extent of 90 percent of the cost of such acquisition in accordance with the Federal-Aid Law of 1958. The Connecticut law also provides for acquisition of such rights. Tennessee and West Virginia enacted provisions calling for studies of billboard regulations. At this time, the laws of Connecticut, Maryland, North Dakota, and Wisconsin—and possibly Virginia—are considered adequate to qualify the States for Federal reimbursement.

Controlled Access

Most of the legislation enacted during the year for controlling highway access consisted of minor amendments to existing laws. Ten States passed laws prohibiting commercial establishments on controlled-access highways.[4] Among those, the Delaware

[4]Arkansas, Connecticut, Delaware, Illinois, Minnesota, Montana, North Dakota, South Dakota, West Virginia, and Wyoming.

and West Virginia acts authorized the State to establish frontage roads adjacent to controlled-access facilities to serve competitive commercial enterprises located on adjacent private property. These ten States bring the total to 28 States having such laws.[5]

Advance Acquisition of Right-of-Way

In the Federal-Aid Highway Act of 1956, Congress authorized Federal reimbursement for land acquired up to five years in advance of construction. Although the 1958 act extended this period to seven years, this increase was inadvertently omitted when the highway law was recodified as Title 23, in 1958. The Federal-Aid Highway Act of 1959, however, reenacted the extended provision so that the advance acquisition period is now seven years.

By the end of 1959 there were 19 States having statutes explicitly authorizing acquisition of land for future use.[6]

Ohio and Utah are the most recent States to enact such laws. Their laws are somewhat unique in that they allow the director to use abundant retirement trust funds for financing advance acquisition. As the pressures mount to seek new sources for highway funds, it can be expected that more States will look to the larger pension funds.

The Ohio law[7] of July 20, 1959 authorizes the Public Employee's Retirement Board, the School Teacher's Retirement Board, the School Employee's Retirement Board and the Industrial Commission to enter into agreements with the Director of Highways whereunder the director could act as agent for the particular board in purchasing property in the board's name when the director deems such property will be needed for a contemplated highway project. The total amount involved under any such agreement may not, at any one time, exceed 10 percent of the combined total assets of the industrial commission and retirement board. Although title to the property will be taken in the name of the board furnishing the money, the director may lease, rent, or otherwise use and manage the property during the period between purchase and use for right-of-way, and the income from this management will be placed in a highway right-of-way acquisition and management fund, for use to pay taxes, insurance, costs of management and purchase of right-of-way.

The director must repurchase the property from the owning board prior to the letting of a construction contract or within five years from date of purchase, whichever is earlier, for a price to include the original purchase price plus a rate of interest upon the original investment to be determined by negotiations between the particular board or industrial commission and the Director of Finance, with approval by the State Controlling Board. If because of some change in plans some property or portion of property will not be needed for right-of-way when the final plans are drawn, the law authorizes the director to sell such excess property to the highest bidder at public auction, after purchasing the property from the owning board or industrial commission.

The proponents of the new law claimed many advantages would result from a system of advance purchase. Most important, they thought, was that it would allow the needed time to acquire right-of-way, particularly on urban projects where the number of properties to be acquired runs into the thousands; it would allow for a more orderly planning of a comprehensive freeway system; it would tend to prevent the pyramiding of

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[5]Arkansas, Colorado, Connecticut, Delaware, Georgia, Illinois, Indiana, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming.

[6]Arkansas, California, Colorado, Florida, Idaho, Indiana, Louisiana, Maryland, Nebraska, Nevada, New Jersey, New York, North Dakota, Ohio, Oklahoma, Texas, Utah, Virginia, Wisconsin.

[7]See Memorandum 113, August 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 396.

land values and lessen economic waste which takes place when right-of-way is acquired after building improvements have been constructed in the interim period between planning and actual construction; it would provide for a more orderly development of properties adjacent to the freeways; it would result in a cheaper construction costs of the freeway as a result of new streets and subdivisions laid out in contemplation of the freeway; it would allow for a more orderly and effective zoning of the adjacent areas; and it would tend to keep to a minimum the number of people who would be seriously inconvenienced. The experience of California was relied upon to show the advantages of acquisition for future use. It was estimated that California saved in the past six years approximately $167,000,000 through advance purchase. Also, that leases, rentals, and excess parcel sales under the California land management program last year alone showed a net return of nearly $9,000,000.

The proponents claimed that the investment of monies from the trust funds would permit the funds to prosper just as much as they would from other investments, and at the same time would provide the means to give the general public great benefits that could not otherwise be realized without substantial tax increases.

The Ohio Department of Highways has provided for administration of the new law by setting up a Bureau of Advance Procurement in the right-of-way department. However, it was expected that the act will be tested in the courts to determine its validity prior to undertaking an extensive program of advance right-of-way acquisition.[8]

This year Utah also established a revolving fund of $5,000,000 bringing the total to at least 10 States now making use of the revolving fund technique for financing advance acquisition.[9] This technique generally calls for several million dollars to be set aside to acquire the land when a route is chosen for a road that is not to be built immediately. When funds for the road subsequently become available, the revolving fund is reimbursed for the advance previously made.

Legislation enacted in Calfiornia and Iowa during the year concerned a subject closely connected to future acquisiton, that is, "property management," which involves the problem of what to do with property acquired in advance while awaiting construction of the highway. The new Iowa statute permits the rental of property not immediately needed. In California, where land rentals were already permitted, the new statute created the "Highway Properties Rental Fund" in the State treasury for deposit of rental revenue, 24 percent of which is earmarked for distribution to counties and the balance to the State highway fund. Minnesota also passed a law providing that when real estate in excess of that needed for highway purposes is acquired, it may be leased in the one-year interim period before sale, 70 percent of the proceeds to be creditied to the trunk highway fund, and the remaining 30 percent to the city, village, borough or township where the real estate is located.

LAND ACQUISITION FOR HIGHWAY PURPOSES

Land acquisition has properly taken its place as one of the most important factors to be considered in modern highway planning. This, of course, is due mainly to the gigantic Interstate highway program currently being carried out. Such consideration is justified, if for no other reason, because of the constantly rising costs of acquiring the wide rights-of-way necessary to construct the Interstate System.

When property is taken through the exercise of eminent domain, it is only natural to expect that conflicts will arise between condemning authorities and some landowners. Fortunately, by far the greater amount of land acquired is through amicable negotiations and settlements. It is the relatively rare transaction that becomes an expensive and full-fledged court struggle. Nevertheless, such cases as are carried as far as

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[8]The constitutionality of this law was upheld by the State Supreme Court on March 30, 1960 (not yet reported).

[9]California, Indiana, Maryland, New Mexico, New York, Ohio, Utah, Washington, West Virginia, and Wisconsin.

the appellate courts are important. A great deal of time and expense goes into their conduct. During the year, at least 46 cases were decided by the State appellate courts involving various problems arising out of the condemnation of land for highway purposes.

Authority to Condemn

All States have the inherent power of eminent domain, but due to the appearance from time to time of unique fact situations or out of the ordinary attempts to exercise the power, cases continue to arise questioning the authority to condemn. During the year, the courts of Colorado, Illinois, New York, and Utah decided such questions. The specific question in the Colorado case, whether consent of a city was necessary for the State Highway Department to continue a State Highway through the city, was decided in the negative. The Illinois decision permitted condemnation of easements for water and sewer pipe lines servicing a privately owned turnpike gasoline service station. The New York case presented the court with a very difficult legal problem which it resolved by holding that the New York highway law alone was not specific enough to remove a certain legislative exemption from condemnation. The Utah case was typical of the situation where one governmental agency with the power of eminent domain desires to acquire property already devoted to public use. Resumés of these cases follow.

Colorado.—The State Supreme Court was called upon to rule whether the State and County of Arapahoe had authority to condemn land for highway purposes without the consent of the municipality through which the project ran. In holding in the affirmative the court reasoned as follows:

The Department of Highways could lawfully condemn public or private property within a municipality for such pruposes under authority of Sec. 120-3-17 of the State statutes which provided that State or county highways could be "designated, established and constructed in, into or through cities and counties, cities or towns, when such highways form necessary or convenient connecting links for carrying State highways or county highways into or through such cities and counties, cities or towns, and for such purposes the department of highways and the boards of county commissioners of the several counties may condemn or otherwise acquire rights-of-way and access rights."

The court noted that Sec. 120-13-35(1) of the statutes provided that "rights-of-way for such streets shall be acquired by either the city, city and county, or incorporated town or by the State as shall be mutually agreed upon." However, the court said, although the language authorized resort to agreement, it was only an optional method, permissible as a substitute for proceedings in condemnation. In other words consent of the town was not a prerequisite to condemnation of property within the corporate limits, since the very next subsection gave the Department of Highways authority "to acquire rights-of-way by purchase, gift or condemnation for such streets, highways, and bridges."

Although the town alleged that Sec. 120-3-17 violated that section of the Colorado constitution which prohibited the general assembly from passing "local or special laws in any of the following enumerated cases, ... laying out, opening, altering or working roads or highways ...", the court ruled that since the statute was not intended for local application but was statewide and general in scope, it was not a special law within the coverage of the constitutional provision.

Nor, according to the court, was the statute in violation of a provision of the State constitution that prohibited the general assembly from imposing taxes for the purpose of any county, city, town or other municipality corporation, in that the statute required certain duties of highway maintenance to be performed by the town on State highways, which would necessitate a special tax to be levied upon the town. The court pointed out that Sec. 120-13-3 of the statutes shifted the responsibility for maintenance to the Department of Highways, but aside from this fact there was no merit in the argument, since it could not be said that a tax had been levied by the legislature when it

defined certain duties and obligations to be performed by counties, cities and towns. [10]

Illinois. —The Illinois State Toll Highway Commission condemned land belonging to the Eden Cemetery Association, a religious corporation, for easements to provide sewer and water facilities to a privately owned automobile service station and restaurant, located on property adjacent to the Northern Illinois Toll Highway. It was admitted by the association that the easements would not interfere with any existing graves and the amount of compensation was ample. The association, however, alleged that the commission's action constituted an attempt to condemn land for private use. The circuit court upheld the commission's action and the association appealed.

The high court, in affirming this decision, noted that one of the prime purposes of a toll highway, and one of the declared purposes of the enabling act, was to eliminate traffic hazards. The court found that notwithstanding the fact that the service facilities were privately owned and run by Standard Oil Company of Indiana, they still promoted traffic safety by reducing the need for entrances and exits to reach such services off the turnpike. The court concluded that service stations and restaurants were an integral part of the toll road system, regardless of who operated them, and since the easements complained of were essential to the efficient operation of these services, they too were in the public interest. Authority to condemn for such purpose was, therefore, sustained. [11]

New York. —The Society of the New York Hospital operated and maintained a hospital in the City of White Plains. In 1927, the legislature enacted a special statutue which, among other things, provided that so long as the society used its grounds for hospital purposes none of the land would be taken for any use and that it would be unlawful to open any streets through the grounds belonging to the society. Thirty years later the Superintendent of Public Works, in the process of constructing an interstate route connecting the New England Thruway and the New York Thruway, deemed it necessary, pursuant to the Highway Law of the State, to appropriate by eminent domain a narrow strip of vacant land (approximately one acre) belonging to the society. There was no question that the land in question was owned and occupied by the society for hospital purposes and was embraced in the land referred to in the 1927 statute. It was conceded, however, that the appropriation of the land would in no way interfere with the operation of the hospital proper. The trial court and the appellate court both found in favor of the society and the superintendent appealed to the Court of Appeals of New York, which again affirmed in favor of the society.

The society contended that the statutes of 1927 forbade, so long as they stood unrepealed, any taking of any of the hospital's lands. It did not question the State's right to terminate that exemption from appropriation but said that no later statute had such an intention or result. The superintendent, on the other hand, contended that the 1927 legislation barred action by the City of White Plains only, and, further, that if such legislation did apply to the State that applicability was ended by the State highway law amendments of later years, specifically, Sections 30 and 340-b, authorizing the appropriation of lands for arterial highways; and more specifically, Section 340-a, authorizing the location of one of these interstate routes as "passing through or northerly of White Plains."

Said the high court: "While all are agreed that eminent domain power cannot be surrendered ... it still remains that the power is legislative and that it is the legis-

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[10]Town of Greenwood Village v. District Court, 332 P. 2d 210, November 1958. See Memorandum 108, March 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 385.

[11]Illinois State Toll Highway Comm'n v. Eden Cemetery Ass'n, 158 N. E. 2d 766, May 1959. See Memorandum 166, November 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 408.

lature which determines the necessity for and the time and manner of its exercise.... The power lies dormant till used but however long unused may be resumed at the will of the legislature....Read against the background of those settled principles, the meaning of the two 1927 acts is plain. The legislature for a consideration paid by the hospital corporation announced its intention not to take any of the hospital lands and forbade the city or anyone else from appropriating them. Such a legislative declaration and mandate continues to express the legislative intent until a contrary intent is displayed."

The court said that all statutes passed since 1927, giving the superintendent authority to acquire lands anywhere for highway purposes were to be strictly construed. Then the court reasoned that it was not strict construction of generally worded statutes like the Highway Laws sections to read them as wiping off the books the 1927 legislation as to specific lands. "The Legislature has power at all times to command its agents to take or refrain from taking a particular property. Its positive direction not to take described lands should in reason be cancelled only by an equally plain command or permission to appropriate." The court noted that the society was not the only one with special statutory exemption from condemnation, and said that since such exemptions are, though subject to repeal, traditional and valid, public policy required that thier repeal or abrogation be evidenced by clear legislative language.[12]

Utah.—The State Road Commission made a motion for the immediate occupancy of land occupied by a railroad. The motion was denied. The essential facts were as follows: The railroad's main line ran north-south through Midvale, Utah. A branch of this line ran in an easterly direction from this main line, along Center Street. The road commission contemplated the elimination of this branch so that a limited-access freeway, planned along a route east of and parallel to the railroad's main line could be constructed at grade, the freeway and main line to be underpassed to accommodate the vehicular traffic which daily moved along Center Street. The programming for the project dated back to 1948 and since that time at least one-half of the necessary approaches to the intersection had been acquired. The order for immediate occupancy was sought so that questions as to whether Center Street would cross at grade, underpass or overpass could be resolved. It appeared that without an order for occupancy plans which would require many months to prepare could have but conjectural assurance of being effectuated. The road commission asked only for immediate occupancy in the hearing not suggesting or requesting any determination as to whether the freeway was a higher and better use than the railroad branch line, which was an issue brought up by the railroad company.

The Supreme Court of Utah affirmed the denial of the motion for immediate possession. It noted that both the road commission and the railroad were empowered to exercise the right of eminent domain, making this case "somewhat of a rarity, requiring a determination as to whether the exercise of the one power or the other will better promote the public good." The court said that if the facts adduced at the one-sided hearing on the motion had been established at a regular trial where there would be an opportunity to hear both sides of all issues, "there would be little doubt but that the freeway as proposed would serve a higher and better use than did the branch line." But the court nevertheless ruled that since the railroad had made an issue of the matter of higher and better use it should be allowed to present any competent evidence it might choose at a regular trial. Therefore the Supreme Court remanded the case to the trial court for a regular trial with a "suggestion" that such trial be given priority.[13]

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[12]Society of the New York Hospital v. Johnson, 154 N.E. 2d 550, November 1958. See Memorandum 110, May 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 390.

[13]State v. Denver and Rio Grande Western Railroad Co., 332 P. 2d 926, December 1958. See Memorandum 107, February 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 380.

Compensation for Damages

The fundamental question in most condemnation cases is how much money, or the equivalent, the landowner is to receive as compensation for the taking of his property for public use. Consequently, it is not surprising to find that the largest proportion of such cases during any given period involves issues related in some way to damages. In 1959, 16 highway land acquisition cases were found which could be classified under this subject. A brief review of these cases is discussed under the following subheadings:

Severance Damages.—This theory of damages comes into play when only part of the landowner's property is taken for public use. As a general rule, the measure of damages when such a situation is presented is the difference in the value of the whole property immediately before the taking and the value of the remaining property immediately after the taking. Among the 16 cases involving questions of damages eight, in as many States, involved severance damages. Two cases involved the question of unity of use—one in New Jersey which held that the jury must decide the question of the functional relationship between the condemned land and the remaining portion, and one in South Dakota where the court held, among other things, that in determining damages due to the taking of land used as a ranch, land leased by the condemnee for grazing purposes, as well as that held under grazing permits from the Government might be taken into consideration as an appurtenant element of value.

Arkansas.—The supreme court held inadmissable certain testimony regarding damages to property resulting from a partial taking because the standard used in appraising did not take into consideration the difference between the value before and after taking.

The highway commission condemned approximately 0.3 of 2.9 acres of the owners' land for reconstruction work along U.S. 67. The property was used for a cafe, motel, residence and leased gasoline station. Two expert witnesses for the commission testified that just compensation would be $9,000 and $10,250, respectively, based on the difference in value before and after the taking. The owners' witness, qualified for his knowledge of property values in the area, estimated the damage at $20,350. He did not, however, base his estimate on the "before and after" test.

The court held that the Arkansas test which had to be used in measuring damages in cases of partial taking was a determination of the difference between the value of the whole before taking and the value of the remainder after the taking. Since the owners' evidence was not based on this test, the court found no substantial evidence in the record to support a judgment of more than the highest commission evaluation, that is, $10,250. The court permitted a 15-day period in which the owners could file a remittitur of $5,750, at the end of which time, should they fail to do so, the case would be reversed and remanded as not being within the scope of the evidence.[14]

Georgia.—The Georgia Rural Roads Authority desired to construct a road which would cross land in Houston County owned by Mr. Whipple. The State notified the county that it had authority to provide and pay for the desired right-of-way, and the county offered the landowner $1,000 for the property to be taken. Condemnation proceedings were later instituted, and an award of $1,125 was made, allowing $125 for severance damages.

After the highway was constructed with 25 to 40 ft of fill across this property, the landowner filed a petition to cancel the condemnation award alleging that the county commissioners represented to the owners in the presence of the State highway engineer (who drew the specifications for the road) that it would be constructed at ground level, and the engineer did not dissent. He further alleged that the appraisal of value was made upon this assumption. Instead, 25 to 40 ft of fill was constructed which virtually destroyed the value of the abutting property.

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[14]Arkansas State Highway Commission v. Fox, 322 S.W. 2d 81, April 1959. A discussion of this case will also be found under "Leasehold Rights and Removal Costs."

The supreme court noted that the landowners were prevented in the condemnation proceedings from proving as severance damages the construction of the fill complained of due to mistake of fact, and the assessors who fixed the damage, and the court which approved the valuation were kept ignorant of an intention to construct the fill. These were held to be sufficient grounds to set aside the award and judgment of condemnation. [15]

Kansas.—In a decision recently handed down, the supreme court held that where the Kansas Turnpike Authority condemned a portion of land, the real improvements on the condemned part should have been given dual consideration, that is, as part of the value of the realty taken and as effecting damage to the remaining portion.

The Kansas Turnpike Authority condemned a 15.06-acre segment of the owner's farmland for construction of the turnpike. Included in the property taken were such improvements as three trees, which provided shade to the remaining farmhouse, one of two barns, a hog house, cow shed, over 1,000 feet of stone wall corrals, and the only well which could provide an inexhaustible supply of water, even in the longest droughts. Underlying parts of the farm, including the part taken, were rock formations allegedly suitable for quarrying and road construction. The owner sold some of this rock, taken from the remaining land, to the road construction contractor at $1,000 per acre; the contractor also used rock taken from the condemned land but made no compensation to the owner.

The owner objected to the trial court's inconsistency in admitting the condemner's evidence of damage to the remaining portion, based on value of the above mentioned improvements while not requiring it to consider these improvements in its appraisal of the value of the realty condemned. He objected to the admission of testimony pertaining to his temporary access to the well and to the denial of compensation for the mineral rights described.

On appeal, the high court observed that the general rule regarding severance damages was that the owner should be compensated for the fair market value of the land taken plus the diminution in value of that remaining. Where farm land was condemned, the court held however that the value of buildings, other improvements, and fixtures should be given "dual consideration"; first, as part of the real estate taken, and second, in determining the damage, if any, to the remainder since their use was part of the over-all operation of the farm. It was therefore error to admit testimony of the condemner as to value of the realty taken which did not consider the improvements.

Evidence pertaining to the well tended to show that it was the only reliable well on the farm and that it was located on the property condemned. The turnpike authority, however, was permitted to testify, over the owner's objection, that while the condemned area was originally fenced off, thus preventing access to the well from the farm, the fence was moved up in front of the well and, at the time of suit, the owner was permitted access to it. The supreme court held that this evidence should not have been admitted as it fell within the general rule of declarations and future intentions of a condemner as to what would be done with respect to property condemned. The court said that such declarations could not affect either the character or extent of the condemner's rights acquired or the amount of damages it must pay as compensation. The condemener could not condemn conditionally but rather could take only what it absolutely needed. The measure of compensation due the landowner should be the rights acquired, not the use intended. Since the condemner had no right to mitigate the effect of the condemnation by merely allowing access, and did not grant any kind of permanent easement or right of access, the testimony of such an arrangement was held inadmissable.

Finally, the court considered the owner's claim of compensation for the rock and mineral deposits. The court noted that such deposits underlay farm land all over the

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[15]Whipple v. County of Houston, 105 S.E. 2d 898, November 1958.

area and were not peculiar to the farm in question. The owner had manifested no intention, prior to condemnation, of utilizing the deposits; on the contrary, he had planted wheat over much of it. The court held that if the minerals were to be reflected at all in the damages, they should be as part of the land, and then, such a use of the land must have been so reasonably probable as to have an effect on the present market value of the land at the time immediately prior to condemnation. Here, the deposits only had value after and as a result of the condemnation, and were therefore unavailable as a measure of damages. The ultimate test of value, said the court, was the value to the owner, not the condemner; the fact that the contractor made use of the rock on the condemned portion was not a compensable factor. On this point, then, the lower court's ruling was correct, but in view of the errors discussed above, the supreme court reversed the judgment. [16]

Minnesota.—In the Village of Bloomington, Hennepin County, State Highway No. 100 was being widened, and in connection therewith a condemnation suit arose, which was complicated by an existing zoning ordinance. Mr. and Mrs. Heller owned property and buildings facing on the south side of the highway. One building which was about ten years old, leased to the Studebaker-Packard Corporation, was rectangular in shape, 133 ft wide and 200 ft deep. It was set back about 37 ft from the existing right-of-way line. The new right-of-way line was to be established 72 ft south of the existing line, which would take 35 ft off of the front of the building. This portion included the more important components—the heating system, plumbing and water, lavatory, display room, offices, and lunchroom. The balance of the building was used as a warehouse.

About four years before the village had adopted a zoning ordinance which required a 60-ft setback, causing this building to become a nonconforming use. However, according to the ordinance such nonconforming use could continue until, among other things, the building "shall be substantially destroyed, then the land on which such structure was located or maintained shall from and after the date of such destruction be subject to all the regulations specified by this ordinance "

Court appointed commissioners awarded the sum of $115,000 to the owners and $2,078 to the lessee. The State appealed to the district court, arguing that the Hellers should be compensated for only the front 72 ft (35 ft because of the change in the line and 37 ft more to return to its former nonconforming use). The argument of the Hellers was that the taking resulted in a "substantial destruction" of the building and that if it were to remain it would have to comply with the 60-ft setback provision. Hence, the taking would result in the destruction of 95 ft of the building.

The district court agreed with the Hellers and refused evidence by the State as to the damages based on the loss of only the front 72 ft of the building. The trial court also refused to permit the State to introduce evidence of the provision in the ordinance which allowed application for special-use permits and exceptions to the ordinance and evidence which would show that the Hellers had not made application for such permit. The court also instructed the jury that there would be substantial destruction. The award of the jury was, accordingly, only slightly lower than that of the commissioners.

The State then appealed to the Supreme Court, which affirmed. The high court ruled that as a matter of law the taking in this case resulted in a substantial destruction, although the term "substantial" is ordinarily relative and its meaning is to be gauged by the circumstances. In this case the gauging element was not that the total area taken was a small percentage of the whole building or that the cost to restore the building without reference to the setback provision would be less than half of the total value of the building. The court said that the destruction was substantial because "of the important nature and character of the part of the building taken as compared to the function of the entire building."

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[16]Hoy v. Kansas Turnpike Authority, 334 P. 2d 315, January 1959. See Memorandum 114, September 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 401.

Also, in determining the before and after value of the property, the court said that the zoning ordinance and its effect—that the new structure would have to be 60 ft back from the right-of-way line—would affect the after value. The court also held that the the Hellers were under no duty to apply for the variance. In this instance, said the court, it was not a breach of their duty to exercise reasonable diligence to minimize damages. It was reasonable for the Hellers to conclude that the variance was not minor, and they could not allege undue hardship, because compliance with the setback provision only required the destruction of a portion of the building used for warehouse purposes which only involved bare walls and floor. [17]

South Dakota.—The State Highway Commission, for purposes of reconstructing a portion of State Trunk Highway No. 16 as a part of the Federal Interstate Highway System condemned a total of 51.6 acres of one Willard Bloom's property. Bloom owned 4,040 acres of land in Pennington County which he used as a cattle ranch. All except 640 acres was contiguous, in roughly a rectangular shape. The highway bisected this main rectangle in the southern area approximately diagonally, so that of the remaining land 1,088 acres lay south of the highway including separate parcels as described below and 2,900 acres to the north. On both sides of the highway were summer and winter pastures. The house and buildings lay to the north of the highway and the well and corral lay to the south. An interchange on a county road provided a crossing for vehicles; for cattle, two crossings under the 300-ft wide highway were provided, one 10 ft by 10 ft and about one-half mile away, one 7 ft by 7 ft. Apart from the contiguous land in the rectangle described, Bloom owned some separate pieces of property all used in connection with the ranching operations: south of the main rectangle and on the east, he owned 320 acres and in between this and his main tract, leased 320 acres from someone else; one mile south of this he owned an 80-acre tract of dry hayland from which hay was taken and hauled to the ranch headquarters for feeding—this was part of the winter range; also, two to three miles to the east was a 240-acre tract known as "flood irrigated hay land" where hay was made and hauled to the ranch for feed, but which was not part of the summer or winter range. Also around the area he had permits to graze on government owned land.

The trial court awarded damages in the amount of $25,000. The State appealed from the trial court's refusal to allow a new trial. The Supreme Court affirmed except as to one point. The decision considered several things of interest.

The court ruled that in determining the value of owned land used as abase for ranching purposes, it was proper to take into consideration as an appurtentant element of value, grazing permits from the government, and that as to land leased by the condemnee for grazing purposes the same principle applied.

In court instructions to the jury on the subjects of fair market value, measure of damages, and just compensation, the term "the entire tract " was used. The State objected to this on the ground that these instructions did not distinguish between land owned by Bloom and permit and leased land on which Bloom had the right of pasturage. The court ruled, however, that the term was not misleading and would be understood by the jury to refer to the land owned by Bloom, especially since Bloom had not introduced evidence to show that his land had any enhanced value by reason of any rights in the other land. The State further objected that these instructions took from the jury the question of whether or not the non-contiguous portions of the ranch were separate tracts for which compensation should be awarded. The court, in keeping with a case formerly decided[18], said that physically separated parcels or tracts of land held in one ownership constitute one distinct parcel of land if the parts are devoted to a single

[17]State v. Pahl, 95 N.W. 2d 85, February 1959. See Memorandum 111, June 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 392.
[18]State Highway Commission v. Fortune, 91 N.W.2d 675 (1958).

use. Also where there is no dispute in the facts, the question whether physically separated parcels constitute one parcel because of unitary use is a question of law for the court. In reviewing the evidence, however, the high court found that there was a unified use of Bloom's land for ranch purposes except for the 240 acres of "flood irrigated hayland." There was no evidence that it was used for grazing, but just for growing hay which was hauled by truck to the main ranch. Access to the ranch was still available by way of the county highway. The court said that it was error to allow the jury to consider it in determining severance damages as if it were a part of the ranch, referred to in the instructions as "the entire tract," under the principle of unitary use.

As to the consideration of benefits on which the commission claimed the jury should have been instructed, the court said that only those benefits which may inure to the owner as to the part of the property not taken resulting from the improvement and which are of such a nature as to increase the market value of that part of the property not taken may be considered, and not benefits accruing to the community generally. Here, there was no evidence of these special benefits.

The State wanted an instruction that would have required the jury to limit severance damage to that directly caused by the construction and use of the interstate controlled-access highway over and upon Bloom's land without reference to the fact that the highway on land to the southeast of Bloom's property, that is, government land, would make it impossible to move the cattle directly back and forth from the land used for grazing north of the highway to land used for grazing south of the highway, except through the two cattle passes described above. The court approved of the denial of this instruction. It said that under the "taking and damaging" clause of the State's constitution it is a basic rule that where no part of an owner's land is taken, but because of the taking of other property so located as to cause damage to an owner's land, such damage is compensable only if the injury is peculiar to the owner's land and not a kind suffered by the public as a whole; whereas, if a part of an owner's parcel or tract of land is taken, the owner is entitled to be compensated for the part taken and for damage to the part not taken even though the damage is of a kind suffered by the public in common. The court noted from the evidence that the section of the highway constructed on land not actually owned by Bloom would have a tendency to make it more difficult and expensive to move cattle from the owner's land north of the highway to the government permit land lying to the south thereof and to the owned land south and west of such segment. The court said that "any elements of detriment such as additional labor, expense or inconvenience in the operation of the remaining land as a ranch, which were appreciable and substantial in nature and had a reasonable tendency to lessen the market value of the land, could be taken into consideration.... For the purpose of determining severance damage to the part not taken, the part of defendant's land taken was to be considered as an integral and inseparable part of a single highway project not limited to the segment of the highway on his land but extending so far as the construction and use of the highway had a reasonable tendency to cause detriment to the part not taken and to reduce the market value of his land not taken from the viewpoint of a ready, able and willing buyer."

Another question arose as to the State's request that the jury be permitted to view the property, which may be done under a State statute. The trial court refused, and the Supreme Court affirmed. It said that whatever may be the evidentiary effect of a view when allowed, the granting or denying of an order for a jury view of the premises under this statute rested in the sound discretion of the trial court. The court said that a granting of a view should be the rule when it would be of aid to the jury in making an award that would be fair and just yet not so overly generous as to hinder the making of a desired public improvement. A view should be denied only for good and cogent reasons. Here, the court noted, the ranch was 80 miles away, was typical of ranch land in the community, and the effect of the separation could not be determined by a view. If there is no clear showing of abuse of discretion, said the court, by the trial court, in denying a view, the exercise of the discretion vested in the trial court by the statute will not be distrubed on appeal.

The court then considered the reduction of the verdict so as not to reflect any consideration of the 240 acres of "flood irrigated hayland" mentioned above. The court

noted that by the State constitutional provision on condemnation, the damages in a condemnation case had to be determined by a jury, so that a court could not substitute its finding for that of the jury by increasing the verdict. But, said the court, the province of a jury is not invaded when a court in the exercise of its judicial powers determines as a matter of law that a verdict or an award is not sustained by the evidence or is against the law. So the court reduced the judgment to exclude damage to the 240-acre tract, and affirmed otherwise the judgment of the lower court. [19]

New Jersey.—The Sreel Investment Corporation owned a plot of land in the Village of Ridgewood, which was the subject of a condemnation action instituted by the village. The lot was 150 ft long and 75.4 ft wide. On the front of the lot were four stores rented by the corporation owner to business tenants. Two stores were 70 ft long and two were 50 ft long. The back portion of the lot was rented by the corporation to individuals for parking. On one side of the lot was an alley 14 ft wide, over which the owner had a right-of-way.

The municipality adopted an ordinance authorizing the acquisition by condemnation of a number of parcels of land, including rights-of-way, for the purpose of making "the lands available to the public for the public parking of vehicles or for other public uses or purposes." Among the properties condemned was the rear 70 ft of the property in question. This left the property with 10 ft behind the two 70-ft stores and 30-ft behind the other two stores. Also condemned was the easement of the owner and others in the 14-ft alley for use as a public right-of-way.

From an award of $16,450 made by condemnation commissioners, appointed according to New Jersey procedure, the owner and the village both appealed. The pursuant jury trial resulted in an award of $8,200 for the land taken and no award for consequential damages. The corporation appealed, contending that the finding of no consequential damages deprived it of just compensation in the "constitutional sense."

The Supreme Court of New Jersey stated that according to the law when only a part of an owner's land is taken he is entitled to be compensated not only for the value of the land taken but also for any diminution in the value of his remaining land which may be attributed to the taking. It allowed, however, that under certain circumstances severance might not effect a change in the value of the remaining portion of an owner's property.

The court examined the trial court's charge to the jury, which the owner complained was prejudicial. The trial judge, instructing the jury, gave an example of a supermarket, by way of illustrating that the parking area for such a business is such an important part that when the entire land is being used for its highest and best use, parking is the highest and best use, "and in that event, the parcel of land cannot be divided without destroying the highest and best use for which the entire parcel is available." As to the land in question, on the other hand, the trial court said: "And there is no relation between the use of the property which is being taken and the front portion, the remainder; no relation in its use, no relation in its productive value. The uses are independent of each other. There is no functional relationship between the front and the rear. One part does not compensate the other part, as a supermarket with its parking lot does. So far as I can see, that is the evidence in this case insofar as the use of the property is concerned." The trial court then summarized the testimony of the corporation's experts (land appraisers) who had opined that the taking of the land in question would result in a diminution in the value of the remaining property and based their computations on the theory that prior to the taking the owner's property was a functional entity with the value of the building partially dependent upon the availability of the vacant area in the rear. The experts for the village had made their computations on a replacement-less-depreciation basis and on a capitalization-of-income basis on the theory that there was no functional relationship.

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[19]State Highway Commission v. Bloom, 93 N.W. 2d 572, December 1958. See Memorandum 110, May 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 390.

The high court thought that the jury instructions might have implanted in the minds of the jury the idea that the severance in question did not result in any damage to the remainder, which was "contrary to the factual testimony as well as the opinions expressed by the owner's expert witnesses that the part taken was functionally related to the remainder."

The Supreme Court granted a new trial, holding that in view of the conflicting testimony of the experts, it was a jury question as to whether there was a functional relationship between the condemned and noncondemned portions of the lot. It further commented on other points raised. One of these was the contention by the owner that it was improper for the village to ask one of its experts "whether or not benefits would accrue to adjoining property owners from the creation and maintenance of a municipally owned parking lot of this kind, graded, lighted and maintained by the municipality." The high court considered this error. It pointed out that the eminent domain legislation did not provide that general benefits were to be considered in arriving at an award, except in the limited situation where an assessment is to be levied, in which case it may be set off against any award rendered. The court also noted that New Jersey cases uniformly held that general benefits may not be considered to reduce the damages which an individual property owner would sustain from the taking of a portion of his property. "There is no reason why a man whose land is taken for a public improvement should be made to contribute more for the public and common benefit than his neighbor, whose lands are not taken but who is equally benefited by the improvement."[20]

Tennessee.—In Overton County, the Hasslers owned some property and by contract furnished, free of charge, a right-of-way of the dimensions required by the county, for purposes of building a highway. The consideration recited in the contract was the "incidental benefits to our property to accrue from the location of this County Highway, by, over, or through our lands and premises." However, the construction of the road, it was later learned, would destroy the landowners' well, grocery store, and filling station. Consequently they sued for damages. The trial court disallowed the claim because of the contract.

The Supreme Court reversed, and held that the owners are entitled to show evidence of these elements of damages "evidently not contemplated by the parties at the time of the execution of the above contract." The court relied on the case of Denny v. Wilson County, 198 Tenn. 677, 281 S.W.2d 671, August 2, 1955, where it was recognized that, where the landowner suffered damages as a result of condemnation and use of his land, which neither he nor the condemnor contemplated at the time of the proceedings, and the damage was of such nature that the court would have rejected an attempt to prove the same in condemnation proceedings as speculative and conjectural, the landowner may be compensated for such damage in a subsequent action.[21]

Texas.—A court of civil appeals recently held it was improper to permit a condemner to testify as to prices paid for improvements situated on condemned land after the taking, and the cost of moving such property.

In this case, commissioners appointed by the court found damages in the amount of $15,500 for the taking of part of the landowner's property by the State and the improvements located on the part taken. A subsequent trial resulted in an award of $10,075 for the property taken, and no severance damages.

The facts of the case indicated that immediately after the award of the commissioners, the State took possession of the property and sold improvements located on the land

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[20]Village of Ridgewood v. Sreel Investment Corporation, 145 A.2d 306, October 1958. See Memorandum 108, March 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 385.

[21]Hassler v. Overton County, 311 S.W.2d 206, March 1958. See Memorandum 106, January 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 378.

taken to a third party who in turn resold them to the original owner. The sales were subject to the condition that the property be removed as quickly as possible. In the meantime, the owner had appealed the commissioners' award.

The landowner contended that the lower court erred in permitting the State to prove (a) that he had purchased the improvements located on the land condemned, including the price paid and the cost of moving, and (b) that if the owner could buy the same improvements, their cost would constitute the replacement value.

The appellate court noted that past decisions had uniformly held that prices paid for property by a condemning authority were not admissible to establish market value of property being condemned, because such sales were actually forced sales, and not free and voluntary under the rule as to what constitutes a willing seller and a willing buyer. The State contended that testimony tendered as to the sale of the improvements after the property was condemned did not violate the foregoing rule, because the only condition attached to the sale of the personal property located on the land condemned was that the State reserved the right to reject any and all bids. The court noted, however, that it was understood that the property had to be moved immediately. The court found that the sale of the improvements was without doubt a forced sale, and the fact that the improvements had to be removed immediately necessarily reduced the value of the severed improvements. Evidence of the sales, therefore, should not have been admitted. The case was reversed and remanded for a new trial.[22]

Leasehold Rights.—Some of the most difficult condemnation problems arise where leasehold interests are involved. Ordinarily, the condemner brings an action against the landowner to have the courts determine just compensation for the land acquired. Whatever outstanding interests there may happen to be in the condemned land, the condemner is not concerned, for those interests are to be worked out between the owner and the holders of the outstanding interests. However, in actual practice the courts are frequently called upon to determine the justice of various claims of the lessee. During the past year, illustrative cases were found in five States. In a Georgia case the court held that the tenant was not required to remain in possession of the premises in order to prosecute a claim for damages. In Maryland, the tenant was found entitled to damages for the unexpired portion of his lease, even though it was terminated by mutual agreement between the owner and tenant, when no termination clause was included in the lease. A Michigan case held that the condemner must negotiate with the lessee before instituting condemnation proceedings, and in Pennsylvania the court ruled that an oral agreement to mine coal constituted a valid contract under which a claim for damages could be processed. Finally, in Arkansas, the court held that under the circumstances present, the sum of compensation to owner and lessee could exceed the value of the whole when not leased.

Georgia.—The City of Atlanta condemned a leasehold property of which it also happened to be the landlord, and the State appellate court refused to permit the city defenses it might have employed in its capacity as landlord since it elected to act as a condemner.

On April 1, 1953, the tenant, operating the premises as an optical business, was put on notice by the city of its intention to condemn and raze the building as part of its expressway construction. During the same month the city became the owner of the building, and therefore the tenant's landlord. For the next 16 months the tenant consulted and negotiated with the city's land agent regarding possible compensation and in an attempt to ascertain the approximate date he would have to vacate. Acting apparently on the advice or representations of the land agent and believing this eviction and the city's taking to be imminent, the tenant on August 1, 1954, ceased to pay rent to the city on the theory that the rent would be deducted from the award of compensation. On December 15 of the same year, the tenant received a letter from the city instructing him to vacate by the 31st of the month on connection with the proposed construction of the expressway. The tenant removed such property as was salvageable and turned the keys of the building over to the city.

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[22]Breithaupt v. State, 321 S.W. 2d 361, February 1959.

The city claimed that the tenant's actions in ceasing payment of rent and leaving (or abandoning, as the city put it) the premises constituted a mutual rescission of the lease. The court, in dismissing this claim, made two observations. In such a case, where an individual's property or business area is affected by proposed and imminent demolition, he need not remain in possession to preserve his right to compensation. The tenant's removal from the premises, therefore, did not operate as an abandonment of the lease. The court further observed that at no time were the tenant's dealings with the city concerned with the landlord-tenant relationship; all of the tenant's negotiations were with respect to the condemnation and ultimate compensation; the city never gave him notice, as landlord, that it considered the non-payment of rent to be a termination of the lease, but rather, consistently acted in all communications as a condemner. In light of this, the court held it reversible error that the lower court had heard the city's defenses based on its role as landlord.[23] The tenant was thus entitled to compensation and a new trial was ordered.

Maryland.—The State Roads Commission, on August 10, 1956, instituted condemnation proceedings to acquire for highway purposes some land on University Boulevard West in the City of Wheaton. The tract from which this portion was taken was improved by buildings, one rented for use as a grocery store by one Veirs, under an extension of a lease which was to expire on August 16, 1959, or later. Space was also rented to another for use as a barber shop. The commission estimated the value of the property taken at $2,100 and deposited that amount into the court.

In the subsequent trial the award was fixed at $14,600, apportioned as follows: $13,180 to the owners, $1,200 to Veirs, and $220 to the lessee of the barber shop. Only Veirs appealed from this judgment, contending that the trial court erred in giving two instructions (a) "that the total allowance to all of the defendants in this case cannot exceed the value of the land taken plus the consequential damages", (b) that Veirs' leasehold interest terminated as of October 31, 1957, the date as of which the lease was canceled by mutual consent, although it would have continued but for this cancellation at least until August 10, 1959, and possibly longer. Veirs and the owner of the land had come to an agreement to cancel the lease because the commission installed a curb after it started construction on the property taken, which cut off vehicular access to Veirs' store from the road in front of it. The area taken and the adjacent area in front of the store had been used largely as a parking lot for Veirs' customers. The denial of vehicular assess, he felt, made the property useless to him.

The court of Appeals of Maryland affirmed the judgment as to the total amount of damages to be paid by the commission, but ordered a new trial as to the apportionment of damages between the owner and Veirs. The court held that the first instruction complained of was correct; not so as to the second instruction. Contrary to Veris' contention, the court thought that the evidence did not show a complete taking of the leasehold interest. The measure of damages to the lessee, said the court, would be the difference in market value of the lessee's interest before and after taking. The market value of the tenant's lease after the taking may be affected by any of the terms of the lease and it is, of course, directly affected by the amount of rent that he still has to pay. However, the objection to the court's instruction that the lease terminated as of October 31, 1957, was a valid complaint. The court thought that the net effect of this instruction was to limit the time for which the jury might apportion damages to the lessee to the period from August 10, 1956, to October 31, 1957. On the date of the taking, this limitation did not exist, and ordinarily changes in the property occurring after the date of taking do not affect the amount of damages or compensation to which a party may have become entitled. This rule would not bar an agreement between the owner and the lessee as to their respective interests in the award, for example, in consideration of the cancellation of the lease and the release from the obligation to pay rent, a lessee may assign to the owner his claim for compensation covering the period between the date of cancellation and the date of termination as fixed by the terms of the lease.

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[23]House v. City of Atlanta, 106 S.E.2d 828, November 1958.

The court thought here, however, that the instruction of the lower court, limiting the extent of Veirs' recovery to a period less than that of the unexpired portion of his lease was erroneous, because it assumed that the cancellation of the lease of itself resulted in an assignment to the owners of Veirs' interest in the award for the period after the cancellation. The evidence did not show this and it did not necessarily follow. Hence the high court reversed and ordered a new trial only for a redetermination of the apportionment of the total damage allowed, the total amount of damages being affirmed as against the State Roads Commission [24]

Michigan.—This case dealt with the necessity to negotiate with a leaseholder as well as the fee holder. The State Highway Commissioner, in connection with the improvement of State Trunkline Highways US 12 and US 131 in the County of Kalamazoo, negotiated with the owner of a certain parcel and offered $68,000 for the entire premises, including the leasehold interest of one Brummit who operated a filling and service station business on part of the premises Brummit was not approached and was offered nothing by the commissioner, "presumably on the assumption that it was the coerced duty of the (lessor and lessee) on imminent peril of condemnation, to negotiate amongst themselves for the purpose of whacking up that which the commissioner had offered the lessors for all."

The Supreme Court of Michigan ruled that because of this the proceedings were invalid. The Attorney General sought to justify the practice of omitting negotiations with the lessee on grounds of convenience and need for summary acquisitive action, although he recognized that good faith negotiations by agreement is a condition precedent to valid condemnation proceedings. The statute in question was to the effect that when the highway commissioner shall be unable to agree with any person, "interested" included leasehold interests. It said that the lessee here was as much entitled to precedent and good faith negotiations toward acquisition of his interest as was the landowner, and that the commissioner was burdened with the duty of attempted good faith purchase of the leasehold as a condition of validity of any proceeding looking toward statutory acquisition of such leasehold.[25]

Pennsylvania.—The supreme court recently decided a case determining the rights of one not an owner and not clearly a lessee to compensation for the taking of his rights in land. The Pennsylvania Turnpike Commission, in connection with the proposed construction of the northeast extension of the turnpike condemned certain land located in Lackawanna County for a 200-ft right-of-way. To state as simply as possible the individual interests in this land, one Moffat was the owner as of the time of the taking. In 1946, before he was the actual owner but while he had from the then owner the contractual right to mine and remove the coal underneath the surface of the land, Moffat entered into an oral agreement with one Schuster, whereby Schuster was given the right to mine and remove the coal underneath for sale purposes, with rights reserved in Moffat to purchase the coal from Schuster at a stipulated price or to be paid a royalty for all coal removed. The area to be mined was limited and defined under the agreement and approximated 65 acres. (Such an arrangement for individuals to mine and remove coal from lands owned by larger coal companies is apparently typical and frequent in the hard coal fields.) By the agreement, Moffat was not to cancel the agreement before exhaustion of the coal except for good reason and cause.

Schuster began mining operations and expended thousands of dollars in connection with fulfilling this contract. At the time of the present condemnation, Schuster owned several buildings used in connection with mining operations. The coal was not directly under the surface of the land over which the turnpike established its right-of-way but underneath land immediately adjoining, and in order to reach and mine this coal, Schuster had driven a slope. As a result of the turnpike construction, certain buildings were torn down, others were moved to new locations outside the right-of-way, a new

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[24]Veirs v. State Roads Commission, 143 A.2d 613, July 1958.
[25]Lookholder v. Ziegler, 91 N.W.2d 834, September 1958.

road permitting ingress and egress to and from the mining operations was constructed and the entry to the slope had to be altered and its grade changed.

Schuster petitioned for a board of viewers, which was duly appointed, and which awarded damages in the amount of almost $48,000. The case went to trial at the request of the commission and resulted in a judgment of $67,000. The commission appealed, contending that Schuster did not have any property rights or interest in the land which was "taken" by the condemnation. Schuster relied upon an oral agreement to establish his property rights and interest.

Insofar as the tract of land in question was concerned, announced the high court, at the time of condemnation the ownership of the coal, the surface and the right of support was in Moffat. The commission argued that the agreement between Moffat and Schuster merely granted a license or a tenancy at will, under which Schuster was entitled only to notice to remove and not compensation. The court thought differently. It held that Schuster acquired by the agreement the right not only to mine the coal under the land but the right to the use of so much of the surface of the land as was necessary to the conduct of the mining operations. The court reasoned if Schuster was merely a licensee under the agreement, the expenditure of large sums of money in reliance on the agreement made the license irrevocable and was to be treated as a contract giving absolute rights, and protection in the enjoyment of those rights. By the same token, the oral agreement did not create a tenancy at will, for Moffat could not terminate the rights granted to Schuster unless and until the latter failed to perform his obligations in a proper and workmanlike manner, or the term ended. So, concluded the court, rights of Schuster were affected by this condemnation. Property rights were directly taken.[26]

Arkansas.—The supreme court allowed a tenant individual compensation based on the value of a lease in addition to awarding the owner damages for the total value of the property condemned, but struck down an award for expenses incurred in removing fixtures from the property.[27]

The highway commission condemned a portion of a lot for the reconstruction of US 67. Part of this portion had been leased by the tenant, White River Petroleum Company, for use as a service station. The lower court had awarded $16,000 to the owner as the value of the whole property and $4,800 to the tenant as the value of the lease (computed on the basis of 38 months remaining on the lease at $100 value per month over and above the rental value plus $1,000 for relocation or removal costs). The commission, on appeal, objected to the award for removal expenses and pleaded that it was axiomatic that the sum of the parts could not be greater than the whole and therefore any, award to the tenant should be deducted from the appraisal value of the property as a whole which had been awarded to the owner.

The court cited with approval an opinion by Justice Holmes to the effect that it is individuals, not property, who are compensated and therefore, the sum of leasehold and fee interests in a property can exceed the value of the whole when not leased. The court found that in view of the exceptional value of the lease—the gas station was located at a busy highway junction—the interests were legitimately considered separately, and affirmed the $3,800 portion of the award.

The court disallowed the $1,000 for removal expenses pointing out that one of the risks incurred by a tenant when he puts personal property on rented land is that ultimately he will have to move; the condemnation did no more than hasten the move. The court affirmed the lower court's award conditioned on the tenant's filling of a remittitur of the $1,000.

Removal Costs.—As a general rule, in the absence of a statute providing otherwise, no compensation is given for the cost of removing personal property from condemned

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[26]Schuster v. Pennsylvania Turnpike Commission, 149 A.2d 447, March 1959. See Memorandum 112, July 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 395.
[27]Arkansas State Highway Commission v. Fox, 322 S.W.2d 81, April 1959. (This case is also discussed under "Severance Damages.")

realty, except where personalty is attached to the realty in such a way as to be considered a fixture, or where the personalty used on the property bears such a degree of relationship with the realty as to be considered a trade fixture.

Two cases were decided during the year, one in Arizona and one in New York, which indicate the lengths that either the condemner or landowner will go to either apply or evade the general rule. In the Arizona case the State attempted to make use of a lease provision, to which it was not in privity, which treated certain buildings and other permanent improvements as personalty. In the New York case the leaseholder attempted to convince the court that the personal property it had deliberately left on condemned property had been appropriated by the State at the time the realty was taken. These two cases are discussed in more detail in the following.

Arizona.—In this case, the supreme court held that the State could not escape compensating a leaseholder for permanent structures attached to the realty by availing itself of a removal clause in the lease which treated the buildings as personalty.

The State condemned 1.23 acres of land for highway purposes, all of which acreage was included in the tenant's lease. In the condemnation suit, the owner was paid $10,000 as the value of the fee, independent of and excluding the value of the several permanent buildings and other improvements placed on the property by the tenant. The State claimed that it had no liability to the tenant because of a provision in the lease which stated that the tenant was to remove all improvements made by him from the permises at the expiration of the lease (which expired two days after the taking); a further provision removed from the lease any portions condemned for highway purposes. The State claimed, and the trial court held, that these provisions deprived the tenant of the improvements and left him no alternative but to remove and recoup his losses from the salvage and not from the State; that is, the lease required that they be considered removable personal property rather than permanent realty.

The supreme court, in reversing, held that these provisions were exclusively for the benefit of the landlord and tenant and were not available to the State. The inherent character of the improvements was realty, said the court, regardless of the agreement regarding removal, and justice required that the State should compensate the tenant for the fair value of the property.[28]

New York.—The Court of Claims rejected an argument attempting to persuade payment for the alleged taking of personal property belonging to the lessee of property taken by the State for the State Thruway System.

Bodnar Industries, Inc., leased the property on which it conducted a manufacturing business. As tenant, the corporation had the right, under the lease, to remove only "personal property not permanently affixed to the building." Certain items were removed, but others were left behind. Under the lease, such property was deemed abandoned, and thereupon belonged to the fee owner. The coporation claimed, however, that since the removables were personalty, it had the title thereto, and would have removed them except for the damage that would have been done to them in the process of removal, and the fact that little economic value would remain after removal. It claimed that since this had resulted from the condemnation, it had been deprived of its property and was entitled to compensation from the State.

The court in rejecting the argument stated that it was not supported by any statute or court decision. There was no evidence that the State had actually appropriated the items of personalty involved, or that it intended to do so. At most, the evidence indicated that the claimant simply left the items behind. The court stated also that case law went contrary to the argument, and cited a case saying that many removables were "necessarily more or less injured in the process of removal" without the owner being entitled to compensation therefor.[29]

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[28]Gilbert v. State, 338 P.2d 787, April 1959.
[29]Matter of New York, 192 N.Y. 295, 84 N.E. 1105, 1908.

The court concluded that the items left behind were abandoned, and dismissed the claim.[30]

Necessity for Taking

The determination of necessity for taking private property for public use is generally considered to be a legislative function. The legislature usually delegates this discretionary function to authorized State agencies. The courts will not ordinarily interfere with the exercise of this prerogative without a showing of fraud, collusion, or gross abuse of discretion on the part of the acquiring agency.

Outlined below is an important California decision, which was handed down during the year. The court's opinion draws a sharp distinction between the issues of necessity and public purpose, holding that once the public purpose is established, the issue of necessity will not be reviewed by the courts even though fraud, bad faith, or abuse of discretion are alleged.

California.—The landowner's property was located in a Los Angeles city block bounded on the east by Broadway and west by Olive Street. The property fronted on Broadway and extended west. Ninety-ninth Street ran from Olive east and dead-ended at the western border of the owner's property. When the State constructed the new Harbor freeway, which ran generally along Olive Street, 99th Street was blocked off, thus landlocking the 99th Street property between Olive and Broadway (Fig. 1). The

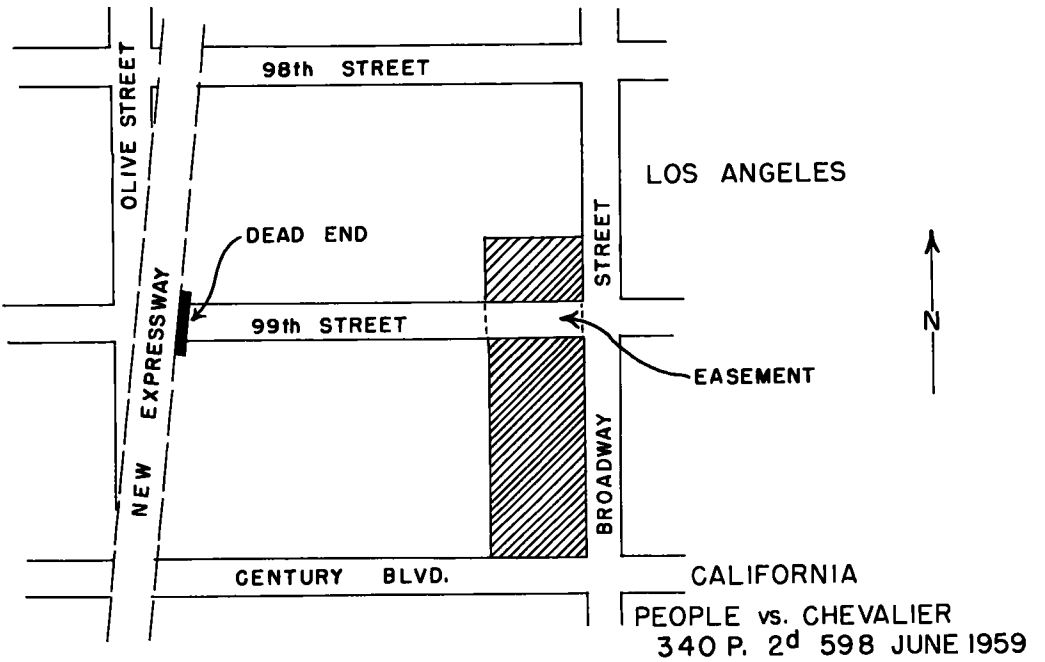

Figure 1.

State, in previous proceedings, had attempted to condemn an easement through the owner's property in order to cut 99th Street through to Broadway, but the owner prevented this by successfully claiming that the State's authority did not extend to such

[30]Bodnar Industries, Inc. v. State, 187 N.Y.S.2d 359, 1959.

an action. Subsequently, the City of Los Angeles brought the present action to condemn the easement.

Basic to the owner's appeal were his allegations that the city abused its discretion by failing to consider the feasibility of constructing a frontage road parallel to the freeway and that the city "acted in bad faith, fraudulently, arbitrarily, and negligently" insofar as it relied upon the State's findings rather than make an independent investigation regarding the public interest; that it conspired with the State to accomplish that which the State could not do for itself. The trial court noted that State law dictated a conclusive presumption in favor of the city, and so refused to hear evidence or argument on these allegations. From this ruling, the owner appealed.

The supreme court cited with approval various cases and authorities including the United States Supreme Court to the effect that eminent domain is an inherent attribute of sovereignty and in the absence of limitations such as might be provided for in the constitution, the question would be legislative or political, not judicial. The court noted that the only restrictions placed on this power in either the State or Federal Constitution were that the taking be for a public purpose and that just compensation be paid for the taking. It followed, therefore, and the court so held, that the question of necessity was purely political and not subject to judicial inquiry.

The court noted further that various cases could be cited which seemed to indicate an implied exception to the conclusive presumption in favor of the sovereign or city regarding the determination of necessity. The cases indicated that the determination of necessity should be reviewable when facts constituting fraud or abuse of discretion are pleaded. The court distinguished these cases by noting that they often confused the issues of necessity and public purpose. Once the determination of public purpose is established, said the court, the issue of necessity will not be reviewed by the courts even though fraud, bad faith, or abuse of discretion are alleged. The court also noted that the owners had considerable protection since, in any event, just compensation would be paid and, under the California statute, the conclusive presumption applied only to ordinances passed by a two-thirds vote.[31]

Immediate Possession

Authority to take immediate possession of property expedites construction of public improvements by the avoidance of delays from long and drawn out court proceedings solely for the determination of just compensation.

Twenty-four cases decided during the year were found to involve questions of quick-taking procedures. Twenty of these were decided in Georgia, apparently as a result of the highly contested and ultimately split decision of the Woodside case which redefined the meaning of the statutory word "taking." A Georgia condemning authority must now pay the preliminary award into court as a condition precedent to appealing an award to a jury trial. Cases from Arizona and Nevada held about the same thing, although the Arizona case emphasized a slightly different point in holding that the State could appeal the condemnation award even though it had taken possession and had paid the award into court. In brief, the distinction between the Georgia cases and the Arizona case was that in the former the State wanted to appeal without tying up highway funds by paying the preliminary award into court, and in the latter case the landowner alleged the State could not appeal because it had already paid the award and taken possession. The Mississippi court apparently take the opposite viewpoint, and, according to the latest decision, permits its State highway commission to appeal without paying the damages into court first. The Louisiana case upheld as constitutional the validity of its immediate possession law.

Georgia.—In March 1958, the supreme court held, in Woodside v. City of Atlanta, 103 S. E. 2d 108, that the "taking" of property for which compensation must be paid

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[31]People v. Chevalier, 340 P. 2d 598, June 1959. See Memorandum 115, October 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 404.

according to the constitution is not confined merely to a physical taking, but may also consist of an interference with rights of ownership, use, and enjoyment, or any other right incident to property, so that the mere institution of a condemnation proceeding and a determination of an award by a board of assessors deprived landowners of their right to the free use and enjoyment of their land, and would constitute in law a "taking." Consequently, at this point in the condemnation proceedings, tender of payment to the landowners or payment into court was a condition precedent to the condemner's right of appeal to a jury. The condemner could not refuse to pay the amount awarded by the assessors and at the same time insist upon its right to take the property.

In October 1959, the State Highway Department of Georgia, before the Court of Appeals of Georgia, in State Highway Department v. Wilson[32], attempted to show that the Woodside case, which was a divided court opinion, was not a binding precedent on either the supreme court or the court of appeals, since the decision was in conflict with an earlier supreme court full bench decision, Hurt v. City of Atlanta, 28 S.E. 65 (1897). The appeals court said that if it were a simple matter of conflicting opinions, the binding authority would be the earlier case and not Woodside. However, Woodside had ruled that the language in the Hurt case alleged to be in conflict was obiter dictum, that is, matter, not necessary to its opinion. The court of appeals said that it was not bound by obiter dictum, and the high court's decision that the former language was obiter dictum, although a decision by a divided court, was binding on the court of appeals. Other prior supreme court decisions of a full bench, alleged to be in conflict with the Woodside case were examined by the court and found to be distinguishable and hence of no mitigating effect on Woodside. The Woodside case "...is, therefore, not only binding on this court, but in our opinion is a sound construction of the constitutional provision in question designed to guarantee a substantial right to the sovereign citizens of this State in the ownership and enjoyment of their private property."

In another case before the court of appeals of the same day, State Highway Department v. Blalock[33], the court strictly followed the Woodside case and affirmed the Superior Court of Clayton County in dismissing an appeal by the State Highway Department from a board of assessors' award because the department did not first tender payment of the award to the landowner or pay the amount into the registry of the court. However, in this particular case the landowner had also appealed from the award of the assessors and the trial court allowed the landowner to dismiss the appeal without first obtaining the consent of the highway department as the opposite party. This dismissal, argued the highway department, was contrary to the provisions of code Sec. 6-503, that "No person shall be allowed to withdraw an appeal after it shall be entered, but by the consent of the adverse party." The court of appeals ruled that this provision did apply to condemnation cases and that it was error to dismiss the landowner's appeal without first obtaining the consent of the condemner.

Apparently there were many Georgia cases awaiting the outcome of the epochal Woodside case, because, besides the two discussed above, shortly thereafter at least 18 more reached the court of appeals on practically the same issues.[34]

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[32]106 S.E.2d 544, 1959 (See Memorandum 114, September 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 401.)

[33]106 S.E.2d 552, 1959 (See Memorandum 114, supra.)

[34]Fulton County v. Goodman, 107 S.E.2d 232; State Highway Department v. Haynie, 108 S.E.2d 107; State Highway Department v. Hobbs, 107 S.E.2d 260; State Highway Department v. Holland, 107 S.E.2d 577; State Highway Department v. Lumsden, 108 S.E.2d 142; State Highway Department v. Mederer, 107 S.E.2d 578; State Highway Department v. Murry, 107 S.E.2d 569; State Highway Department v. Parramore, 107 S.E.2d 585; State Highway Department v. Ponder, 107 S.E.2d 284; State Highway Department v. Raines, 107 S.E.2d 259; State Highway Department v. Raines, 107 S.E. 2d 578; State Highway Department v. Reinhardt, 107 S.E.2d 914; State Highway Department v. Royal, 107 S.E.2d 259; State Highway Department v. Temples, Same v. Patton, Same v. Whittle, 107 S.E.2d 274; State Highway Department v. Trustees of the Mount Lebanon Baptist Church, 107 S.E.2d 577; Towler v. State Highway Department, 111 S.E.2d 154, all 1959.

In all of them the courts based their decisions on the holdings of the Woodside case. Consequently, where applicable, they either affirmed the trial court's dismissal of the highway department's appeal from the assessor's award for failure of the department to tender payment to the landowner or payment of the amount of the award into court, or they did not allow a dismissal of the case where the other party had not previously consented to dismissal.

Arizona.—About seven miles from Benson, the State had condemned some property for purposes of highway construction. The State took possession and began construction under Arizona's "quick-taking" statute, under which the State could, at the time of filing for the condemnation, apply for immediate possession, and after a hearing on necessity and probable damages, and a deposit into court of double the probable damages, get full possession and use. Later, a trial was had and judgment entered awarding damages to the landowners. The State paid the full amount of this judgment into court and shortly thereafter filed its notice of appeal. Next the court allowed the landowners to take the money from the court in full satisfaction of the judgment. After this, the landowners made motion to dismiss the appeal.

The landowners claimed that the State waived its right to further appeal by voluntarily paying the judgment, taking possession and using the property. The code, however, allowed the condemner upon application to the court to remain in possession "until final conclusion of the litigation;" a landowner could accept the judgment money paid into court and thereby abandon all defenses to the action except as to the amount of damages. The State, therefore, claimed that it did not waive its right to appeal, since all the steps taken were in accordance with the statute.

The supreme court in a three to two decision ruled that the appeal was not waived. The court said that although the statutes did not explicitly set out the right of appeal in such cases, the statutes seemed to contemplate a right of appeal by the State and a right of appeal by the condemnee as to the amount of damages. The court pointed out that to interpret the statute so as to deny an appeal when the steps provided for were taken "would mean that whenever the State sought use of property before conclusion of an appeal, as provided for by the statute, the condemnee would gain a fixed right, not to 'just compensation', but if awarded, to excessive, unjust compensation—a result hardly consistent with the legislature's enactment and beyond the 'just compensation' which the constitution requires."

The dissent interpreted the statute differently, claiming that since it was adopted almost verbatim from California, the California interpretation should be applied, which was to the effect that in order to take possession of the property, the State must first accept the award of the jury and pay it into court for the benefit of the owner, and that as soon as it did so, it waived its right of appeal, a matter of the State's not having its cake and eating it too.[35]

Nevada.—The State's quick-taking statute was brought before the courts to test whether the State, as a condition to remaining in possession pending its appeal, must deposit in court the amount of the award.

The State through its highway department condemned land in Washoe County and after taking possession under an order for immediate occupancy, secured a decree of condemnation from the district court. Later, it appealed as to the amount of compensation, but the district court, upon motion of the landowners, ordered the State, pending its appeal, to deposit into court the amount of the condemnation award. Section 37.170 of the code required the condemner to deposit the amount of the judgment into court if it desired to take possession or remain in possession pending appeal. The State contended that this statute did not apply when the condemner was already in possession under an order of immediate occupancy, under Section 37.100 of the code. The

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[35]State v. Jay Six Cattle Company, 335 P.2d 799, February 1959. See Memorandum 114, September 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 401.

supreme court construed the statutes to mean that the condemner must deposit in court the amount of the judgment even though it is in possession under the "quick-taking" statute before judgment. "Although compensation need not first be made, but need only be secured (under the quick-taking statute, by executing a bond for double the amount of probable damages), payment should not be unduly delayed in those cases where the condemnee has already lost the possession and use of his property."

The State contended, as did the landowners in the Arizona case previously discussed, that the practical effect of taking possession and paying the deposit would be to deprive it of its right to appeal, according to the California rule. The court, however, said it would not follow the California construction of the statute, but the Arizona construction.[36]

Mississippi.—The State Highway Commission condemned 6.52 acres for right-of-way purposes in connection with construction of the new US 11. Testimony regarding the difference in value before and after taking ranged from $22,000 estimated by the commission appraisers, to the landowner's estimates of $124,000 and $157,465. The county court awarded $120,000 based partially on testimony as to business profits and property yield, and partially on various elements considered as separate items without relating them to the market value as a whole. These proofs were introduced over the commission's objection, and the commission appealed the award to the circuit court.

During the pendancy of this appeal, the commission, without paying the damages into court, entered into immediate possession and further, procured an injunction against the owner requiring him to remove his personal property from the condemned right-of-way within 30 days. The owner thereupon filed, as part of his answer in the circuit court, a motion to dismiss. The basis for this motion was two-fold: The owner claimed (a) the commission, by taking immediate possession without paying the damages, forfeited its right of appeal; and (b) by obtaining the injunction, it waived all errors committed at the trial level. Apparently the underlying basis for the motion was the constitutional provision requiring actual payment of compensation before possession may be taken.

On appeal, the circuit court denied this motion. In considering the commission's direct appeal, the court, holding that the errors complained of were prejudicial and the award excessive, remanded the case to the trial court with directions to reverse unless the owner accepted a remittitur of $18,000. The owner accepted this remittitur thus limiting the judgment to $102,000, from which judgment the commission appealed to the supreme court.

The supreme court, in affirming the circuit court's disposition of the owner's motion, applied its previous interpretation[37] of this constitutional provision, that is, that it does not apply to the State or its political subdivisions. The highway commission did not, therefore, have to pay the damages before entering into immediate possession. The high court also agreed with the circuit court that obtaining the injunction did not operate against the commission as a waiver of all errors. The court did, however, reverse the case on the basis that the excessive award was the result of the testimony erroneously admitted by the court as to business profits, etc., which "shocked the conscience" of the court.[38]

Louisiana.—A 1954 act of the Louisiana Legislature permits the expropriation and immediate possession by the State for highway purposes upon deposit of estimated adequate compensation for the taking in the registry of the court, at the same time preserving the property owner's subsequent right to contest in court the amount of compen-

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[36]State v. Second Judicial District Court, Washoe County, 337 P.2d 274, April 1959. See Memorandum 114, September 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 401.
[37]Mississippi State Highway Commission v. Buchanan, 165 So. 795, 1936.
[38]Mississippi State Highway Commission v. Rogers, 112 So.2d 250, May 1959. See Memorandum 116, November 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 408.

sation for the public purpose of the taking (LSA-R.S. 48:441-460). This was based on the 1948 constitutional amendment (Art. VI, Sec. 19.1):

> The Legislature shall have authority to authorize the taking of property for highway purposes by orders rendered ex parte in expropriation suits prior to judgment therein provided that provision be made for deposit before such taking with a court officer for the amount of appraisals of the property so taken and damages to which the owner thereof may be entitled, if any, which appraisals may be made in such manner as may be provided by law either before or after institution of suit, and need not be by judicially appointed appraiser.

The Supreme Court of Louisiana reversed judgments of the trial court enjoining the State Department of Highways from taking possession of land under the statute on the ground that the statute was unconstitutional. The landowner contended that the constitutional provision granted the legislature power to authorize only expropriation orders issued at the discretion of the trial court. The court ruled, however, that the legislative requirement that the trial court "shall issue an order" of expropriation upon the Department's compliance with the statute did not exceed the authority conferred upon the legislature by the amendment. The court further ruled that the statute did not violate other constitutional provisions of due process, prior compensation before a taking for a public purpose, and separation of powers between the judiciary and other branches of the government on the ground that these other provisions were adopted before the amendment under consideration. The earlier provisions, the court said, must yield to the subsequently enacted amendment to the extent that they are in conflict therewith. Moreover, the constitutional amendment would control to the extent that it conflicts with any general constitutional provision, since a special provision prevails in respect of its subject matter over general provisions in conflict therewith.

In answer to the landowner's contention that the statute in question violated the federal due process requirements, the court relied upon the United States Supreme Court decision of Bragg v. Weaver, 251 U.S. 57 (1919), upholding a similar State statute, wherein that court said:

> ...It is settled by the decisions of this court that where adequate provision is made for the certain payment of the compensation without unreasonable delay, the taking does not contravene due process of law in the sense of the Fourteenth Amendment merely because it precedes the ascertainment of what compensation is just.

The court further pointed out that Louisiana's act is closely patterned upon the Federal Declaration of Taking Act which had been upheld as against similar contentions that the taking without a prior opportunity to be heard offended due process.[39]

Set Off of General and Special Benefits

When part of a landowner's property is taken for a public improvement, States permit the public authority taking the land to give evidence if the remaining property will be benefited by the construction of the improvement. The public authority may set off or mitigate the amount of severance damages to the extent of these benefits. Most jurisdictions, however, make a distinction between general and special benefits, and preclude the setting off of the former. It is difficult to give a complete definition of the distinction between the two types of benefits. Generally, however, it can be said

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[39]State v. Macaluso, 106 So.2d 455, November 1958. See Memorandum 109, April 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 387.

that benefits which are peculiar to the estate of the landowner are special, and benefits which are common to the public are general.

Cases decided this year in Nebraska and North Carolina are two examples of how differently the State courts handle this problem. It should be noted that Nebraska apparently allows set off only for special benefits, and North Carolina allows it for both special and general benefits. The Nebraska court held, in effect, that in the instant case the alleged special benefits were actually general benefits. The North Carolina case ruled that special and general benefits could be set off only against damages to the remaining land.

Nebraska.—In Gosper County, State Highway No. 283 was to be improved by changing it from a graveled to a paved road, leveling some parts and straightening others. In connection therewith the State condemned 1.07 acres of farm land owned by the Phillips who abutted the highway on the east. The taking brought the highway closer to the farm buildings and included the landowners' old access road, which connected with the highway about 350 ft north of the buildings. To provide access, the State proposed to construct a new driveway which would extend from the highway directly to the location of the buildings on the farm.

On trial to determine damages, the State asked for an instruction to the jury on the subject of special benefits. This was refused by the trial court and on this ground the state appealed to the Supreme Court. The latter affirmed the lower court's refusal. The evidence was that all the owners of land abutting along the highway would enjoy identical benefits. One witness for the State testified that a paved highway would increase the value of the ajoining land on either side, and that he considered the land in question more valuable after the taking of the 1.07 acres because of the improved highway, but that this would help everyone on the highway. The court noted that the claimed benefits, either because of the improved highway or the new driveway, were not expressed at the trial in terms of money, so that there was no way the jury could have determined value of the alleged benefits. Another expert for the State testified that the proposed change in the driveway would make no difference in the value of the land.

The court quoted as follows from a former Nebraska case on the subject (Backer v. City of Sidney, 166 Neb. 492, 89 N.W.2d 592 (1958): "The most satisfactory distinction between general and special benefits is that general benefits are those which arise from the fulfillment of the public object which justified the taking, and special benefits are those which arise from the peculiar relation of the land in question to the public improvement." Here, said the court, there was no peculiar relation of the Phillips' land to the public improvement concerned either because of the changes made in the highway or the construction of the driveway from it to the buildings on the farm.[40]

North Carolina.—The State Highway Commission appropriated 15 acres of Horace and Mary Robinson's 76-acre tract for the relocation, including a "cloverleaf" interchange, of US 1. The taking bisected the Robinson tract, leaving 54.5 acres on one side and 6.5 on the other. Commissioners assessed the Robinsons' damages at $7,908, but upon appeal by the State Highway Commission to the superior court, judgment was reduced to $4,220.

The landowners appealed to the Supreme Court of North Carolina, claiming error on the part of the trial court in its instructions to the jury as to special and general benefits. The court stated the usual rule as to measure of damages, that is, the difference between the before and after value of the property. "The items going to make up this difference embrace compensation for the part taken and compensation for injury to the remaining portion, which is to be off-set under the terms of the controlling statute by any general and special benefits resulting to the landowner from the utilization of the property taken for a highway." The particular error assigned was in the following paragraph of the trial court's instruction:

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[40]Phillips v. State, 93 N.W.2d 635, December 1958. See Memorandum 111, June 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 392.

> If, however, you find that the fair market value of the entire tract of land is less after the taking than it was immediately before the taking, then to such a decrease in value you must give credit for any special or general benefit, under the rule that has already been explained to you, and subtract that from the difference that you arrive at as between the before and after value .... (emphasis by the court)

The court held that this instruction was prejudicial error and granted a new trial. The court said that the jury was instructed by the above quotation to first determine the difference between the before and after value and then subtract from the such difference the value of general and special benefits. This is not proper, said the court. The value of general and special benefits is not to be subtracted from the difference; the benefits, if any, are elements for consideration in determining the fair market value of what was left immediately after the taking.[41]

Public Hearings

Last year the Delaware high court emphasized the fact that public hearings were a Federal requirement in such situations as presented by the case in point, and held that the particular public hearing conducted met the requirements of the Federal act.

Delaware.—Some taxpayers in the City of Wilmington sought from the Court of Chancery of Delaware an injunction against the construction of a proposed freeway to the extent that it would bisect the city. The taxpayers owned real property in the vicinity of the proposed freeway. Their complaint was that the project would remove from the tax rolls property having an assessed value of almost $4,000,000, including homes, business establishments, churches, theatres, parking lots, a playground, and parklands, and that unless enjoined would adversely affect the life of the city.

They claimed that public hearings on the project held pursuant to the Federal-Aid Highway Act were not presided over by a member of the State highway department as, they alleged, was required by that act. They contended also that the route as finally approved was selected precipitately and without premeditation or a fair opportunity given to objectants to register their protests.

The State highway department denied improper action on its part in the selection of the route, and insisted that the required hearings were fairly conducted and met all legal requirements, and that the route finally selected was the result of several years of careful study by competent engineers and not the by-product of capricious or willful actions.

The court noted that any State highway department submitting a plan for a Federal-aid highway must certify to the Commissioner of Public Roads that it had held public hearings or afforded the opportunity for such hearings and considered the economic effects of the location of the proposed project. "The intent of these requirements is to give to every interested citizen the opportunity to be heard on any such proposed project, as well as the opportunity for a State highway department more fully to inform the public of the supposed advantages of such project." The court said the fact that a private citizen presided at such hearings did not prevent Federal approval of the project, and did not violate any rights of the landowners. Insofar as relief was sought against the State highway department, the taxpayers, while dissatisfied with the department's choice of a freeway route, could have no conceivable basis for objection based on alleged abuse by the department of constitutional guarantees of due process, freedom of assembly and the like. The matter of public hearings, the court said, was a Federal requirement and not a State requirement; there was no State law directing the State highway department to hold public hearings on any project to be built under its auspices.

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[41]Robinson v. State Highway Commission, 105 S.E. 2d 287, October 1958. See Memorandum 109, April 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 387.

The answer of the highway department was sustained as to this point and, based on this and other points, the department's motion for dismissal was granted.[42]

Reservation of Right-of-Way

In order to preclude the possibility of extensive development taking place on land to be acquired at a later date for planned highway improvements, thus increasing the already skyrocketing costs of right-of-way, several of the States have worked in close cooperation with local authorities to prevent the construction of costly improvements within the future right-of-way. A local planning authority, knowing that a State highway is planned for a particular location, for example, may take this proposed land use into consideration in reviewing subdivision plats, approval of which may be conditioned on reservation of sufficient space to accommodate the highway right-of-way. Requests for building permits may be reviewed with the proposed highway in mind, and the owner, when the situation is explained to him, persuaded to change his plans accordingly.

In the absence of statutory authority to reserve land for future highway improvements, however, persuasion is the keynote in such a program. This fact is illustrated by several court decisions handed down in the past year, all of which are subsequently discussed. In summary, an Ohio court held a city could be compelled to issue a building permit in spite of the likelihood of future condemnation of the land involved; in Kentucky a landowner was held entitled to the value of reasonable improvements made even after receiving notice of the proposed highway improvement; and a New York court held that the State could not be compelled to institute condemnation proceedings for land needed for a planned highway improvement, but noted that the municipality could be compelled to issue a building permit. On the other hand, a Maryland court, although declining to pass on the validity of the State's practice of informing local planning or zoning bodies of contemplated highway improvements, so that such improvements could be taken into account, seemed to indicate that such practices might be acceptable under certain circumstances.

Ohio.—In the City of Dayton, the Dille Laboratories Corporation sought a building permit for the erection of a building upon its premises within the city. The permit was denied on the ground that the property would probably be required in the relocation of US 25. It appeared that at the time of the application for the permit, the plan for the relocation had not been made final but that it was hoped final plans would be received shortly. Aside from any complications caused by this hope, the application seemed to be in proper order and the corporation sought mandamus to compel the issuance of the permit.

The Court of Appeals of Ohio for Montgomery County held that the city could not refuse the permit. The court noted the steps required for a condemnation: (1) a resolution by the city commission declaring its intent; (2) the giving of written notice thereof to the owner in the manner prescribed; (3) passage of an ordinance by the commission ordering the purchase at an agreed price, or (4) if the commission was unable to agree with the owner on the purchase price, the passage of an ordinance directing the appropriation to proceed; and (5) application by the city attorney to the proper court, followed by (6) subsequent procedures in accordance with general law. At the time of the application, only the first two steps had been followed. Consequently, held the court, the corporation was still the owner of the land and was entitled to use and improve its property in any lawful manner it might see fit. "Denial of a building permit for the sole reason that the city may later appropriate is an unauthorized present interference with relator's rights of ownership." The fact that "significant strides" had already been taken toward performance of the public project did not constitute an appropriation of the property, said the court.

The court recognized the difficulties confronting both parties. On the one hand the city had to deal with the other State and Federal agencies as well as with engineers and

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[42]Piekarski v. Smith, 147 A. 2d 176, December 1958. See Memorandum 111, June 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 392.

others, in completing its plans and embarking upon final action. On the other hand, the corporation could not be expected to refrain indefinitely from embarking upon its plans until others completed theirs. There were hazards on both sides, said the court, but such circumstances could not be allowed to affect the legal rights of the parties.[43]

Kentucky.—In an appeal from a condemnation proceeding, the Court of Appeals sustained an award of the trial court, holding that evidence of an owner's good faith in locating his house was admissible.

Proctor Morris and others acquired a tract of land on Williamsburg Street, Whitely City, in 1951. In the fall of that year, a surveying crew passed over its eastern corner, and it was generally understood that preparations were being made for a new highway. Three years later, Morris began planning his house. At his request, the highway department sent him a sketch of the proposed highway. Morris changed the position of his house from one near which the proposed highway might be to the extreme opposite side. A highway engineer checked the location of the house, allegedly stating it would be "all right." The house was then completed.

The State Highway Department argued, on appeal, that Morris should have seen to it that the house he intended to build was not in the path of the new highway, and that he waived any claim to damages by failing to take such action.

The Court of Appeals noted that a condemnation proceeding did not impose upon the condemner the obligation of taking property. Therefore, so long as a landowner acted in good faith, in an ordinarily prudent manner, he should not be deprived of the value of reasonable improvements made after the action was instituted. The inception of condemnation proceedings did not impose any legal restrictions on the land—the owner could sell it or be compensated for buildings or crops started with a knowledge of the situation. All landowners shared the uncertainty of probable condemnation. Property could be taken by eminent domain whenever it stood in the path of a public improvement.[44]

New York.—The Supreme Court of Nassau County, rendered a decision in May 1958 recognizing hardship on certain landowners whose property was threatened with condemnation but holding that they were not entitled to relief. In 1954, the Superintendent of Public Works was authorized by law to proceed with the construction of the "Wantagh Oyster Bay Expressway" and the "Long Island Expressway from Guinea Woods Road to the Suffolk County Line in the vicinity of Melville." Surveys and maps showing general routes of these roads were prepared and distrubuted, but no inclusive official maps of the entire route were thereafter filed; instead, the Department of Public Works proceeded to file smaller sectional maps and to acquire properties at various points along said routes, with no attempt at continuity. Some of the landowners' property lay within the routes shown on the preliminary maps, and it appeared certain that eventually some would be taken. None of their property, however, had been taken at the time of complaint.

These landowners contended—in a suit to compel the State to file official maps—that this practice caused great hardship in that finding a buyer who would pay a fair price under such circumstances was impossible, that the planning commission would not issue approval for development, that the municipalities in which the properties lay refused to issue building permits, that because of tax rates it was no longer profitable to use the property in question for farming, and that these landowners would have to continue to maintain their property and pay taxes until the State formally acquired the property—all this despite the fact that the properties of many owners similarly situated had already been taken. The State denied none of this.

The landowners argued that these events amounted to a de facto taking without compensation, and a denial of the equal protection of the laws, in violation of their consti-

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[43]State ex rel. Dille Laboratories Corp. v. Woditsch, 156 N.E.2d 164, July 1958. See Memorandum 112, July 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 395.

[44]Commonwealth v. Morris, 320 S.W.2d 309, January 1959. See Memorandum 115, October 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 404.

tutional rights. The State maintained, however, that as a sovereign it was under no legal duty, and could not be compelled, to exercise its power of eminent domain.

The court agreed with the State. It noted that thousands of separate and distinct operations take place before the construction of a road. Hence, the Department of Public Works could not reasonably be expected to wait until every detail of every section has been engineered before commencing work anywhere on a multi-sectioned project. Such delay in an urgently needed improvement, said the court, would greatly prejudice the public interest.

The court sympathized with the landowners as to the hardship and said that it would be of no comfort to assure them that the planning commission and municipalities could be compelled to issue building permits, because of the improbabilities of finding a purchaser or getting a fair price or, as a developer, securing mortgage money. The court thought it unfortunate that there was no present redress, but held that under the law and until these landowners were given the right to allege and prove such damages in a condemnation proceeding the courts were powerless to aid them.[45]

Maryland.—The Congressional School of Aeronautics, Inc., had several acres of land in Rockville, fronting on Route 240. In connection with the widening of that highway, the State Roads Commission sought to condemn 89,343 sq ft. After unsuccessful negotiations for the purchase and sale of the land, the matter was referred to the Board of Property Review of Montgomery County, which determined that the fair market value of the land was $1.25 a sq ft, or $111,688.75 for the land in question. The Commission appealed from this finding and instituted condemnation proceedings in the Circuit Court. The award granted there was $49,000, approximately $0.55 a sq ft. Unhappy with this, the school appealed to Maryland Court of Appeals, which ordered a new trial.

All of the land sought to be taken was zoned residential. This classification had been retained for a strip 100 ft wide measured from the centerline of the existing road. Next to this strip was another strip 200 ft wide which was zoned commercial, and beyond that the balance of the school's property was zoned light industrial. One of the Commission's witnesses testified that the strip zoned residential "was reserved for road widening," and another witness for the Commission gave similar, but less positive, testimony as to the reason for the reservation. The Commission's experts valued the land at approximately $1.09 per sq ft, if zoned commercially; two reduced their valuations by 50 percent because of the residential designation, and the other reduced his valuation by 60 percent. Experts for the school had higher evaluations, even considering that the property was zoned residential.

Several issues of interest were handled by the court. The first was whether the zoning of the strip in question as residential was invalid as amounting to a taking of property without payment of just compensation, a contention of the school. The court said that the general rule in other jurisdictions was that zoning cannot be used as a substitute for eminent domain proceedings so as to defeat the constitutional requirement for the paying of just compensation in the case of a taking of private property for public use by depressing values and so reducing the amount of damages to be paid. No Maryland case had ever decided that; Maryland cases had gone no further than holding that if a zoning ordinance permanently so restricts the use of property that it cannot be used for any reasonable purpose it goes beyond permissible regulation and must be regarded as a taking of property without compensation. The court said that the question raised here was the narrower one which had not yet been decided in Maryland, but that the instant case did not require its determination.

Evidence showed that the residential strip reservation was made by the county several years prior to the taking, but that about 15 months after the institution of this suit, the city rezoned as commerical that portion of the 100-ft strip previously zoned as resi-

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[45]Froehlich v. Johnson, 176 N.Y.S.2d 505, May 1958. See Memorandum 115, October 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 404.

dential which was not taken by the Commission in this proceeding. The Commission stated that it followed the practice of informing local planning or zoning bodies of contemplated highway improvements and the proposed routes thereof, in order that such anticipated improvements could be taken into account and the cost of the acquisition of land for highway use could be held down. The county and the Commission urged that such a program was necessary and proper if costs of land acquisition were not to soar to such heights as to be prohibitive and asked the court to pass upon the validity of this policy. The Commission also asserted that the school could not challenge the zoning classification in this condemnation proceeding.

The school sought an instruction that if the jury should find that the zoning authority restricted the zoning of the land taken to residential use in order that it might be acquired for highway use at a lower pcie, the jury should disregard this "restrictive zoning." This instruction was refused in the trial court.

The court noted that no official who was concerned with the matter of the original zoning was called to testify with regard thereto. The Maryland Code provision entitled "Zoning and Planning," the court acknowledged, recognized the close relationship between planning and zoning. It specified "adequate provisions for traffic" as one of the items to be considered in the formulation of a master plan. It conferred the power of eminent domain for street or highway purposes upon planning commissions established under the act. This, the court said, seems consonant with the rule elsewhere recognized that zoning cannot be used as a substitute for eminent domain so as to defeat the constitutional requirement for the payment of just compensation for private property taken for public use.

As to passing upon the validity of the policy outlined by the Commission, the court said that it would not, on the "scanty record before us."

> In the whole complex process of planning and zoning, including passing upon plans for new developments or subdivisions of one kind or another, there may be considerations affecting particular situations which would have a material bearing upon the applicability of the general rule that zoning cannot be used to depress values in order to make condemnation less costly. For example, if a property owner or developer seeks present reclassification of a tract in anticipation of the construction of a new or improved highway, it might well be that he would be quite willing either to agree to dedicate some of his land for use of the new highway or to assent to the retention of an existing classification of land in its expected path in the hope and for the purpose of inducing the proper public authorities definitely to locate the proposed new or widened highway on a part of his land for the obvious benefit and enhancement in value of the balance of this tract: Plainly, the owner would derive benefit rather than sustain loss in such circumstances. We cannot say, in vacuo, how far it might be permissible for public authorites to proceed along such lines.

The court made serveral pronouncements as to the effect to be given zoning ordinances, generally. It said that a reasonable probability of a zoning reclassification within a reasonable time may be taken into account in determining the market value of the property at the time of the taking. It noted that in some jurisdictions the probability of early rezoning can be taken into account in valuing the property to be taken upon a showing that the existing classification is such that the property cannot be used profitably and upon the presumption that, in such a situation, the zoning authorities will perform their duty to revise the classification. In Maryland, the court noted the status of property with regard to the existence or non-existence of zoning restrictions at the time of the taking might be considered by the jury, even though a change from no zoning to a restricted zoning classification was imminent and actually went into effect shortly after the taking.

Another question was whether testimony of a witness was admissible when he based his estimate on market value partly upon the limited time for which a prospective,

willing purchaser might be able to use the property because of the prospect of its being taken for the highway widening which gave rise to this suit. The court said that the rule in Maryland was that value so determined was improper. Evidence of value based upon the effect of taking involved in a pending condemnation suit is inadmissible, and this rule is an applicable to considerations which might tend to depress values as to those which might tend to increase them and should also extend to the effect of the prospect of the taking. "If the prospect of taking is to be used in gauging market value at the time of taking, we should get into something of a vicious circle." It was on the trial court's denial of the landowner's motion to strike the testimony of this witness that the court based its decision to reverse and remand.[46]

Right-of-Way Costs and Land Values

The United States Department of Agriculture publishes periodically, "Current Developments in the Farm Real Estate Market," wherein it gives, among other things, an analysis of the change in dollar value of farmland as based on index numbers of value per acre, including improvements. This information has proven helpful to right-of-way officials during the past decade, since any change in the dollar value of farmland has a direct effect upon the cost of right-of-way, and by observing these changes, certain trends in the cost of right-of-way can be predicted with a fair degree of accuracy.

According to the latest report from the Department of Agriculture, the total market value of farm real estate was estimated at $199.1 billion on March 1, 1960. The figure amounts to $4 billion higher than a year earlier. Moreover, the average value per acre advanced to $111.46 per acre, and the national index advanced to 173 (1947-49 = 100), new record highs.

There was a marked slower rate of increase, however, and the slowdown was most pronounced in the Corn Belt, Lake States and Northern Plains. Changes in the 4 months ended March 1, 1960, were largely nominal. After advancing 6 to 8 percent in each of the 3 previous years, values increased 3 percent in the 12 months ending the first of March. Although no State reported a decline in the latest 12-month period, increases were 2 percent or less in most of the Corn Belt, Lake States, and Northern Plains. Values increased more than the national average in most of the Mountain and Pacific States and in New England (See Fig. 2).

Although small, this latest increase raised the national average to 35 percent above the November 1953 level, the low point in the most recent upward swing.

According to this latest Department of Agriculture's publication, the predominant opinion of farm real estate reporters, as of March 1960, was that the trend indicated there probably would be little change or even a decline in prices for farm land in the next 6 months. The greatest shift in reporters' opinions since last October occurred in the Corn Belt, where about a third of the reporters thought market values would decline in the next 6 months. Elsewhere, opinions as to increases and decreases were more evenly divided, but most areas showed a smaller proportion than last fall of reporters who thought values would increase.

CONTROL OF HIGHWAY ACCESS

Broadly conceived, control of highway access involves the restriction or prohibition of access of motorists generally and restriction of access, air, light, and view of owners of adjacent property. Controlling such access is the basic principle of the modern expressway. It is the best answer so far to the problem of overcoming the enormous human and economic toll of motor vehicle accidents, traffic congestion with its annoying delays, and high operating costs—all of which are associated with conventional highways. Nevertheless, in addition to financial limitations imposed by this high cost highway the establishment of a controlled-access facility does not always

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[46]Congressional School of Aeronautics v. State Roads Commission, 146 A. 2d 558, November 1958. (See Memorandum 109, April 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 387.

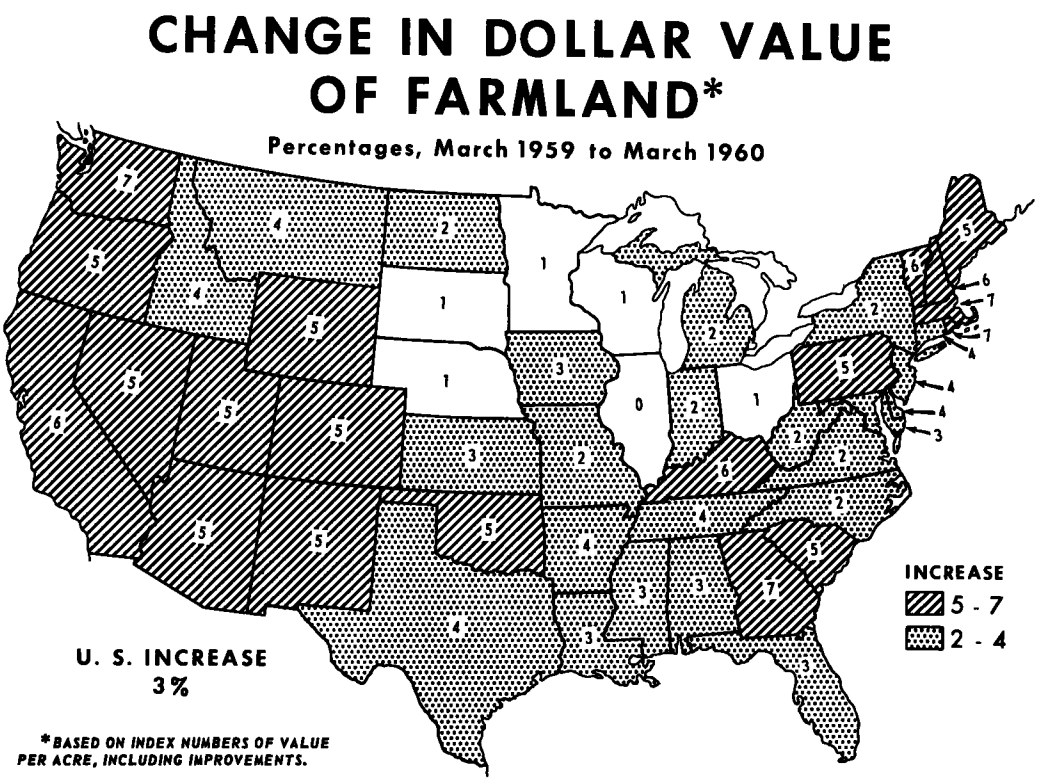

Figure 2.

come about easily. Clear evidence of this fact is the large number of cases that reach the high courts of the States each year involving issues of access control. During the past year, for example, at least 21 such cases were decided.

Access Rights to Existing Highway

Three decisions were handed down during the year involving the question of access rights to existing highways. Included was a United States Supreme Court holding, involving a Pennsylvania case wherein the constitutionality of the State's expressway law itself was questioned. The court declined to resolve this case on its merits, however, stating that the landowners had not exhausted their remedies in the State courts.

A New Hampshire case resolved in the negative the question as to whether the State's authority to control access gave it the absolute right to deny all access to a particular bridge approach as a safety measure to the traveling public. A Forida case upheld the State's authority to use its discretion in determining the need for conversion of an existing highway to a controlled-access facility.

Pennsylvania.—When the Secretary of Highways was about to designate a section of an existing State highway between downtown Pittsburgh and the Greater Pittsburgh Airport as a "limited access highway" under the State's limited access highway act of 1946, abutting landowners sought an injunction in the Federal courts, claiming that such action would deprive them of property without due process of law. They attacked Sec. 8 of the act which provided:

> The owner or owners of private property affected by the construction or designation of a limited-access highway...shall be entitled only to damages arising from an actual taking of property. The Commonwealth shall not be liable for consequential damages where no property is taken.

Although the limited access highways act itself had never been construed by the State courts, the landowners claimed that in the light of State courts' interpretation of other statutes (not indicated), this provision would be construed to mean that compensation was to be paid only if land were taken.

A three-judge U.S. District Court stayed the proceedings to permit the litigants to determine in the State courts their rights under the act. The landowners did take the case to the Pennsylvania courts, but the only thing decided was that their rights could be protected and secured in a proceeding before viewers, as provided for in the limited access highway act, that if the landowners were not satisfied with the result of a proceeding before viewers, they had a right of appeal to a court and jury and if still not satisfied, a right of appeal to the State appellate courts.

The landowners then went back to the U.S. District Court which found the statutue repugnant to the due process clause of the fourteenth amendment, stating that it believed the Pennsylvania Legislature did not intend to compensate abutting landowners "whose right of access to an existing highway was destroyed by the designation of that highway as a limited-access highway." Consequently, a permanent injunction was issued.

The Supreme Court of the United States reversed. It said, through Mr. Justice Stewart, that the district court should have declined to adjudicate the controversy. "Reflected among the concerns which have traditionally counseled a Federal court to stay its hand are the desirability of avoiding unseemly conflict between two sovereignties, the unnecessary impairment of State functions, and the premature determination of constitutional questions. All those factors are present here." The Court said that it must be assumed that the Pennsylvania courts meant what they said in stating that the landowners would be afforded a procedure through which the full measure of their rights under the Federal Constitution would be preserved. The Court said that in the State courts the case of each landowner would be considered separately, with whatever particular problems each case might present, that is, whether access would be completely deprived, and whether it would be preserved through frontage roads or through points of ingress and egress established under the statute.

> There is no reason to suppose that the Commonwealth of Pennsylvania will not accord full constitutional scope to the statutory phrase "actual taking of property." If, after all is said and done in the Pennsylvania courts, any of the plaintiffs beleive that the Commonwealth has deprived them of their property without due process of law, this Court will be here.

Mr. Justice Douglas dissented in part, believeing that the property owners were entitled to a declaratory judgment by the Federal courts, determining whether access to a highway is a property right, compensable under the fourteenth amendment.[47]

New Hampshire.—Owners of land abutting on the westerly approach to the Maine-New Hampshire Interstate Bridge at Portsmouth sought a judgment declaring the approach to the bridge a public highway, to which they had a right of access from their adjoining land. The Interstate Bridge Authority answered that it had the "absolute right" to so control access to the approaches as to make them reasonably safe, "even to the extent of denying all access."

The westerly approach was owned by the authority and extended from US 1 in Portsmouth to the bridge. The land involved abutted the southerly side of the approach, which consisted of two eastbound lanes separated by a grass strip from two westbound lanes. The southerly abuttment bordered closely upon the edge of the traveled way of the approach and tended to obstruct the view of the land, which had a frontage of 146 ft on the highway, commencing about 200 ft east of the abutment.

The owners had acquired title to the property from the city and the quitclaim deed

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[47]Martin v. Creasy, 360 U.S. 219, 1959 (See Memorandum 112, July 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 395.

made no mention of access rights. At that time the northerly side of the tract was fenced off from the approach road by a 7 ft link fence. Subsequently, on December 14, 1956, the owners applied to the authority for access to and from the bridge approach in order to operate a restaurant on the premises. The application was denied on the ground that it would create a traffic hazard to the traveling public using the approach.

The trial court finding that the westerly approach was a public highway and that the proposed entrance and exit to the property would present a dangerous additional hazard to the traveling public using the eastbound lands of the westerly approach to the bridge, dismissed the petition. The owners excepted and these exceptions were transferred to the Supreme Court of New Hampshire, where the lower court decision was revised.

The high court based its decision on the ground that the exclusion of the owners' evidence concerning traffic conditions and existing hazards which resulted in a dismissal of the petition without consideration of the issue of over-all reasonableness of proposed access in light of all aspects of the situation was error.

The approach, unlike more recently constructed toll roads in the vicinity, was not a limited-access highway. Moreover, the court indicated in its opinion that additional hazards were something to be expected, for, it said, the greater the amount of business transacted in a given locality the greater are the dangers which the public must necessarily encounter, and greater are the landowner's needs.

As an additional reason for its holding, the court said that according to prior decisions, such an approach to a bridge was considered in New Hampshire to be a public highway, and therefore the landowners were entitled to a reasonable access to the approach unless these rights were transferred to or condemned by the authority when the premises were owned by the City of Portsmouth. However, no evidence was offered of any conveyance from the city to the authority, and the court therefore concluded that the landowners acquired the right of access previously owned by their grantor, the city, and that they now had such right, subject to the power of the authority to regulate the same to the extent permitted by law.[48]

Florida.—In Dade County, the turnpike authority widened State Road 826 and converted it to a limited-access facility. The owner and lessee of certain lots along this road operated twin drive-in theaters and claimed among other things that the turnpike authority had eliminated their right of direct ingress and egress, resulting in the destruction of their business operation on that site. Among other things, they asked for a restoration of direct access. The circuit court found in favor of the landowner and the turnpike authority appealed.

As to the access questions, the landowners contended, first that the conversion of the road into a limited-access facility constituted a use inconsistent with the former use and amounted to an abandonment of the public easement originally granted by predecessors in title, thereby effecting a reversion. The District Court of Appeal, Third District, reversed the lower court's ruling for the landowner on this issue, It said that under the general authority granted to the State Road Department to provide for an adequate road system, the department was specifically authorized to establish limited-access facilities in such areas as the needs might require. Public safety, the court said, is a major factor in determining the nature of a road facility. The governmental agency, under the police power, had the authority to exercise its descretion when conditions required. The court held that the fact that a highway subsequently provides limited access to adjacent property does not constitute a diversion from the public purpose required by the dedication of the easement or the right-of-way deed.

On the question of denying direct access, the appeals court said that the lower court was in error for enjoining the authority from denying direct access to the property. The tunpike authority contended that suitable provision had been made by the use of "secondary roads" which would provide indirect access to the theaters. The court said that private landowners having property abutting on the public ways had no vested right of ingress and egress and were bound by public necessity. Quoting the State's

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[48]Webb v. Maine-New Hampshire Interstate Br. Auth., 152 A.2d 521, 1959.

Supreme Court in Weir v. Palm Beach, 85 So. 2d 865 (1956), the court said: "If the improvement for the benefit of the public interferes with the pre-existing means of ingress and egress and view enjoyed by the individual property owner, without an actual physical invasion of the land of the property owner, then again we have a situation where the individual right is subordinate to the public good and any alleged damage suffered is damnum absque injuria."[49]

Access Rights to New Highways

Although the high courts of at least seven States have held that access rights on new highways are not compensable, the contrary view was taken by the Alabama and Kansas State Supreme Courts during the year. A strong dissent was filed in the Kansas case, the dissenting judge declaring that the result was unsound and unsupported by the majority rule in the United States.

In a New Hampshire case involving a new controlled-access highway, the court upheld the authority of the Commissioner of Public Works and Highways to so regulate, restrict, or prohibit access as to best serve the traffic for which the facility was intended.

Alabama.—The supreme court held, in a case involving alleged impairment of access, that where a new controlled-access highway was constructed on an owner's property, thereby closing a pre-existing road and causing circuity of travel to the nearest town, such injury should be reflected in the diminished value of the portion not taken. Effectively, this rule permitted compensation based on the difference in value before and after taking despite the objection that such impairment was not compensable.

The owner had an 80-acre farm in Blount County, Alabama. Two roads crossing the property indirectly connected with old US 31, which led north to the town of Hanceville; the farm did not abut on this highway, consequently the access was "indirect". The county condemned 8.33 acres of the farm's eastern boundary to construct a controlled-access highway which replaced highway 31. In construction of the new highway one of the two roads running through the farm was closed off. The owner sought damages to the remaining portion of the farm based on the fact that the new highway added 3½ miles to the distance from the farm to Hanceville, via the second interior road, causing inconvenience and thereby diminishing the value of the farm (Fig. 3).

The county alleged that section 23 of the State constitution, which pertains to eminent domain, limited compensation for loss of access to cases where the property taken actually abutted the highway prior to the taking. The lower court, over the county's objection, instructed the jury that it should consider the impairment of access in its award of compensation for damage done to the remainder; the proper test would be the difference in value of the property before and after taking.

The high court ignored the county's claim and limited its discussion to the depreciating effect which the impairment had on the value of the remaining farmland. In quoting from prior cases, the court said:

> The final inquiry is the difference between the value of the tract before and after the completion of the project. This will include consideration of all those circumstances which depreciate its value as a direct result of the works. (Stovall v. Jasper, 118 So. 467, 1928). Certainly this is so if it affects the ingress and egress to the useful portions of the property from the highway. (Hooper v. Savannah, 69 Ala. 529, 1880).

In concluding, the court held that since the remaining portion was made less accessible, it would follow that this rendered it less valuable—a circumstance, therefore, worthy of the jury's consideration.[50]

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[49]Florida State Turnpike Authority v. Anhoco Corp., 107 So. 2d 51 December 1958. See Memorandum 114, September 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 401.

[50]Blount County v. Campbell, 109 So. 2d 678, February 1959. See Memorandum 113, August 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 396.

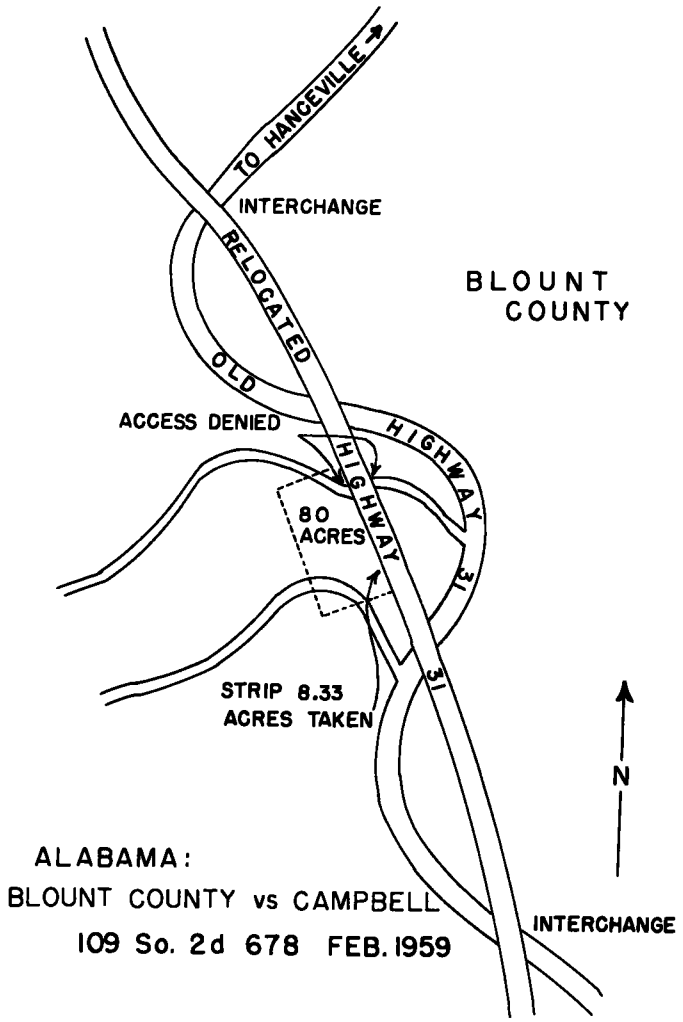

Figure 3.

Kansas.—In a recent decision, the supreme court settled the question of what evidence is competent and relevant to the measure of damages when property is severed and taken for a controlled access road on a new location by distinguishing between what it termed an "abstract principle of law" and the realities of the before and after market value test for severance damages.

The landowners owned a residence and a motel on 6.82 acres of land fronting on the old US 24. The State highway commission condemned the back, or north, 4.32 acres for the relocation of the highway, which new highway was to have controlled access (Fig. 4). The old road was to remain in service; consequently, access to it from the home or motel was not affected. The evidence of damage claimed was based on (a) the taking of virtually the entire backyard of the home; (b) the loss and damage to the motel as a business enterprise due to the rerouting of the bulk of the traffic from the old road in front to the new road in back, access to which was not provided from the owner's property; and (c) the resulting circuity of travel and access both to the motel and the residence, causing considerable depreciation in the market value of this remaining property. With reference to this last claim, it was noted that access to the new highway was only possible at points 600 ft east and 1½ miles west of the property and although

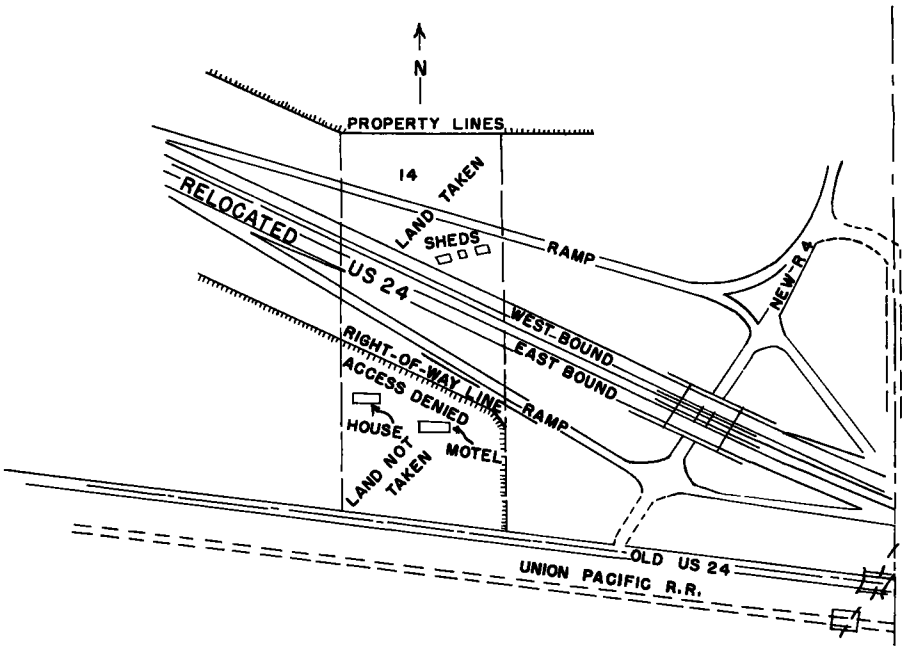

Figure 4.

at one point on the new highway the top of the motel could be seen, it could not be seen from either exit. Further, damage was claimed for the increased noise of traffic and the unsightliness of the resulting changes in grade.

All issues on appeal turned on proper measure of damages. The commission's experts estimated the difference in value before and after taking at figures ranging from $4,961 to $6,250, while the owner's estimates ranged from $20,500 to $25,000. The jury awarded the owners $16,629 and the commission appealed, assigning as error the court's instruction number 10 to the jury and also protested the admission of the owner's expert testimony as being based on erroneous and illegal tests. Instruction number 10 read:

> You are instructed that where, for the purpose of establishing, widening or improving a public highway, a strip of land is taken from a tract and the owner's right of access from a public highway is taken, the owner is entitled to compensation for injury to and depreciation, if any, of the remainder of the tract resulting from the appropriation of the land rights of access in question.

The high court said, in support of the commission's objection to this instruction, that an abutting property owner has a property right of access, known as an "easement appurtenant" or "easement access", in existing streets and highways which is compensable under the exercise of eminent domain. Where, on the other hand, a new highway is constructed, and free access is denied, such denial of access is not by eminent domain but rather by an exercise of the sovereign police power, and therefore compensation is not required. Such was the case here. The court recognized that as a general rule, where existing access is not impaired by construction of the new road, denial of access to the new road would not be compensable. Further, the court observed that as a general rule an owner abutting a highway has no vested property right in the traffic traveling thereon and therefore loss of business or anticipated profits and reproduction

traveling thereon and therefore loss of business or anticipated profits and reproduction costs are not legal evidence of the market value of the property.

The court concluded, however, that the admission of the evidence complained of was not reversible error. On the contrary, the court opined, correct as the above statements of the law were, they were, nonetheless, no more than "abstract principles of law." The court held that the ultimate test in measuring severance damages was the difference in market value between the whole property before taking and the severed portion after, the latter based on the price a willing seller would be able to obtain from a willing buyer. The court ruled that although impairment of access, loss of business, and circuity of travel could not form independent bases for assessing damage, taken together, it was legitimate for conscientious appraisers and the jury, in determining value, to place in consideration all those "elements which an owner or prospective purchaser could reasonably urge as affecting" the property's fair market price. The award was, therefore, affirmed.

There was a strong dissent which argued that, in effect, the owner was permitted to recover indirectly that which he could not recover directly. Since underlying the decision was the fact that property was actually taken, said the dissenting justice, the result was that while other property owners along the old road, similarly affected, but no part of whose property was needed for the new road, would be out of luck, this owner was compensated. The dissent concluded that the result was unsound and unsupported by the majority rule in the United States.[51]

New Hampshire.—In connection with the construction of a section of Route 28, extending for approximately two miles in a southerly direction from the Manchester-Londonderry town line in the Town of Londonderry, the Commissioner of Public Works and Highways took land from Fortin and Merrill for a controlled-access highway. In each case the highway divided the land. Access on the west side of the highway was completely denied, but on the east side, three points of access were granted. One action brought by the landowners was to enjoin the commissioner from interfering with their rights of access, air, light and view (another action for the assessment of damages was at the time of this report pending in the Rockingham County Superior Court).

The commissioner filed a motion to dismiss on the grounds that the action was against the State without its consent. The case eventually reached the State Supreme Court. The landowners contended that their suit was not meant to interfere with the official discretion of the commissioner but rested upon the charge of abuse of power, that the acts of the commissioner were arbitrary, unreasonable and capricious and beyond his authority. If this were true, said the court, the acts were not those of the State. However, the court noted that the limited-access statute gave the commissioner authority "to so design any limited access facility and to so regulate, restrict, or prohibit access as to best serve the traffic for which such facility is intended." In the face of this, said the court, the landowners would have to allege facts which if proved would establish that the commissioner abused the discretion vested in him by statute. Merely alleging that the access granted was inadequate and constituted a great hardship was not enough.[52]

Frontage Roads

Court decisions in this area of control of access law fall into no fixed pattern and appear to be determined almost exclusively on the basis of circumstances present in a particular case, rather than on any fixed principles of law. More time is needed before the courts will have worked out such clear-cut principles as to the rights of abutting owners in this field of highway law.

None of the court decisions involving frontage roads handed down during the past

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[51]Riddle v. State Highway Commission of Kansas, 339 P. 2d 301, May 1959. See Memorandum 113, August 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 396.

[52]Fortin v. Morton, 147 A. 2d 644, December 1958. See Memorandum 111, July 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 392.

year gave a definitive answer as to whether a landowner is entitled to compensation for impairment of access when given access by means of frontage roads rather than directly to the main traveled way, of if such facilities may in effect mitigate damages. In an Indiana case, the court more or less ignored what was referred to as a dead-end driveway by which the owner might reach the main highway directly, which the owner contended was not adequate to serve the property, holding that the landowner's right of access was a property right which might not be taken from him without compensation.

A Georgia court upheld the trial court's refusal to instruct the jury as to the frontage road being provided, holding that if this instruction were given, the judge would also have to charge all of the law on the project and instruct the jury that the landowner's right to use the frontage road was not a permanent vested right, since the highway department had authority to alter or vacate such road at its pleasure. An Arizona case held that the frontage road provided would act to mitigate damages which loss of access due to a change in grade would cause.[53] Finally, although not directly in point, a Washington decision indicated that frontage roads would act to mitigate damages which loss of direct access would cause.

Another aspect of the frontage road problem was decided in New Hampshire when the supreme court held that the Commissioner of Public Works and Highways could not be compelled to construct a frontage road to provide access for certain landowners to the Spaulding Turnpike.

Indiana.—This case tested the right of abutting landowners to sue the State for an alleged loss of access to a highway resulting from its relocation and conversion to a limited-access facility. There was no physical taking of the landowner's property, and although the narrow issue of the case was whether the circuit court had jurisdiction to hear the suit, the case is of more than ordinary interest because of the court's pronouncements on the landowners' right of access in the particular situation.

The property in question had a total western frontage of 606.25 ft on Madison Avenue (US 31) in Indianapolis; its southern boundary bordered Caven Street for 185.7 ft. A new limited-access expressway was being constructed 50 to 60 ft west of the present Madison Avenue, and 13 to 19 ft below the present grade. With the completion of the new expressway, access to the property on Madison Avenue was to be eliminated. To provide access, the Highway Department proposed to leave part of the old Madison Avenue, which would constitute a "dead-end driveway" 16 to 30 ft wide along the west side of the property, proceeding southerly to Caven Street where traffic proceeded easterly (Fig. 5).

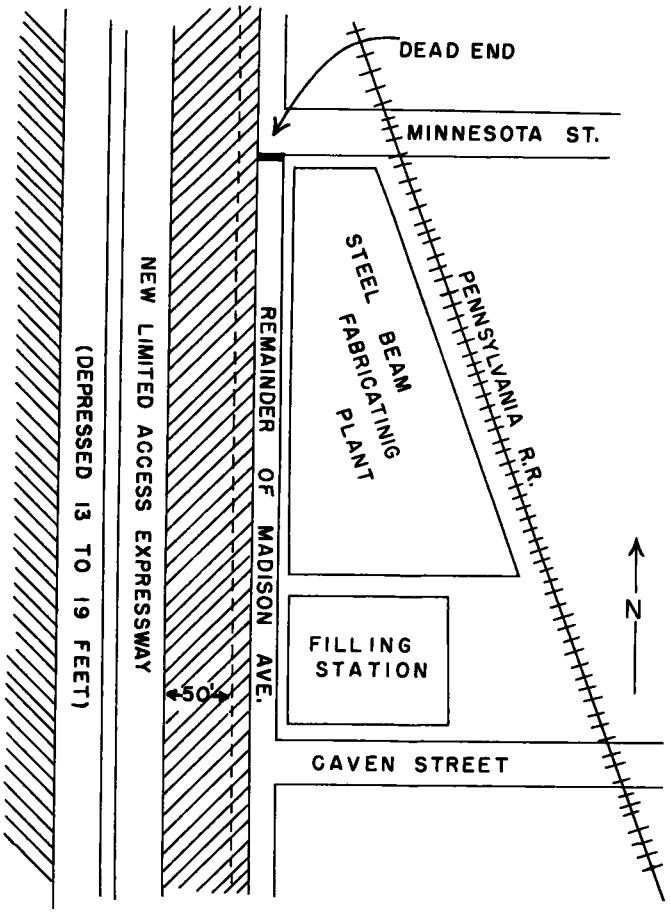
It was contended by the landowners that the resulting access would not be adequate to transport the steel beams fabricated at a plant on the norther portion of the property, and that the only access to said property for either pedestrian or vehicular traffic would require a circuitous route of approximately one and one-half miles more than the old route which utilized access to Madison Avenue. The landowners brought suit complaining that the proposed construction was an unlawful taking of land and rights of access to and from Madison Avenue; they asked the court for the appointment of appraisers for the assessment of damages, relying on two statutes to support the action they took—the Eminent Domain Act of 1905 and the Limited Access Statute of 1945. The former provides (Acts 1905, ch. 48, sec. 11):

> Any person having an interest in any land which has heretofore been or may hereafter be taken for any public use without having first been appropriated under this or any prior law may proceed to have his damages assessed under this act, substantially in the manner herein provided.

[53]This decision was reversed on rehearing.

The latter provides (Acts 1945, ch. 245, sec. 5):

> For the purposes of this act, such authorities of the state, counties, cities, or towns, may acquire private or public property and property rights to limited access facilities and service roads, including rights of access, air, view, and light, by gift, devise, purchase or condemnation in the same manner as is now or hereafter may be provided by law to acquire such property or property rights for the laying out, widening or improvement of highways and streets within their respective jurisdictions.
> (Emphasis by the Court.)



INDIANA:
STATE vs MARION CIRCUIT COURT
153 N.E. 2d 327. 1958

Figure 5.

The State contended that the Eminent Domain Act applied only where actual property was taken and not to consequential damages resulting from a lawful change in the method of use of the property taken without restriction in the original grant. With this contention, however, it asked only that the action be dismissed for want of jurisdiction of the court over the State, for want of jurisdiction over the subject matter, and for want of power to grant the relief sought.

The Supreme Court of Indiana affirmed the lower court's overruling of this motion to dismiss. It noted that the cases cited by the State as authority for its proposition did not involve a denial of abutting landowners access rights, or a change in the use of existing highways. The court reasoned that if rights of access are property or property rights which the State may acquire by condemnation as above specified, then it would not legally follow that the acquisition of such rights of access does not constitute a taking of property, but only a noncompensable consequential injury. The court reiterated what had been decided by former State decisions to the effect that the owners' right of ingress and egress to a public highway is a property right which may not be taken from him without compensation.[54] The court said that the concept of sovereign immunity of the State from suit "is not so inherently sacred as to prevail in the face of statutes giving the property owner a remedy when his right of access thereto is taken for a public use." The court ruled, therefore, that the circuit court did have jurisdiction. The court said that since the action was brought to test solely the lower court's jurisdiction it was inappropriate to discuss questions of substantive law governing an abutting owner's right to damages or other relief for loss of access because of a limited access highway or street.[55]

Georgia.—The State highway department instituted proceedings to condemn property for the purposes of constructing a limited-access highway in conjunction with the State highway system. The defendant landowner appealed to a jury which returned a verdict in the amount of $15,000 for the land taken and $5,000 consequential damages. The State Highway Department filed a motion for a new trial, which was denied, and it appealed to the Court of Appeals of Georgia, which affirmed.

The main ground asserted by the Department in asking for a new trial was that the trial judge erred in failing to instruct the jury as to a provision of the Code which defined a local service road as "any road or street, whether existing at the time of the designation of a limited-access highway or thereafter established, which serves the owner or occupant of any land or improvements abutting a limited-access highway and which gives a means of ingress to and egress from any such lands or improvements." The Department claimed that this was error even though the Department had not requested the charge, because the jury had been left with the impression, after the judge's instructions on the nature of a limited-access highway, that as a result of the construction the landowner's right of ingress and egress to his property would be destroyed and therefore returned a larger sum for consequential damages than was warranted.

The court noted that there was uncontradicted testimony that the landowner's access would not be destroyed by the construction of the limited-access highway, and that the jury should not have been confused on this point. The court thought that the judge covered the material issues in the case in his instructions and if the Department desired further instructions it should have so requested. The court further said that if the judge had charged the code provision he would have been required to go further and charge all the law on the subject and instruct the jury that the landowner's right to use the frontage road was not a permanent vested right, but was defeasible in that the De-

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[54]See Huff v. Indiana State Highway Commission, 149 N.E.2d 299 (1958), included in HRB Correlation Service Memorandum No. 103, Item 1, September 1958 of the Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Department of Economics, Finance and Administration.

[55]State v. Marion Circuit Court, 153 N.E.2d 327, October 1958. See Memorandum 108, March 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 385.

partment had the power and authority to alter or vacate the local frontage road at its pleasure.[56]

Arizona.—The State high court made a ruling, in the form of binding directions for retrial, which is at once interesting and worthy of scrutiny.[57] The ruling, in brief, was that the trial court must not consider loss of direct access to a pre-existing highway caused by a change in grade when awarding severance damages for the taking of abutting property to be used in constructing a frontage road.

The landowners operated a motel on property abutting the Tuscon-Benson Highway. Prior to the condemnation they had direct and unlimited access to the road. The State, in its efforts to convert the highway to a controlled access facility, condemned a 54-ft strip (0.124 acre) of the landowner's property in order to construct a frontage road. In addition, it proposed to elevate the grade of the existing highway some 20 ft above the frontage road as it passed the motel property, and to separate the highway from the frontage road both by an embankment and a barrier fence.

The frontage road was to be one-way, westbound, and would approach the highway 170 ft beyond the property by means of a ramp. To approach the motel from the highway, a westbound traveler would leave the highway by a ramp approximately 1,400 ft east of the property. Eastbound travelers would have to make use of appropriate underpasses and ramps, as would the owners should they desire to leave their property and travel east (Fig. 6).

The lower court awarded $18,500 damages for the property taken and $10,750 for severance damages which latter sum was based substantially on the theory that the consequent impairment of access was compensable. The State appealed, claiming error in awarding the severance damages since the frontage road provided equivalent access, and any impairment of access caused by the change of grade was not compensable.

The court acknowledged that the landowner's access had been impaired but held that such damage was not compensable when caused by a change of grade. The State's action in changing the grade was analogous to removing all contiguity to the owner's land by changing the location of the road. Such action, said the court, had been held universally to be a non-compensable exercise of the police power.

The court reasoned further that since the owner's direct access was already impaired by the State's police power action, the taking for a frontage road could not be considered as an impairment of access but, on the contrary, it must be considered as an aid to access. The court, therefore, instructed the lower court to retry the issue of severance damages basing its award on the difference in market value of the remaining land before and after taking, but omitting from consideration the non-compensable loss of direct access caused by the changed elevation of the new highway.[58]

Washington.—This condemnation suit was connected with the widening of State Highway 18 and the construction of frontage roads thereon. Part of the land in question was also taken for purposes of an interchange, referred to as ramps, running at right angles to the main highway and connecting with the frontage roads. At the trial the State introduced evidence, through a Department of Highways engineer, as to its construction plans and a location map showing the tracts in question along with the proposed highway extension, frontage roads, and interchange to be built thereon. The engineer testified that there would be no limitations on access between the interchange ramps and the west boundaries of the property. The State's counsel stipulated, as is the custom in such cases, that the State would be bound to construct the highway in accordance with the construction plans that it had placed in evidence.

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[56]State Highway Department v. Zimmerman, 104 S.E.2d 702, July 1958. See Memorandum 107, February 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 380.

[57]This decision was reversed on rehearing in April 1960 (State v. Thelberg, 28 L.W. 2511).

[58]State v. Thelberg, 344 P.2d 1015, October 1959. See Memorandum 116, November 1959, Committe of Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 408. As previously mentioned, this decision was reversed on rehearing (State v. Thelberg, 28 L.W. 2511, April 1960).

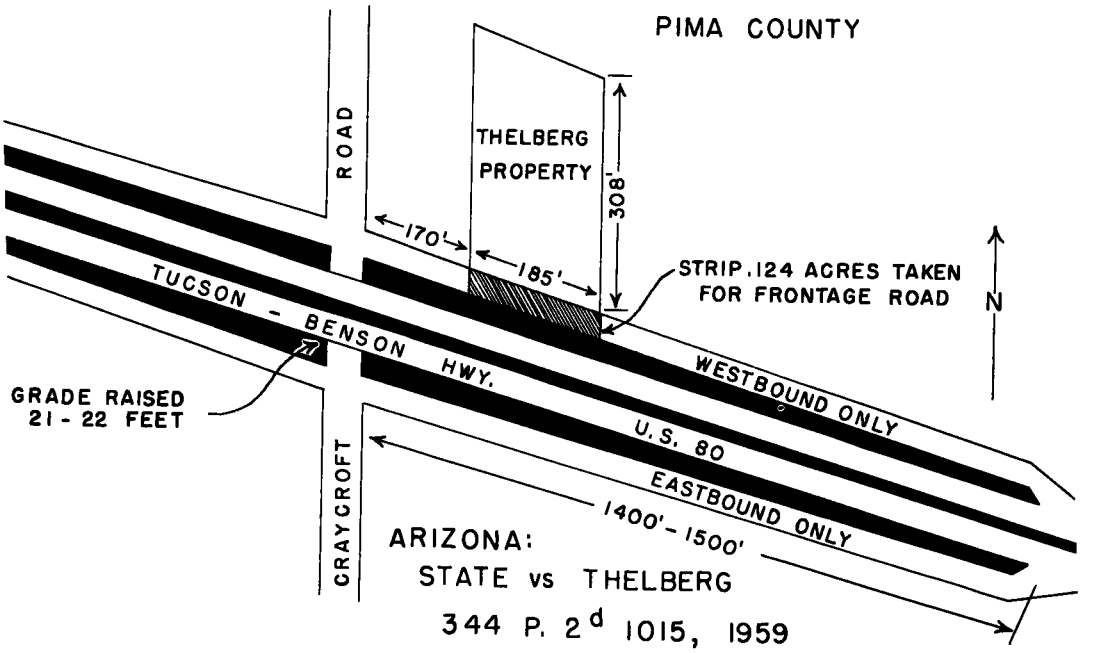

Figure 6.

The State argued that the benefits to the property would offset in all or in part any loss in value caused by the encroachment proposed in the construction of the highway. On the basis of this evidence, appraisers testified that access granted to the interchange points would benefit the land in question by opening up portions thereof to residential development. On the basis of all the testimony the jury did not include in its award any damages to this tract.

Two weeks later, in another condemnation trial involving another parcel of land, but included in the same project and shown on the same maps, it was established that certain "X's" on the map represented a barbed wire fence that the State intended to construct. This fence, it was then noticed, was also to be built between the interchange ramps and the boundary of the tract involved in the case. So the engineer's testimony in the earlier trial was seemingly inconsistent with the construction plans in this respect.

A motion for new trial was then filed concerning the tract involved in the first case. It was contended that this new evidence destroyed the benefits testified to and would probably increase the amount of the verdict. In order to avoid this, the State filed a stipulation that the fence would not be constructed and that the owners of the property would have "unhampered access to the ramps of the interchange exactly as testified to at the time of the trial." The trial court ruled that the stipulation came too late and that the State was bound to construct the highway in conformity with its maps and plans. The court ordered a new trial.

The owner contended that the State was bound, by rule of law and by stipulation of counsel made at the trial, to build according to the construction plans presented at trial, and that the State's later stipulation came too late and could not change those plans.

The Supreme Court of Washington overruled the trial court. The high court recognized that construction plans must be presented so that the extent of loss to the property owner could be understood and damages determined. It said that if, after an award is made, the condemner deviated from its plans in such a way as to cause a further loss of property value, this would constitute another condemnation for which just com-

pensation must again be assessed. But the court noted that such stipulations were a means by which the taking or damaging of private property could be kept to a necessary minimum in condemnation proceedings. To accept the owner's contention would, in effect, make such stipulations in mitigation of damages unavailable. The court reasoned that even if the jury had discovered this evidence of the proposed fence, the State's stipulation that the fence would not be build could benefit only the property owner. The State's stipulation would change the construction plans to conform to the proof given of them, and would make the newly discovered evidence unavailable upon retrial.[59]

New Hampshire.—Landowners Kostrelos, Alexandropoulos and Carkin sued to compel the Commissioner of Public Works and Highways to construct a frontage road to provide access to their land from the Spaulding Turnpike on which their land abutted, and which State statutes directed said Commissioner to construct. On September 30, 1953, the Governor and Council approved the layout of a portion of the turnpike as proposed by the Department of Public Works and Highways and voted that a frontage road be constructed on the easterly side of the northbound lane. A commission appointed by the Governor and Council laid out the highway in question, including the frontage road, awarding no damages to the landowners. The landowners alleged in their petition, that they had given their rights of access to the proposed highway to the State in consideration of agreements by the State to construct the frontage roads.

The Supreme Court of New Hampshire held that the Commissioner had exclusive authority to determine the layout of any proposed highway, that it had no plain duty to construct frontage roads, nor could it be compelled to do so. The court noted that the laying out and construction of limited-access highways was governed by a statute under which the Commissioner of Public Works and Highways was vested with discretion to determine the location and nature of a proposed highway, including the question of whether frontage roads should be constructed. The court pointed out that the language of the statute did not vest authority in either the Governor and Council or the commission appointed by them to determine the layout of a road, but that this question rested solely with the highway commissioner. The Governor and Council by the statute were limited to a determination of the public need and to approval or disapproval of the highway as proposed by the Commissioner. The commission appointed by them was limited to the acquisition of the land required for the highway proposed by the highway commissioner and approved by the Governor and Council. Thus, held the court, while the landowners alleged the refusal of the defendant Commissioner to perform a plain duty to construct a frontage road, the statutes in question disclosed that he was under no such duty.

The Supreme Court dismissed the petition, and in so doing noted that the question as to whether any remedy was available to the landowners under existing statute had not been presented and was not therefore under consideration in the present action.[60]

Street Closing

It goes almost without saying that when a modern controlled-access highway is built, many intersecting streets must be closed. When such closing occurs, abutting and nearby landowners sometimes suffer damages due to blocking or impairment of their access, circuity of travel, loss of business, etc. Such damages by themselves, however, are not generally considered compensable, but if there has been some taking of the landowner's property these damages are apt to be considered in the determination of severance damages.

Three cases were decided during the period covered by this report which involved

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[59]State v. Basin Development and Sales Co., Inc., 332 P. 2d 245, November 1958. See Memorandum 107, February 1959 Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 380.

[60]Kosterlos v. Merrill, 143 A. 2d 400, June 1958. See Memorandum 106, January 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 378.

the effect of closing intersecting streets due to the construction of controlled-access facilities. The Iowa Supreme Court held that damages resulting from the elimination of interesections in connection with a controlled-access highway were not compensable unless the landowner abutted on the portion vacated. The Missouri Supreme Court held that a landowner was not deprived of property by the closing of an adjacent street at the intersection of an expressway.

A New York case involved the barricading of an individual landowner's easement of access to a highway as an exercise of the police power for the purpose of preventing traffic from making left-hand turns from the highway. In this case the court enjoined the county from obstructing the access on the ground that any exercise of the police power must be reasonable, and here the court considered the obstruction to be unreasonable.

Iowa.—The supreme court recently came forth with an opinion that might well end all litigation in that State involving the question of whether compensation is due a landowner as a result of eliminating an intersection in connection with the construction of a controlled-access highway.

The case arose in connection with the building of Interstate 35 in a general north and south direction across Clarke County. At one point it crossed an east-west secondary road which was to be closed at the intersection. One Lelia Warren owned two tracts of land abutting this secondary highway; one tract was 200 ft to the east of the new highway and the other a quarter mile to the west, on the other side of the new highway. She had been using both tracts in connection with her homestead and for the same farming operations. The secondary road had for many years been used as a convenient means of travel between the two tracts. Cattle had been driven back and forth and farm machinery had been moved regularly by means of this road. The closing of the secondary road compelled the landowner to substitute for the direct one-quarter mile road between her lands a route over three miles in length (Fig. 7). This, the landowner contended, constituted 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 was not impeded, but she contended that in a broad sense her right of ingress and egress to her two farms had been interfered with, that she should receive compensation for damages and that the obstruction of the secondary road should be enjoined until proper steps were taken by the commission to have such damages determined and paid. The trial court found for the landowner and granted the injunction.

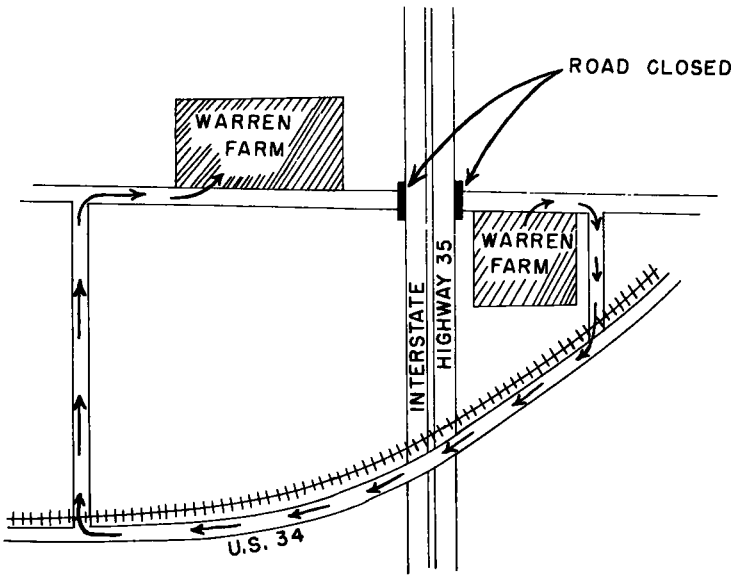
The landowner did not contend that the road could not be closed, but that its closing should have been governed by the procedure outlined in the code chapter entitled "Establishment, Alteration, and Vacation of Highways," which provided, among other things, that "Any person owning land abutting on a 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."

The commission, on the other hand, contended that it had authority to close the road by a later chapter of the code, the controlled-access highway statute, specifically, that section which reads:

> 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 state 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. (Emphasis by court.)

This provision, the commission contended, gave it the right to close the existing secondary road without resorting to the procedure provided by the earlier chapter.

The Supreme Court agreed with the commission and reversed the lower court. The



WARREN v. IOWA STATE HIGHWAY COMMISSION 93N.W. 2d 60

Figure 7.

court recognized two ways to prevent access to a controlled-access facility, by the police power, or by eminent domain. In Iowa, the court said, it is evident that the State proceeds through exercising its police power. It was the intent of the legislature, said the court, 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 the earlier chapter. "Special statutes take precedence over general ones, when they cannot be reconciled."

Then the court considered the landowner's assertion that she would suffer a special injury from the closing of the secondary road, and that unless compensated the closing would amount to a taking of property in violation of the Federal and State Constitutions. Said the court:

> 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 direct ways 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 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....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.
>
> ...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.

The court considered several Iowa cases and found that in general they held that property which does not abut upon that portion of the road vacated and the access of which to the general system of highways is not impaired by the vacation, is not specifically damaged. The court cited authority from many other jurisdictions that held that same. It held that the damage to Mrs. Warren was greater in degree than that suffered by the general public, but not different in kind. "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.... If it were not so, no highway system would be possible."[61]

Missouri.—The construction of a limited access highway through the City of St. Louis, created for the Handlan-Buck Company in that city a problem which found its way to the Supreme Court of the State. The construction was on 3rd Street. The company had a large manufacturing plant on 1st Street, with frontage on Poplar Street, one and one-half blocks from its intersection with 3rd Street. Poplar Street, like many other streets, was closed at 3rd Street. The company complained that this damaged its business and asked that the State Highway Commission be enjoined from closing the street (or as an alternative) for damages in the sum of $707,000. The company alleged that the city had entered into a contract with the State Highway Commission wherein it was agreed that certain streets intersecting 3rd Street would be vacated, but that Poplar Street would be left open. This contract, the company alleged, was inteneded to be for the benefit of the company and others similarly situated (Fig. 8).

The Supreme Court affirmed the Circuit Court's dismissal of the action on the ground that no cause of action was stated. At the outset, the court noted that the contract did not provide that Poplar Street was to be left open; it was not even metnioned. It noted that neither the contract nor the ordinance on which it was based stated that the contract was for the benefit of the company. Then the court emphatically noted that "no part of plaintiffs' property is located adjacent to Third Street or Poplar Street where it intersects Third Street," so that there was no easement of access. The court concluded that therefore there was no deprivation of a property right, restating the established rule in Missouri, that "if it be assumed that plaintiffs' properties will be stripped of potential uses and their value thereby lessened, and that the streets on which such properties are located will become cul de sacs as plaintiffs claim,...all as a result of the street vacations in question, still plaintiffs will not by reason thereof suffer injury special or peculiar to them within the meaning of the rule long established in this State."

The court acknowledged that the company did not dispute this rule but based its claim on the theory that the highway commission contracted with the city not to close Poplar Street. The company claimed that "The Constitution of Missouri of 1945 empowers the city...to form its charter and the charter empowers the city to establish, open, relocate, vacate and...alter...the streets, so that by its contract with the State Highway Commission, both parties are bound, for the benefit of plaintiffs, to keep Poplar Street open across the Third Street Interregional Highway." The court then noted that the authority of the State Highway Commission to construct limited-access highways is derived from the same Constitution—"where the public interest and safety may require." This, the court said, is a grant of police power and the action taken by the State Highway Commission in this instance was within the police power. "If, therefore, the closing of Poplar Street was in the public interest and safety, the authority to close the street could not be limited by contract." This, because no legislative body to which a portion of the police power has been granted can alienate, surrender, or abridge the right to exercise such power by any grant, contract, or delegation whatsoever.

The charter provision of the City of St. Louis, above referred to by the company,

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[61]Warren v. Iowa State Highway Commission, 93 N.W. 2d 60, November 1958. See Memorandum 110, May 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 390.

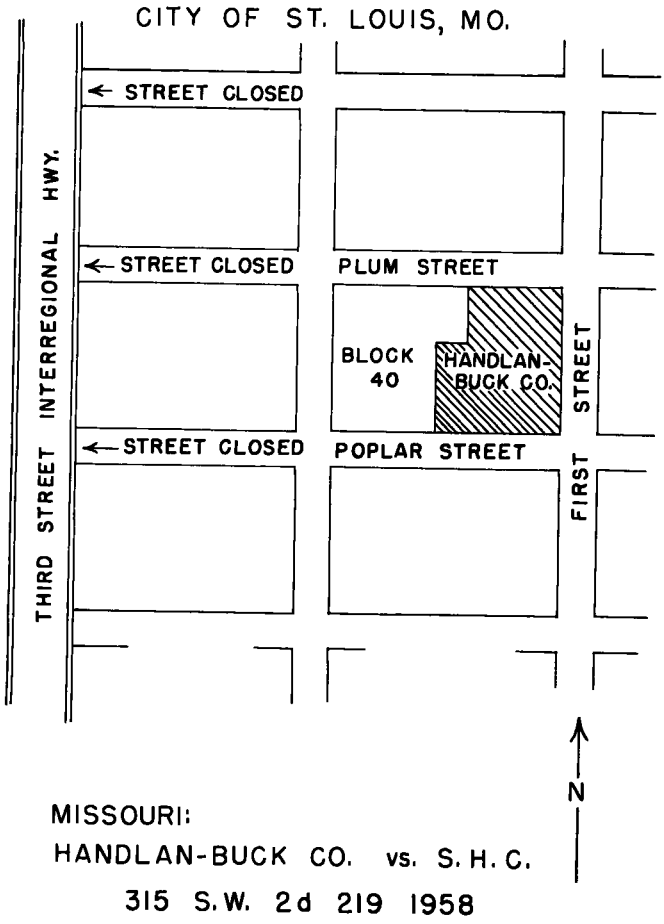

Figure 8.

in no way limited the power of the State Highway Commission with respect to the establishment of limited-access highways, according to the court, the constitutional provision being superior to that of the City Charter. The power to establish limited-access highways, continued the court, is of State-wide concern—its exercise affects the safety of all persons traveling on the roads of the State. The State police power in such a case, the court concluded, is superior to that of a municipality, and cannot be curtailed by contract between a city and the State Highway Commission.[62]

New York.—In this case the property owner brought an action to enjoin the County of Westchester from obstructing their easement and to compel it to remove the barrier it had erected to prevent left-hand turns onto the Saw Mill River Parkway.

The facts of the case revealed that in 1927 the county acquired for parkway purposes a protion of the land then owned by The Children's Village. The deed of conveyance reserved two rights-of-way through the premises conveyed for driveway purposes. The deed further provided that the plans for the driveway were to be approved by the Chief Engineer of the Westchester County Park Commission, but this was never formally done. Nevertheless, for some years the Park Commission maintained signs on

[62]Handlan-Buck Company v. State Highway Commission, 315 S.W. 2d 219, July 1958. See Memorandum 106, January 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 378.

the parkway indicating that the driveway was the entrance to The Children's Village. In 1954 the property which had access via the driveway was conveyed to the present landowner. The county contended the driveway was then abandoned, but the court held that the contention was without merit.

The court conceded that every property right is subject to the paramount right of the State to reasonably regulate its use in the interest of the public welfare and safety, but the regulation must be reasonable and its reasonableness is to be determined in the light of all the facts and circumstances.

The court made a distinction between regulating and eliminating the use of a property right. Here, it said, the erection of a barrier across the access destroyed the right-of-way reserved by the landowner's predecessor in title. Yet it did not appear that all use of the access drive constituted a traffic hazard. On the contrary, according to the court, the evidence indicated that the only hazard was that which resulted from left-hand turns and the barrier was erected in order to eliminate such turns. Since the customary manner of eliminating such turns is by the erection of "no left turn" signs, the court said that while there are other methods, perhaps equally appropriate, the erection of a barrier which destroys all access is not among them. In the opinion of the court that action went beyond what is customary or reasonably necessary. Therefore, the injunction was granted.[63]

Diversion of Traffic

Florida.—When a highway is relocated, the courts have generally held that an owner of property abutting the old highway is not entitled to compensation because the main stream of traffic no longer passes his door. A Florida case illustrating this point recently reached the Florida District Court of Appeals. The landowner had approximately nine acres fronting on the south of US 92 in Hillsboro County. In conjunction with a new highway which lies to the north of US 92 and veers from the landowner's property just to the west, the State Road Department condemned a 0.43-acre triangular portion of the property at the northwest corner. The new highway bypassed, to a large extent, US 92, and would cause the latter to become a secondary road (Fig. 9). The condemnee was awarded $2,200 for the portion of her property taken and damages to the remainder.

The landowner's expert witness at the trial had assessed severance damages of $5,875 and on cross-examination of this witness it was brought out that this was based on diversion of traffic. The trial court allowed a motion to strike this evidence and to instruct the jury to disregard it as an improper element. On appeal, the landowner complained that this was error, urging that the case did not involve a mere diversion of traffic whereby a landowner suffers damage from loss of business and commercial traffic by the building of the new highway which diverts the flow of traffic away from his property. The landowner's complaint was that the project relocated the highway and at the same time, as a part of the improvement, took a portion of the land without compensation for damage to the remainder, in accordance with a Florida statute which directs that "just compensation" shall include "compensation for damages, if any, to his remaining adjoining property."

The District Court of Appeals, in affirming the ruling of the trial court, noted that Florida had no cases directly on this question, but concluded that "The more fair, practical and reasonable rule than the rule for which (landowner) is here contending" was that stated by the Supreme Court of New Mexico in a unanimous 1945 decision in the case of Board of County Comm'rs of Santa Fe County v. Slaughter, 49 N.M. 141, 158 P.2d 859, at 860:

> The general rule for arriving at just compensation for property not taken but adversely affected is the so-called "before and after" rule; and this poses the

[63]Chain Locations of America v. Westchester County, 190 N.Y.S. 2d 12, 1959.

question: What was the value before the taking; and what is now the market value after the taking? The owner of the propetry, ordinarily, is entitled to receive the difference between these sums .... However, the vast majority of the courts approve a definite exception to this rule in that it is recognized that there are elements of damage for which no compensation will be given even though the market value may be adversely affected .... Specifically, with reference to this case, the rule is that ordinarily no person has a vested right in the maintenance of a public highway in any particular place. That exception is based upon the consideration that the State owes no duty to any person to send public traffic past his door. See cases cited in 118 A. L.R. 921.[64]

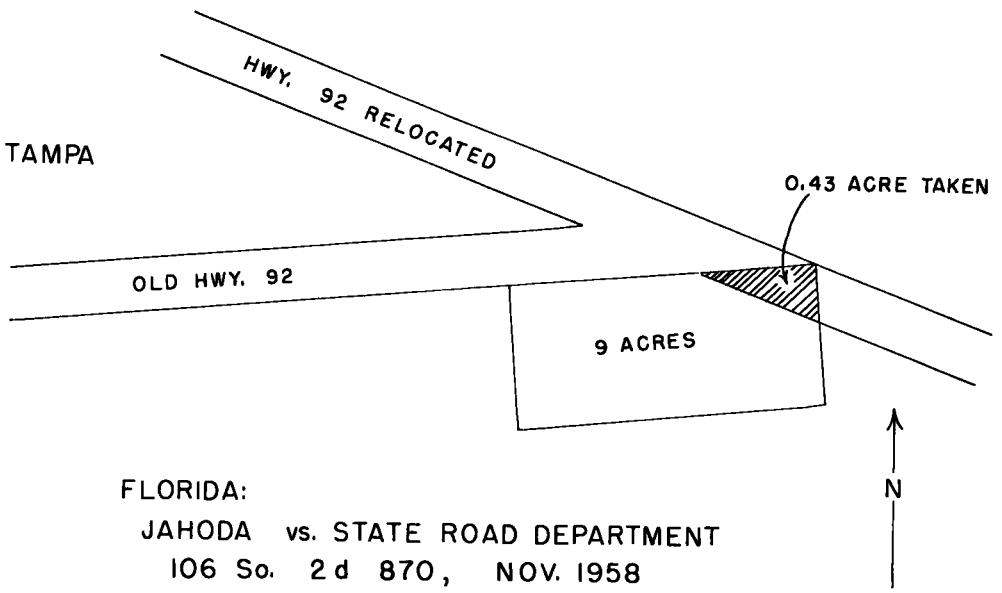

Figure 9.

Regulation of Access

On many highways which are not of the fully controlled access type, it is desirable to impose some restrictions on access in order to preserve the efficiency of the highway. Such restrictions can often be accomplished by means of the police power, as opposed to the outright taking of access rights under eminent domain, envisioned by controlled-access legislation. Restrictions of this type which have been successfully used in many instances include the use of a median or dividing strip and the control of the number and location of driveways, or even in some instances of the use of access openings.

[64]Jahoda v. State Road Department, 106 So.2d 870, November 1958. See Memorandum 109, April 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 387.

Theoretically, a landowner whose access is restricted is not entitled to compensation therefor, but the courts may vary in their interpretation of the distinction between "taking" and "regulating," being influenced in part at least by the effect of the restrictions imposed or the reasonableness thereof. A reading of the following court decisions illustrates some of these variations in the thinking of the courts.

Dividing Strip.—Three important cases re-emphasized the general rule allowing no compensation under the police power for damages allegedly sustained from the construction of a median or dividing strip, even in the face of strong pleas urging a relaxation of the rule. The Iowa Supreme Court held that where there was evidence that the jury had considered the effect of the construction of a dividing strip on the value of the property involved, contrary to instructions, an order for a new trial was justified. The Virginia high court ruled that the highway commission could not contract away its inherent right to regulate highway access. In a Washington case, the court held that the landowner was not entitled to damages resulting from, among other things, the prohibition of left-hand turns because of a median strip constructed in front of his property.

Iowa.—The landowner's property consisted of a 7½- or 8-acre tract in Des Moines that fronted on Hubbell Avenue, which was being developed into a controlled access road and East 42nd Street. On the Hubbell Avenue frontage, near the intersection of East 42nd Street, were a restaurant, a garage and service station for cross-country trucks and other motor vehicles, and a two-story building used as a law office, residence and sleeping accommodations for 20 truckers. The reconstruction involved widening Hubbell Avenue, the placing of a median strip over which traffic could not cross, and the construction of curbs. The highway commission condemned a strip of the land two ft wide and 754 ft long (Fig. 10).

The controversy revolved about evidence considered by the jury contrary to instructions. Expert valuations, of course, varied greatly between the landowner's experts and the State's. The highest estimate of damages by the State's experts was $869 and the lowest estimate by the landowner's witnesses was $23,000. The jury's award was $14,000. Three jurors made affidavits that during their consideration of the case several jurors argued to the others that the construction of the dividing strip should be considered in fixing the damages to be awarded; also that the jury should consider the possibility, referred to in the landowner's argument, that the road might be converted into a parkway, thereby doing away with the truck stop business. One of the instructions was: "If, because of the regulation of traffic and the division of the highway, some circuity of travel is required by the public using this highway, such regulation cannot be made the basis for a claim of damages against the Iowa State Highway Commission or the City of Des Moines, and such issue has been withdrawn from your consideration." The verdict was set aside by the Polk District Court on the ground that the amount was so excessive as to show passion and prejudice; that the verdict was contrary to law because the only items submitted to the jury could not justify any such verdict. The court granted a new trial.

On appeal the landowner contended that the matters set forth in the affidavits of the jurors inhered in the verdict and could not be used to impeach it, and the trial court erred in giving consideration to such affidavits. But the Supreme Court ruled that the affidavits tended to show misconduct of members of the jury in discussing and considering elements of damage withdrawn from their consideration by the instructions which was merely evidence of what happened in the jury room. It should be distinguished from evidence of the effect of such occurrences on the verdict of a juror or jurors, which may not be shown to impeach the verdict. In the case at bar, the court said, there was substantial evidence to support the finding of the trial court that the jury considered elements of damage which had been taken from its consideration by the instructions. This alone was sufficient to justify the ordering of a new trial. However, in view of the probable new trial, the court saw fit to discuss some of the other matters involved.

The court noted that the notice of condemnation described the land sought to be condemned plus "all rights of direct access to said avenue... from condemnee's property

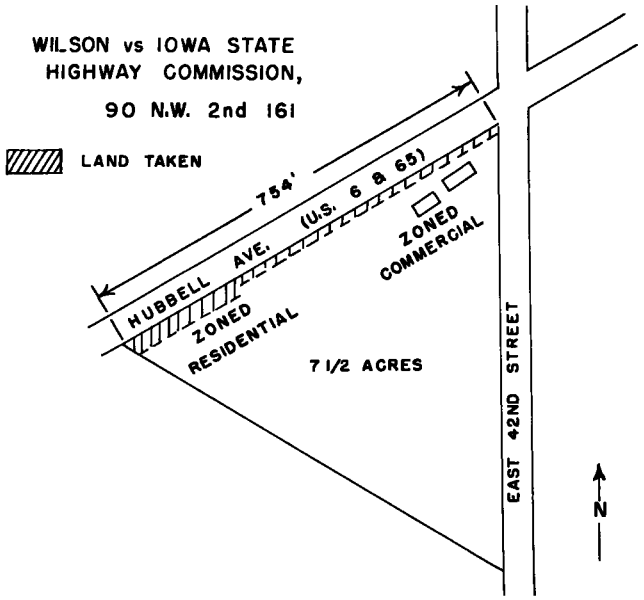

Figure 10.

adjacent thereto, excepting and reserving to the condemnee the right of direct access from said highway at (certain designated places) provided, however, that when and if a frontage road is constructed, such right of direct access shall be limited to the frontage road." On this basis the condemnation commission made its assessment of damages. But later the commission waived, surrendered, released and abandoned "any and all of plaintiffs' rights of such access which may have been affected or claimed to be affected by this condemnation proceeding," and claimed that the only manner and extent to which the landowner's rights of access to the road would be affected would be by a reasonable and proper regulation and control in the interests of the immediate preservation of the public peace, health and safety and for the promotion of the general welfare as a proper exercise of the police power. The court said, first of all, that a condemner could by waiver and abandonment proceed to condemn less property than that originally listed, except "where there is such a substantial or material impairment or interference with the right to access...to the property as to constitute a taking of property or property rights for which compensation must be made."

The court then considered the four curb cuts permitted in the notice of condemnation. It reviewed the rule that in most instances the question of whether an abutting property owner has been denied access that is reasonable is one of fact, not of law, stating that in its opinion, in this particular case the four curb cuts allowed afforded means of reasonable access.

Another side issue decided by the court was that the owner should not have been permitted to testify to the monthly net income of the property; that this was the rule in American jurisdictions "with remarkable unanimity."

Finally, the court ruled that the landowner was not entitled to any damages resulting during actual construction of the improvements, and cautioned against the introduction of such evidence in the new trial.

The Supreme Court concluded that the trial court was not in error in setting aside the verdict and affirmed the order granting a new trial.[65]

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[65]Wilson v. Iowa State Highway Commission, 90 N.W.2d 161, May 1958. See Memorandum 106, January 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 378.

Virginia.—This unusual case arose as a result of the converting of US 58. the Virginia Beach Boulevard, to a limited-access highway. Prior to 1950, the boulevard was a three-lane highway. One John E. Marr and his wife owned property adjoining the highway on the north on which were a restaurant and a dance hall. The highway commission decided to change the boulevard into a limited-access highway with two eastbound and two westbound lanes divided by a median strip with crossovers therein, and with frontage roads on each side. To make this change it needed a strip of the Marr land about 840 ft in length along the north side of the existing right-of-way (Fig. 11).

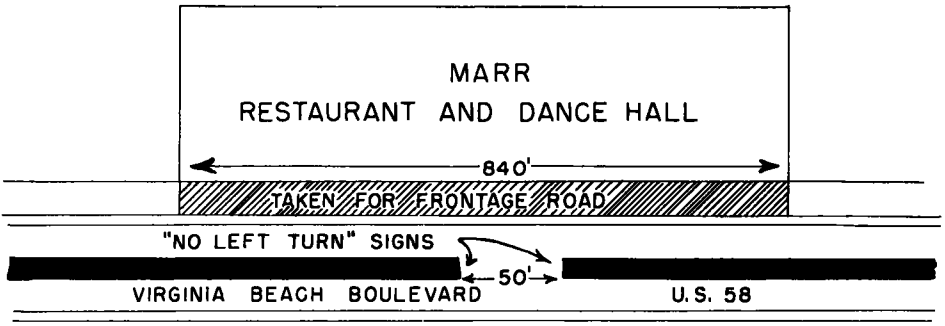
A right-of-way engineer of the highway department negotiated with Marr to purchase a strip of his land for $2,000 "TOTAL for land, any and all damages." The contract to convey also contained an agreement that the State would relocate a proposed crossover in the median strip to a spot directly in front of the Marr property. It was understood further that the land to be conveyed was to be used in connection with the limited-access highway, and the conveyance would include all rights of easement and access pursuant to the provisions of the State's limited-access highway statute.

There followed a deed from the Marrs to the State conveying the land embraced in the contract, but this deed did not contain any provision about the position of the crossover; all other provisions agreed upon were set out in the deed. The construction was done in accordance with the original contract; in fact, in answer to a complaint later raised by Marr during the construction, the opening in front of his property was widened from 40 ft to a compromise of 50 ft, in further conformity with the original agreement. The opening thus established remained in use until April 1957, when the commission erected at both the east and west ends of the crossover "no left turn" signs, the effect of which, Marr alleged, was to practically destroy the businesses. Marr therefore sued to permanently enjoin the commission from maintaining the signs and for damages as a result of their erection.

The commission alleged that there was no agreement to maintain the crossover or that it had the power or authority to enter into any such undertaking on a permanent basis; that the contract did not prohibit the erection of the signs, and that if it was so interpreted it was void, was merged in the deed and was in conflict with that deed. The trial court granted the requested injunction and a recovery of damages.

The Virginia Supreme Court of Appeals reversed. It noted that most of the evidence was related to the traffic conditions, the use of the crossovers, the accident experience, the inconvenient way eastbound traffic was required to enter the Marr property because of the signs, and the damage that had resulted therefrom. The court questioned from what source the Marrs acquired a right to an injunction prohibiting traffic regulations at this crossover. The lower court held in accordance with landowners' contention that the right was derived from the contract for relocating the crossover, the purpose being to enable traffic on the south side of the highway to reach the property, and it was not to be supposed that after the crossover was made, traffic would not be allowed to use it. Accordingly, the lower court held that this provision of the contract created a servitude in favor of Marr on the existing highway owned by the State which could be eliminated only by due process of law and payment of compensation, i.e., by condemnation of the servitude.

The high court ruled that this was erroneous reasoning. It said that such an agreement was in conflict with the terms of the deed; that the property on which the crossover was erected was owned in fee by the Commonwealth. Neither the right-of-way engineer nor the commission itself had power to create a servitude on the property of the State for the benefit of an adjoining property owner in the absence of authority from the General Assembly. The court noted that even the power of the General Assembly to grant the right or privilege asserted might be limited by constitutional provisions relating to special privileges, and the prohibition of any abridgment of the police power, of which the right to regulate and control traffic in the interest of public safety is clearly an exercise. The court further stated that while it was expected by the parties that the crossover when made was to be used, the presumption was that its use was to be subject to the regulations of the commission made pursuant to law, as were all the other crossovers on the highway, and not a presumption that it should include a right which the right-of-way engineer had no power or authority to grant. The court subscribed



VIRGINIA:

DAVIS vs. MARR

106 S.E. 2d 722, 1959

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Figure 11.

to the well-settled rule that when there are stipulations in a contract for sale but not in the subsequent deed, the deed must be regarded as the sole and final expression of the agreement between the parties as to every subject which it undertakes to deal with, and that evidence to alter or contradict the terms of the deed is admissible.[66]

Washington.—A recent condemnation proceeding resulted from the conversion of State Highway 18 (US 10) to a controlled-access facility. The landowner had an 18.86-acre tract of vacant land in the town of Westlake, abutting the highway on the south for a distance of 1,652 ft. At the trial to determine the amount of this landowner's award, the State introduced in evidence three large drawings that depicted the effect the limited-access highway would have on the land, and a large model (2 by 8 ft) that showed the existing highway in front of the property and, by means of an overlay, illustrated the proposed 4-lane highway, frontage road, and the interchange that would be installed a short distance to the west of the property. The plans disclosed specifically that the State proposed to condemn a strip of land along the highway at the northwest corner of the property, varying in width from 10 to 30 ft, 435 ft long, with an area of approximately $^{2}/_{10}$ of an acre; that the landowner's right of access to the highway would be restricted but that there would be access to a two-way frontage road along the west 335 ft of the highway frontage, which would lead to the east-west limited-access highway. Also, because of a median strip, it was apparent that the landowner would not be able to leave the property and immediately make a left turn into the westbound traffic lanes of the new highway.

The landowners claimed the right to compensation because of the strip actually taken, loss of access to and from the highway of the east 1,317 ft of the property, and damages suffered because of the change of method of ingress and egress of the west 335 ft of the frontage. From a judgment in the trial court for the landowner, the State appealed to the Supreme Court of Washington, which reversed and ordered a new trial.

The State claimed several errors by the trial court which should entitle it to a reversal. The court noted that the State's claims of error rested "upon the proposition that, concurrent with a compensable taking in a condemnation proceeding, the State may validly exercise the police power for traffic control and public safety, for which there can be no compensation, even though it affects the method of ingress and egress."

[66]Davis v. Marr, 106 S.E.2d 722, 1959. See Memorandum 110, May 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 390.

Specifically, the State complained that the trial court erred in admitting oral testimony referring to the traffic routes by which westbound traffic would reach the property and return from the property to the through lanes of the highway. The court held that the admission of oral testimony on this was not error since the maps and models illustrated these routes.

The State also complained that it was error to admit testimony concerning the loss of value to the remainder of the property due to the construction of the median strip. As to this the court said that the landowner had no property right in the continuance or maintenance of a flow of traffic past his property, nor was he entitled to damages resulting from rerouting, diversion of traffic, circuity of route, or prohibition of left-hand turns because of the median strip. These matters, the court held, fell within the general definition of traffic-control devices authorized by statute and encompassed within the police power of the State.

The crux of the landowner's argument, the court recognized, was that the "State cannot extract one feature of an overall plan and label it an exercise of the police power in order to reduce the compensation payable to the property owner in a condemnation proceeding." To this the court said that the statutory process by which an existing highway becomes a limited-access facility is a combination of the exercise of the power of eminent domain and the police power. The State must compensate for property rights taken by eminent domain; damages resulting from the exercise of the police power are noncompensable. Therefore, the court held, the State can show the category under which a particular aspect of the limited access facility plan falls, not for the purpose of reducing the compensation payable to the property owner in a condemnation proceeding, but for the purpose of fixing the award for those items that are compensable as a matter of law.[67]

Installation of Curbing.—Generally speaking, the courts have held that a landowner is not entitled to access to the street or highway adjacent to his property at all points thereon. In other words, the street or highway authorities have fulfilled their obligation to the landowner if he is allowed reasonable access to the street or highway system. In two cases handed down this year, however, the Kansas and New Hampshire courts seemed to indicate that although the State highway commissioners might restrict the complaining owners' access by means of curbing, the landowners would be entitled to damages resulting from such "taking of access rights." A strong dissent was filed in the Kansas case, however, the dissenging judge being of the opinion that the State's plan for restricting access was not unreasonable under all the circumstances, in line with the general requirement that the extent of the right of access is that which is reasonably required, giving consideration to the purpose for which the property is adapted.

In a somewhat related case, the Supreme Court of New Hampshire held that it was within the discretion of the highway authority to determine where and what access might be provided for an abutting owner.

Kansas.—A suit for an injunction was brought in Topeka, by the owner of a gasoline service station to prevent the construction of curbing adjacent to the landowner's property without condemnation. The station was located on the southwest corner of the intersection of 75th Street and US 69 in Johnson County. The street ran east and west and the highway north and south. The property had been used for a filling station for over six years.

The State Highway Commission proposed to widen US 69 from two lanes to four. Adjacent to the southeast corner of the property in question, proceeding north, the commission planned to construct a curb for a distance of 2 ft, provide an entrance of 30 ft to approximately 4 ft south of the north line of the property and curbing around the northeast corner thereof (Fig. 12).

The property owner alleged that the State's action would deprive him of free and unlimited access to his filling station; he would be unable to utilize the two north gaso-

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[67]State v. Fox, 332 P.2d 943, December 1958. See Memorandum 107, February 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 380.

line pumps, the two easternmost pumps would have to be removed or the customers serviced would block the ingress and egress of other customers; the two pumps in the westernmost island would have only limited use. His property would be depreciated in value if not wholly destroyed.

The trial court granted the injunction and the State appealed to the State supreme court. The high court upheld the trial court saying that the State would have to resort to condemnation.

The supreme court stated that rights of access are property rights which may not be taken without just compensation. The legislature in enacting the controlled access highway law did not see fit to put any limit on the amount of access required to be taken before the commission must resort to condemnation if it were not acquired by gift, devise or purchase.

Justice Fatzer filed a dissenting opinion, noting that the right of access did not extend to all points of the boundary between the owner's property and the street, but simply to reasonable ingress and egress under all circumstances. The extent of the right of access, according to the dissenting judge, might be said to be that which is reasonably required, giving consideration to the purpose to which the property is adapted.[68]

New Hampshire.—Affected landowners brought a mandamus proceeding to compel the Commission of Public Works to allow access to a highway by removing a curbing which effectively prevented such access. Under a State statute which authorized the construction of controlled access highways, the commissioner was granted authority to prevent ingress and egress "to, from, or across" such highways other than at specified intervals. The statute extended to the controlling of access on previously existing roads such as the one in question.

The complaining owners operated a refreshment stand during 1947 and 1948 but had discontinued this use up to the time of the trial, though they testified to indefinite plans for future development. At the time that the commissioner exercised his discretion and closed the owners' access, the owners alleged that other similar business along the road were permitted to retain their access. The owners based their claim to injunctive relief on the theory that the action was confiscatory, discriminatory and therefore, unconstitutional.

The supreme court noted that the effect of the statute was "to permit, but not require the continuance of existing commercial enterprises," and that the statute was, on its face constitutional. While it is clear that a person may not be deprived of his property without due process of law, stated the court, it happens that sometimes that individual rights must yield to "reasonable legislative restrictions." The court stated further that while it could not review the expediency of police legislation, it could take it into account in weighing the relative public good against the individual burden. For instance, if the public benefit were minor while the restrictions on the individual were serious, the exercise of such police power might be found unreasonable. The court held that such was not the case here because of the public need for controlled-access highways in promoting safety. In denying the owners' contentions, the court noted that the taking of their right of access would be an element of damages for which the owners could recover in another form of action, specifically, a pending condemnation appeal.[69]

Control of Use of Access.—This is one of the most effective of the police power controls devised to protect the efficiency of the highway. In many instances, where it has not been considered necessary to have full control of access, landowners have been allowed one or more specified access points or crossings, particularly where the abutting land was used for farm purposes. Little thought was given to possible changes in use of this abutting land, and the results have been unfortunate in many instances. Conversion of farm land to an apartment development, for example can bring about a tremendous increase in traffic entering the main highway by means of the one access point allowed.

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[68]Atkinson v. State Highway Commission, 339 P. 2d 334, 1959.

[69]Gagne v. Morton, 151 A. 2d 588, June 1959. See Memorandum 116, November 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 408.

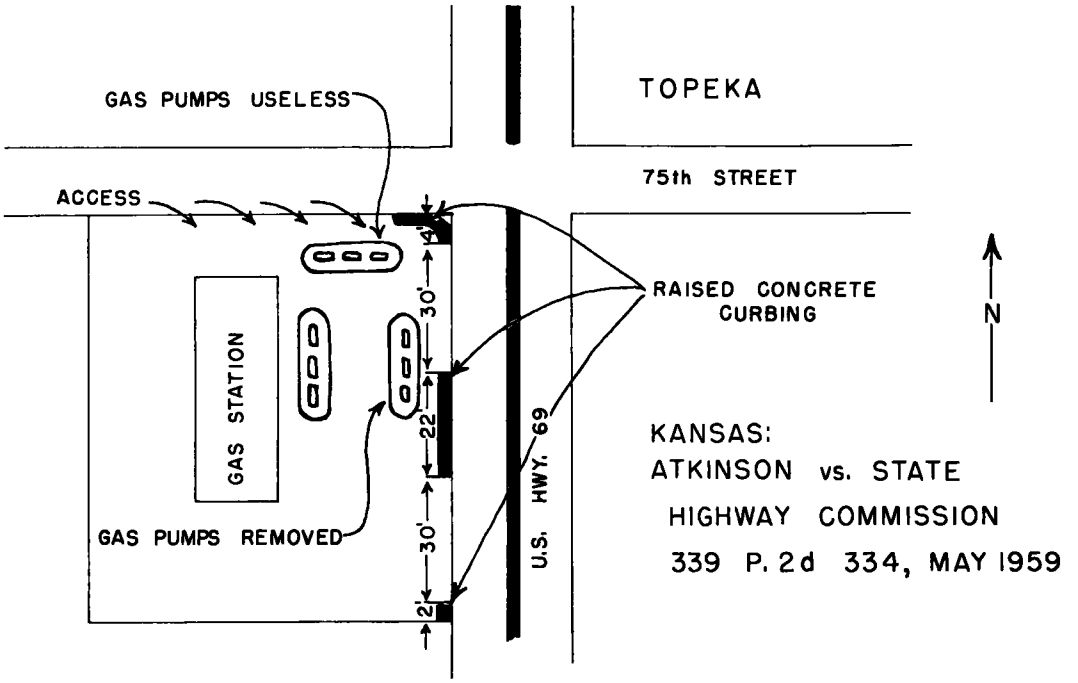

Figure 12.

An Idaho court decision handed down during the past year revolved about a "farm crossing" allowed an abutting owner, who proceeded to construct a motel, using his land on both sides of the road for such purposes. The court upheld the validity of the "farm crossing" restriction placed on the owner's access.

Idaho.—In Elmore County, the Idaho Board of Highway Directors relocated US 30 to bypass the business district of Glenns Ferry and in doing so condemned a portion of a farm owned by one Wolfe and his wife. The new right-of-way bisected the farm. Judgment fot the State was entered upon the written stipulation signed by both parties. This final stipulation and judgment based thereon recited that access to and from the highway "is hereby taken, restricted and prohibited, except for farm crossings" at named points, which were two in number. The highway was constructed as planned and the farm crossings were provided for in the form of openings in the fence where 20-ft gates were installed. Thereafter, Wolfe constructed a motel and a drive-in restaurant on the southern portion of the bisected farm, at either of the two crossings, erected signs advertising the business, and installed flood lights to illuminate the entrances. Then the State sued to enjoin the Wolfes from using the farm crossings for commercial purposes. The lower court granted judgment for the State and the landowners appealed.

The Wolfes contended that during the negotiations leading to the stipulation for judgment they were advised by agents of the State that they could use the entrances for any purpose which the width of the gates would permit; they claimed that they refused to stipulate to a provision in the original stipulation submitted by the State which limited the use of the crossings "for farm purposes only", and that these words were removed from the final stipulation. Agents for the State, however, testified that Wolfe only insisted upon two instead of one crossing and that two were necessary in order to avoid driving cattle along the highway. The testimony seemed to conflict on more than one point.

The crux of the landowners' argument was that there was a distinction between "crossings for farm purposes only", which the Wolfes refused to agree to, and "farm crossings," which they did agree to. The high court said that the distinction was not

apparent, but on the contrary appeared to mean the same thing. The trial court did not make any specific finding as to whether the Wolfes were misled or not, noted the court. The only controlling finding of the lower court was that access was limited to "farm crossing", and that this meant access for crossing the highway with livestock and customary agricultural machinery, necessary and useful for farming purposes, and did not mean access for all uses and purposes, nor for commercial uses or purposes. These findings, said the court, were supported by competent evidence and were therefore conclusive. The injunction was therefore affirmed.[70]

ROADSIDE REGULATION

The term roadside regulation includes many mechanisms such as control of the number and types of entrances and exits to and from property abutting the highway, of outdoor advertising signs along the highway corridor, of drive-in theaters, and many other regulations, all devised to increase the efficiency and safety of the highway, and to protect the tremendous investments of public funds from becoming prematurely obsolete. A recent survy of State statutes revealed that 21 States have specific statutory authority to exercise driveway control by means of permit requirements, promulgated by the State highway departments.[71] Additionally, at least five States exercise such authority under the broad general powers of the highway department.[72]

No significant legislation in the field of roadside regulation was enacted by States in 1959, with the exception of that pertaining to outdoor advertising, previously discussed. There were, however, several court decisions pertaining to the validity of certain controls exercised by State and local governing authorities. The majority of these also involved outdoor advertising, as noted in the following sections. Other cases concerned commercial enterprises adjacent to controlled-access highways and authority to cut down trees obstructing sight distance.

Outdoor Advertising

Indiana.—The City of Angola sought to compel a filling station owner to remove its advertising sign alleging non-compliance with the following highway advertising statute:

> (c) No person shall place, ... any advertising sign,... on any highway in cities between the curb and sidewalk and, in case curb and sidewalk join, no person shall place ... on the sidewalk any advertising sign ... closer than ten (10) feet from the curb line, and overhanging signs shall not overhang the curb. (Burns' Ind. Stat. 1959 Cum.Supp. Sec. 47-1908)

The statute went on to declare signs prohibited under the act to be public nuisances and permitted their removal without notice. The lower court denied the relief sought and the city appealed.

The facts indicated that the filling station owner's property was paved up to the curb—there being no delineation of a separate sidewalk. The sign complained of stood at the top of a pole, the base of which was less than 10 ft from the curb line. The bottom of the sign, however, was more than 10 ft above the curb line and did not overhang it. In no direction did the sign measure less than 10 ft from the curb. The issue of the case turned on the city's contention that the pole should have been considered by the trial court as a part of the advertising sign, and therefore came within the prohibition of the statute.

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[70]State v. Wolfe, 335 P. 2d 884, February 1959. See Memorandum 113, August 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 396.

[71]California, Georgia, Illinois, Indiana, Louisiana, Maine, Maryland, Mississippi, Nebraska, New Hampshire, North Carolina, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Washington, West Virginia, and Wisconsin.

[72]Colorado, Delaware, New Mexico, Texas, and Virginia.

In affirming the lower court, the appellate court opined that the prime purpose of the statute was to provide drivers and pedestrians with an "unobstructed view along the right-of-way for safety purposes." It noted that nowhere did the statute designate any criteria for distinguishing signs from poles, but that it did specifically refer to advertising signs and made provision for the case in which such signs should overhang. The court held that since the sign was not between the sidewalk and curb, was not within 10 ft of the curb, and particularly, since it did not overhang the curb, the evidence clearly established that the sign in question did not violate the provisions of the act.[73]

New York.—Section 21-B of the Zoning Resolution of the City of New York prohibits the erection of advertising signs within 200 ft of an arterial highway. In an action brought by the city under this section, the lower court dismissed the suit to compel a landowner to remove a sign which she had obtained a permit to erect on her premises in 1939. Some years after issuance of the permit, improvement of the highway necessitated removal of the signs. They were relocated within 200 ft of the highway and the city claimed violation of the noted provision of the zoning ordinance.

A sharply divided appellate court reversed the lower court's holding and found that the sign was within the prohibited 200 ft and, therefore, must be removed.

The dissenting opinion noted that the statute referred to "an erection or structural alteration." Since the permit had been issued to include the entire property, the owner could have, in the first instance, validly erected the sign where it now stood and there could be no legal objection. The facts indicated, however, that the sign had actually been erected elsewhere on the property and subsequently relocated in sections. The dissent failed to see how the fact of erecting the sign in a piecemeal fashion should bring it within the prohibition.[74]

Ohio.—As reported in a prior memorandum during the year,[75] the Ohio Valley Advertising Corporation failed in a suit against the State in which it claimed compensation for the State's taking of land upon which the corporation by agreement with the landowner was entitled to place billboards. The basis of the decision of the court of appeals was that the advertising company had no compensable interest in the land, it being a mere licensee under the agreement and not a lessee. Under the agreement the landowner, for a consideration, granted the advertising company full and exclusive right to paint, post, place and maintain advertisements on or about the premises for five years, with a privilege of renewing upon the same terms.

On appeal to the Supreme Court of Ohio, the lower court's decision was affirmed. The court ruled that when the landowner granted or the State appropriated from him the real estate or interests in the real estate, the State received nothing belonging to the company; the company never owned the land or any interest therein. There was no "taking" from the company but only from the landowner. The court indicated that all the advertising company had was a contract right, citing Omnia Commercial Co., Inc. v. United States 261 U.S. 502, 1923, in which it was held that "as a result of... lawful governmental action the performance of the contract was rendered impossible. It was not appropriated but ended." The court quoted with approval 152 ALR 307:

> By the exercise of the power of eminent domain contractual rights may be frustrated in two ways: (1) The contractual rights may be directly appropriated for public use, or (2) although it is other property which is the subject of the appropriation, such appropriation may incidentally frustrate contractual rights relating to the property sought to

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[73]City of Angola v. Hulbert, 162 N.E.2d 324, 1959.

[74]City of New York v. Seel, 190 N.Y.S.2d 865, 1959. (For a more detailed account of the facts and a resume of the prior court's decision, see 177 N.Y.S.2d 56, May 1958, HRB Bull. 232, "Report of Committee on Land Acquistion and Control of Highway Access and Adjacent Areas," p. 40.)

[75]Memorandum 107, February 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 380.

> be appropriated....The rule seems well settled that where real property is taken for public use, a person other than the owner in fee is not entitled to compensation, or to a share in the compensation...unless he has some 'estate' or 'interest' in the property, a mere contractual right, without such 'estate' or 'interest', not being sufficient."[76]

Commercial Facilities on Expressways

Connecticut.—Some landowners sued to enjoin the State highway commissioner from proceeding with the construction of a restaurant and appurtenant facilities along the Merritt Parkway. A statute authorized the commissioner to provide such facilities. Among other things, the constitutionality of this statute was questioned. (Public Acts 1957, No. 660) The Superior Court of Connecticut, Fairfield County, held that the statute was constitutional. It said that such facilities served a public need and the legislature did not exceed its powers in determining that the use was a public one. Likewise, held the court, there was nothing improper in authorizing the commissioner to lease the concession, since this might be more efficient and more economical than if the State operated the facilities.[77]

Control of Vegetation

Iowa.—In Clinton County, the Board of Supervisors planned to improve a 12-mile Federal-aid secondary road connecting two primary highways. Part of a 5-mile segment of the road, called Humeston Road, abutted one Carstensen's property. In connection with the improvement it was considered necessary to cut down 16 large evergreen trees in front of his property. Carstensen petitioned the Clinton District Court to enjoin the board from cutting down these trees and was granted a temporary restraining order, but upon later trial was denied a permanent injunction. Carstensen, on appeal, relied upon a code section which prohibited anyone connected with highway improvements from cutting down or injuring any tree growing by the wayside which did not materially obstruct the highway, or tile drains, or interfere with the improvement or maintenance of the road. He claimed that the court's finding that the trees so materially obstructed the highway as to warrant their destruction was erroneous.

The trial court found as fact that if the trees with their overhanging branches remained, the driver of a modern car entering from Carstensen's driveway when improved would be unable to view approaching traffic at a safe distance without driving his car forward to a position which would place the front bumper of the car approximately 2½ ft upon the surface of the highway and that this would constitute a hazard. Also, that the lower limbs would materially interfere with the operation of standard road equipment used to construct the drainage ditch and gutter slopes, and with future maintenance.

The Supreme Court of Iowa affirmed the lower court's findings. It said that while Carstensen's determined effort to save his magnificient trees was not criticized, his position could not be maintained against the interests of the general public.[78]

PARKING

From year to year, there is a noticeable decline in the amount of litigation pertaining to the provision of off-street parking facilities. This is particularly true of litigation involving the authority of governmental agencies to provide such facilities. This seems to indicate that there is no longer a great deal of dispute as to whether these off-street parking projects constitute a legitimate public purpose. No court decisions

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[76]Ohio Valley Advertising Corp. v. Linzell, 153 N.E.2d 773, November 1958. See Memorandum 108, March 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 385.

[77]Stock v. Argraves, 151 A.2d 894, February 1959. See Memorandum 116, November 1959, Committee on Land Acquisiton and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 408.

[78]Carstensen v. Clinton County, 94 N.W.2d 734, February 1959. See Memorandum 114, September 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Circular 401.

involving this point were noted during the year. Several State courts were, however, called upon to pass upon the validity of certain other aspects of enabling legislation, or to determine whether certain zoning regulations were being properly applied in connection with off-street parking lots.

Provision of Off-Street Parking Facilities

An Ohio city ordinance and a Rhode Island State statute authorizing the provision of off-street parking facilities were declared invalid during the year, in both cases because the provisions lacked certain safeguards which the courts considered essential. In the Ohio case, the court ruled the standards set forth in the ordinance for issuing permits for off-street parking facilities were too vague. The Rhode Island case held the statute's failure to provide specific funds to guarantee payment of just compensation rendered the law unconstitutional.

Ohio.—The landowner in this case, the Associated Land and Investment Corporation, owned property in Lyndhurst, improved with a one-story building and basement. The corporation filed with the building inspector for a permit to add a second story to the building, specifying that the entire premises were to be used for offices. The permit was denied on the ground that off-street parking facilities proposed in connection with the improvement were not sufficient to comply with Sec. 1(a)-(f), Article IV, of the city ordinance.

In effect, this ordinance provided that buildings, with certain exceptions, should have parking space reasonably adequate for commercial vehicles necessary to carry on the business of the occupants of the premises and for the normal volume of car parking by persons coming to the premises on matters incidental to the uses thereof.

On appeal by the corporation the Board of Zoning Appeals of the city recommended approval of the application so long as the employees and employers working on the premises did not exceed a total of 35. Approval of the proposal of the Board of Zoning Appeals was denied by the council of the City of Lyndhurst.

The corporation's request for a mandamus action to compel the city and the building inspector to issue a permit was approved by the lower court, whereupon the city and the building inspector appealed to the State supreme court.

The high court noted in its opinion that the inclusion in a comprehensive municipal zoning oridinance of provisions requiring off-street parking constituted a proper exercise of municipal authority, where the need therefor had been determined by the legislative body of the city on the basis of traffic conditions. However, it was the unanimous view of the court that the ordinance did not contain sufficient criteria or standards to guide the administrative officer or tribunal in the exercise of the discretion vested in it.

The ordinance specified as to loading and unloading spaces that "parking space reasonably adequate" and "adequate space on its lot" for loading and unloading of trucks and commercial vehicles serving the premises must be provided. With respect to parking of automobiles coming onto the premises to patronize the business carried on therein, the ordinance provided that there must be sufficient spaces for the "normal volume of car parking." The court was of the opinion that these requirements were vague and insufficient to guide the building inspector or the Board of Zoning Appeals.[79]

Rhode Island.—A landowner sought injunctive relief to enjoin the City of Providence from condemning his property for use in off-street parking. Basic to this claim was an attack on the constitutionality of the enabling statute. The superior court denied the suit and the complaining owner appealed.

The State supreme court, in reversing, discussed the various constitutional requirements for a valid condemnation statute. The court stated that first, the sovereign must delegate the power of eminent domain, in this case to the city; methods of financing the acquisition of property must be authorized; and the city council must be required to provide funds to finance the improvements. The court noted that these requirements were met in the instant statute.

[79]State v. City of Lyndhurst, 154 N.E.2d 435, November 1958.

The fatal error of the statute, as the owner claimed and the high court concurred, was its failure to provide specific funds for the payment of just compensation as provided for in the State and Federal Constitutions. In addition, the statute failed to provide adequate means to enforce the claim for compensation by the landowner. The court noted that it was not enough, as the city claimed, to incorporate by reference the general procedures contained in the statutes pertaining to condemnation for highway purposes. Specific funds must be provided and provisions must include a means of securing the payment of compensation. Since these features were absent from the enabling statute in question, the supreme court held that the statute was unconstitutional.

It should be noted that, aside from the inadequacies of the statute in question, there was one interesting proviso contained in it. The statute exempted from possible condemnation actions property already used for off-street parking purposes unless it could be shown that the city could at least double the parking capacity of the property. In the absence of such a showing, consent of the owner was required.[80]

Parking Facilities and Zoning Ordinance

At least three decisions interpreting the application of certain provisions of zoning ordinances pertaining to off-street parking facilities were noted during the year. In Michigan a zoning amendment allowing businessmen to use adjoining residential property for off-street parking was upheld; in North Carolina the State supreme court held that a zoning board had no authority to waive parking requirements of a zoning ordiance; and in Texas, the court held that a zoning board might use its discretion in refusing a permit for a non-commercial parking lot.

Michigan.—Residential property owners of Dearborn, claimed that a zoning ordinance amendment which permitted businesses to use adjoining residential property, if it could be obtained, for off-street parking was an unreasonable exercise of the police power. The lower court, in dismissing the complaint, held that in the absence of arbitrary or unreasonable use of discretionary authority on the part of the zoning board, the court would not review its decisions. As to the wisdom or desirability of the ordinance, the court would not substitute its judgment for that of the appropriate legislative representatives of the community.

The amendment to the zoning ordinance, permitting businessmen to so utilize abutting property, contained numberous reservations designed to protect the residential neighborhood. Certain of these reservations protected the appearance of the property by prohibiting its use for vehicle servicing, advertising signs, or parking for non-shopping purposes; by prohibiting its use for parking at all unless various dimensional requirements, vis-a-vis proximity to neighboring residential properties, were met; and by requiring the surface of the lots to be paved, landscaped to conform to the neighborhood, and kept free from weeds, rubbish, etc. The amendment also explicitly left the businessmen to their own devices regarding acquisition of suitable abutting property by preserving for the residential property owners "any easements, covenants, or other agreements between parties." The ordinance granted no right of taking or condemantion.

In sustaining the lower court's decision, the supreme court noted that there was no evidence to indicate that the legislative body acted arbitrarily. The court noted that striving to meet the problems of economic strangulation, (a term applied by the court to describe the plight of the businessmen of the community who could not provide ample parking facilities), and the control of safety hazards were proper subjects for the exercise of the police power.[81]

North Carolina.—The Winston-Salem Housing Authority applied to the City Zoning

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[80]Remington Realty Company v. City of Providence, 151 A.2d 376, May 1959. See Memorandum 115, October 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 404.

[81]Uday v. City of Dearborn, 96 N.W.2d 775, June 1959, See Memorandum 116, Novembe 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 408.

Board of Adjustment for a permit to construct a housing project consisting of approximately 300 units. At the time of the application the proposed area was zoned residential, which zoning provisions required, among other things, "(5) garage or other satisfactory automobile storage space (must be) provided on the premises, sufficient to accommodate one car for each building unit contained within the development." The zoning board, in considering the development, determined that there was adequate on-street parking in the area due to wide streets, and permitted the waiver of provision (5). Interested residents in the area appealed to the superior court; their claims denied, they appealed further to the State supreme court.

The court, in construing the above-quoted statutory requirement, held that on-street parking could not possibly satisfy either the requirement of a "garage" or "satisfactory automobile storage space." The court held further that the statute made no provision for the waiving of its requirements by the zoning board or housing authority. In answer to the respective boards' plea for a liberal construction due to the "dire need for better facilities to meet urgent housing needs," the court noted that this was a political question—not for the courts but rather for the ordaining city council to decide. The high court reversed the superior court and ordered the zoning board to withhold approval of the housing plan until there was shown substantial compliance with the zoning ordinance.[82]

Texas.—This action brought against the Zoning Board of Adjustment of the City of San Antonio was the result of the board's rejection of Edgar Kleck's application for a non-commerical parking lot permit. On appeal to the district court, the action of the zoning board was upheld, and Kleck appealed to the Court of Civil Appeals of Texas. His grounds for appeal were founded on Ordinance No. 24276 of the City of San Antonio, which he alleged offered the board no discretion to deny the application.

The ordinance provided, in effect, that parking lots for non-commercial parking of private non-commercial motor vehicles of customers and employees may be permitted in any district established by the City Zoning Code, subject to certain restrictions which pertain to the paving, marking, parking, entrances, and exits, fencing and use of such a lot. After a hearing, Kleck's application was denied because it was "not in the best interests of the neighborhood and if the request were granted, it would definitely affect the residential development."

The court said it was apparently Kleck's contention that where the ordinance said parking lots for non-commercial parking "may be permitted" it meant "must be permitted." The high court did not agree with this contention. Under such an interpretation all a person would have to do would be to make an application for a permit to establish a non-commercial parking lot in any residential zone, agree to do the things set out in the ordinance, and the permit would be granted as a matter of right. This was not, according to the court, the intention of the city in enacting the ordinance. The court saw no reason to hold that the words were obligatory and not permissive.

It was plain to the court that the enabling statute establishing zoning boards of adjustment in the State of Texas (Articles 1011a through 1011j, Vernon's Ann. Civ. Stats.) clearly granted the right of such a board to use its discretion in issuing or refusing applications for special exceptions to a zoning ordinance.[83]

INFORMATION INTERCHANGE

Eleven monthly memoranda were issued by the committee during 1959 through the Highway Research Correlation Service. These memoranda brought prompt information in the form of digests of new laws and court decisions to committee members and other interested parties. The committee is continuing this practice in the current year.

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[82]Chambers v. Zoning Board of Adjustment of Winston-Salem, 108 S.E. 2d 211, April 1959. See Memorandum 115, October 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 404.

[83]Kleck v. Zoning Board of Adjustment of San Antonio, 319 S.W. 2d 406, December 1958; rehearing denied January 1959.

The memoranda numbers and the month of their release are given in the chart below:

Committee Memorandum No.	H. R. C. S. Circular No.	Month
106	378	January
107	380	February
108	385	March
109	387	April
110	390	May
111	392	June
112	395	July
113	396	August
114	401	September
115	404	October
116	408	November