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

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●THE ANNUAL REPORT of the Committee on Land Acquisition and Control of Highway Access and Adjacent Areas has sought to serve as an indicator of problems of right-of-way, control of access, provision of parking facilities, and regulation of the roadside, all of which are national in scope. Therefore, the interest of the committee in compiling and collating new laws and procedures of the various States, as well as significant decisions of the courts, not only serves to indicate its progress, but also acts as a mirror of unsolved problems in these fields.

As States have become aware that they share common difficulties, they have increasingly called on the committee for assistance in improving techniques and procedures.

To provide an effective forum for the interchange of State practices, the committee conducted in January 1961 an open session at the annual meeting of the Board in which subjects of timely interest were presented to an audience composed of highway officials, committee members, and other interested observers. Papers presented at this session are published in this report.

In his paper, "Subdivision Controls Applied to Highway Problems," John J. Mullins, Jr., Highway Research Engineer with the Bureau of Public Roads, discussed ways to maintain a balance between land use and traffic facilities. Mr. Mullins emphasized the facts that neither land use nor highway location are absolute or constant and that governmental powers to locate highways and to control land use must be exercised with due regard to the effect that each has on the other. The paper includes a discussion of how highway problems have been and could be taken into account in connection with one method of land use control—the regulation of land subdivision.

Noting that rights-of-way needed for the Interstate Highway System will, according to present estimates, require the acquisition of approximately 1, 500, 000 acres of land and 730, 000 individual parcels of land, C. Gordon Haines, Attorney, of Maryland, in his paper, "Tax Implications of Highway Right-of-Way Acquisition," stated that the tax consequences of land acquisition of this magnitude are enormous. The ability of the average taxpayer to obtain a proper tax advantage depends to a great extent on his knowledge of the tax structure. Today's citizen, Mr. Haines said, must understand the tax demands his government has placed upon him if he wishes to derive the greatest benefit from condemnation of his property. His paper very effectively sets forth the technical and difficult provisions of the tax law and its application to the landowner whose property may be taken for public purpose in the future. In this connection, it might be mentioned that in October 1961 the Internal Revenue Service of the U.S. Treasury Department issued a new booklet entitled, "How the Federal Income Tax Applies to Condemnations of Private Property for Public Use," which goes into this matter at some length. This document (IRS 5383) should be helpful not only to property owners whose land is being taken for public improvements but also to the negotiator in his contacts with the property owner.

Freeway routes now under construction will be the major source of supply for prime industrial land for the next five or possibly eight years, according to Dorothy A. Muncy, consulting city planner of Washington, D.C., in her paper, "Reservation of Industrial Sites and the Zoning Device in Relation to Highways." Mrs. Muncy makes a plea for more advance planning by highway and city authorities in order that sites most suitable for industrial plants may not be consumed for uneconomic and unsuitable

subdivisions. An outline of the steps that may be taken to optimize the industrial potential of future freeways is included in the paper.

M. James E. Kirk, Chief of the Engineering Correlation Branch of the Bureau of Public Roads Right-of-Way Division, in his paper, "Standards for Right-of-Way Plans", calls attention to the useful purposes that may be achieved by establishing a standard procedure, form, and arrangement for the preparation of right-of-way plans similar to what has already been accomplished for construction plans by suggesting basic objectives and desirable minimum standards to be used in their preparation. The paper is well illustrated by examples of procedures adopted by one State in establishing adequate standards for the preparation of such right-of-way plans.

The committee's interest in severance damage studies continued because these studies attempt to compare the amount of damages paid in partial takings with after-sales of the remainder portions and will greatly assist in the appraisal of severance damages when a body of information has been amassed. The committee was pleased to note that at the end of 1961 such studies were in progress or planned in some 42 States. Economic impact studies continued to be encouraged by the committee, noting with a certain amount of gratification that at least 37 States now have a total of 45 individual studies in progress.

Another type of study that has been developing during the past year and is of particular interest to the committee seeks to determine the economic impact of interchanges. Inasmuch as estimates of the total number of interchanges that will be constructed in connection with the Interstate System runs as high as 14,000, it is important that their effect on surrounding land be appraised. The committee is happy to note the growing interest of the States in this type of study. At the end of 1961, some five studies were under way and it is expected that a great many more will be undertaken in 1962.

Still another type of study with which the committee is concerned seeks to isolate and evaluate the various police power methods of controlling land use that can be used to achieve highway objectives, such as zoning, subdivision regulations, conservation easements or development rights, and mapped street powers among others. Several States have undertaken or are planning to carry on such studies.

The committee continued to issue monthly memoranda through the facilities of the Highway Research Correlation Service, summarizing court decisions in the fields of the committee's interest, as well as new legislation and administrative procedures in right-of-way departments. Ten such memoranda were issued in 1960, bringing the total to 126 issued since the committee was organized.

The committee plans (a) to continue the issuance of the correlation service memoranda and the annual report on land acquisition, control of highway access, and roadside regulations and (b) to render assistance to State highway departments and others in their search for solutions to problems encountered in the field of the committee's interest.

The committee also sponsored a short study of the "Use of Photogrammetry in Highway Land Acquisition", the study was published as a Highway Research Correlation Service Memorandum, Circular 418, in March 1960 and is reproduced in this report.

The committee envisions a new and substantial effort to assist the AASHO Committee on Right-of-Way in an undertaking to derive and develop appropriate standards in the field of highway right-of-way acquisition. These efforts will need to be based on research and in this connection the committee hopes to be of assistance to the AASHO effort.

LEGISLATION 1960

Most of the State legislatures meet in regular session in odd-numbered years—sessions in the intervening years are generally called only for the purpose of considering matters of more than normal urgency. There was not a great deal of legislation enacted in 1960 of interest to the committee. Several pertinent laws were passed, however:

Land Acquisition

In two States—Alaska and Virginia—legislation providing for acquisition of land in addition to that actually needed for purposes of the highway improvement was enacted. These two laws provide for the acquisition of portions of parcels of land left in such shape

or condition as to be of little value to the owners. Generally speaking, these laws, which have previously been passed by a number of other States, provide for a taking when severance damages resulting from taking of the portion needed for the highway itself would exceed the cost of acquiring the remnant.

Expressways

Enabling legislation was passed in Hawaii to provide for controlled-access facilities. This enactment leaves only two States—Arizona and Alaska—without specific statutory authority to control access.

A Louisiana law provides that automotive service stations or other commercial establishments may not be located within the right-of-way or on publicly-owned or publicly-leased land acquired or used for or in connection with the controlled-access facilities.

Outdoor Advertising

Two States—Kentucky and New York—passed enabling legislation designed to permit these States to enter into agreement with the Federal government for the purpose of receiving Federal reimbursement authorized by the Federal-Aid Highway Act of 1958 for States restricting advertising along the Interstate System. Virginia's billboard law was amended to increase the distance from the outer limits of the highway in which billboards are restricted from 500 to 660 ft.

Provision of Parking Facilities

Two States enacted laws pertaining to the installation of parking meters. A Massachusetts law authorized cities and towns to install such meters in municipally-owned off-street parking lots. Revenue from the meters may be used for maintenance, safety, or the purchase of additional parking lots. An existing Virginia law permitting counties to install parking meters was amended to allow certain county officers to designate locations in which such meters may be installed. The Rhode Island legislature authorized the city of Providence to provide off-street parking facilities.

LAND ACQUISITION FOR HIGHWAY PURPOSES

As the Nation's highway systems increase in size and number, both State and Federal highway authorities have become increasingly preoccupied with acquisition of the necessary rights-of-way, not only to construct the highway as designed for present use, but also to make sure that future traffic needs are taken care of, thereby preventing early obsolescence so common to highways built in past decades.

At times, the private citizen is apt to feel that the promotion of the public good is not so evident or compelling as to merit governmental intrusion on his property, and in many instances seeks redress (at least from his point of view) in the courts, either to prevent what to him is an unjustified improvement or to obtain what he feels to be more adequate compensation.

Confronted with a variety of cases, ranging from statutory interpretation of the right to condemn to the proper method of determining just compensation, courts are often hard pressed, on the one hand, to find a satisfactory rationale to justify the act of the sovereign or, on the other, to prevent exorbitant awards to landowners often based purely on sentiment.

The committee continuously reviews court decisions in the field of highway land acquisition in order to determine trends in the courts' thinking, if any, and presents in the following paragraphs digests of the more significant decisions handed down during 1960.

Authority to Condemn

Although the action of a governmental or quasi-governmental body in condemning land needed for its statutory purposes is seldom questioned, there are occasions when the circumstances of the taking are sufficiently out of the ordinary to justify raising questions by the affected landowners as to the validity of the condemner's actions. One

such case, which came before the courts of Colorado during the past year, involved a taking of land already devoted to public use-in this instance, a park. In another case, the Virginia courts were called on to decide whether a railroad might condemn land needed to replace a portion of highway right-of-way that the railroad needed for a spur track. The decisions in these two cases are summarized in the following paragraphs.

Colorado. — Involved in this case was a taxpayer's suit in which a declaratory judgment was sought to determine the validity of certain ordinances passed by the Council of the City of Denver in 1958. The ordinances provided for the conveyance to the State highway department of city park land for the purpose of constructing a highway.

The ordinances granted to the highway department the right and privilege to construct and maintain a street and highway along a narrow strip of land abutting on Colorado Boulevard and extending along the eastern boundary of a park known as City Park, which highway would pass through the city of Denver. The taxpayer claimed that the ordinances were void as being violative of the State constitution, the city charter, and the public policy guaranteeing the integrity of the park land as dedicated; she also claimed a lack of public necessity, alleging the possibility of selecting alternative routes. This last point was summarily dismissed by the supreme court, which cited the general rule that such administrative determinations would not be disturbed by the courts in the absence of a showing of bad faith on the part of the agency. No such showing was made here.

In substantiation of her other claim, the taxpayer cited the city charter to the effect that no park land could be sold or leased at any time. She also cited the common law of the State which protected the status of parks and claimed that the city was, in effect, the trustee of the land for the general public's benefit and was therefore "powerless to change the status of dedicated park land without a vote of the eligible voters." The city conceded the "trust" theory but argued that it applied only to a "voluntary sale or lease" and could not be extended to restrict the State in seeking to acquire the land for the public purpose of highway construction.

The high court reduced the case to the question of whether or not the city charter provisions that protected the parks were capable of preventing the State from exercising its condemnation power to acquire property for highway purposes. The court held in the negative. Reasoning from this conclusion, the court noted the general State condemnation law which required as a condition precedent to the institution of eminent domain proceedings that an attempt be made by negotiation to agree upon the compensation to be paid. The court then cited the general principle that "the avoidance of litigation, where possible, is to be commended," and noted that the city's ordinance was the product of just such a negotiation as the law required. The court commented on the futility of compelling the institution of condemnation proceedings after an agreement had been reached and concluded that the taxpayer's argument was without merit.[1]

Virginia. —The Supreme Court of Appeals was required to decide a condemnation appeal involving an issue that it characterized as one of first impression in that State. Basically, the issue was the validity of a railway company's condemnation of private property to be substituted for land encompassed in a State highway, which the railroad needed for a spur track. The court held the condemnation to be proper under the circumstances.

The property involved was located in a steeply inclined valley known as Tiller Fork in Dickenson County. Before the condemnation at issue, the Norfolk and Western Railway Company, by arrangement with and consent of the State Highway Department, had condemned a 1,250-ft section of secondary State highway 601 in order to construct a part of a railroad spur track. The steepness and ruggedness of the terrain and the narrowness of the valley made condemnation of this highway property necessary.

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[1] Welch v. City and County of Denver, 349 P. 2d 352, February 1960.
See Memorandum 124, November 1960, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 430.

The contractual arrangement made between the railroad and the highway department provided that the railroad would compensate for the highway right-of-way by acquiring land for and constructing, at its own expense, the necessary relocated section of the highway. Pursuant to this arrangement, the railroad condemned the 9.84 acres here in question.

The owners were awarded $12,000 in the lower court proceeding. On appeal they attacked the railroad's right to condemn, not for the use of the railroad but for the purpose of relocating that portion of the highway that it had taken. The owner relied on the lack of express statutory authority for such a taking. Other contentions, such as lack of a bona fide effort on the part of the railroad to purchase, error by the court in granting and refusing instructions, and inadequacy of award were dismissed by the court either as being without merit or, in the case of the amount of the award, as being clearly within the range of the evidence.

The court cited other cases that held that exchange of land could be considered as a legitimate means of compensating an owner whose land had been condemned, particularly where it could be established that mere payment of money damages would be inadequate or work a hardship on the owner. The court held that the authority to take and exchange property was implied in the highway act. The court reasoned further that, inasmuch as the highway department had wide latitude in abandoning and relocating roads and could thus have validly condemned this property and inasmuch as there were no special advantages to the landowners from condemnation by the highway department over condemnation by the railroad, no useful purpose would have been served by requiring the highway department to go to the expense of condemnation. The court held that the arrangement was the common sense solution to the railroad's problem and the owner was not prejudiced thereby.[2]

Necessity for Taking

The majority of the courts adhere to the principle that the necessity for taking a particular parcel of land is a matter for determination by the body to which the legislature has delegated authority to carry out a specified public purpose. Unless there has been an abuse of discretion, or fraud has been demonstrated, the courts will not interfere. This was the view taken by the West Virginia Supreme Court in upholding a taking by the State road commission. On the other hand, in an Arkansas case, involving condemnation of land by a city for a reservoir, the court departed from the hands-off approach generally followed by the courts, going into the propriety of the city's action in some detail.

Arkansas.—In building a reservoir, the City of Little Rock acquired 15,000 acres of land, including 1,300 acres belonging to the Moreland family. The city filed condemnation proceedings to acquire this land. After this suit was filed, the Morelands hired a geologist to examine the soil content of their land. The geologist's report confirmed what the Morelands had suspected for some time, that the land contained something that gave it an exceptional value. The geologist found that the land consisted largely of what is known as bloating clay, a substance used in making light-weight aggregate, which in turn is used in making concrete products, such as concrete building blocks.

After a trial of the issues in the case, the trial court allowed the city to condemn only 1,165.1 acres of the Morelands' land at $181 per acre. Both the city and the Morelands appealed. The city claimed that the award was excessive and that the entire 1,300 acres was needed for the reservoir project. The Morelands contended that the judgment, in light of the presence of the bloating clay, was insufficient and further that the city did not need the additional 134 acres.

2/Tiller v. Norfolk and Western Railway Co., 110 S.E. 2d 209, September 1959. See Memorandum 119, March 1960, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 419.

The city contended that, even assuming the Morelands' land contained bloating clay, such value should not have been considered in fixing the value of the land because its presence was not discovered until after the time that had been set by mutual agreement of the city and the Morelands for determining the value of the land. The city pointed out that this same court on previous occasions had held that the date of taking was to be used in determining the value of the land. The court in refusing to accept the city's contention on this point said that the land has as much value at the time of taking as it did at any time since. The court went on to say that although facts had been developed to show that the land was worth more, those facts were present at the time of the taking even though they had not been discovered. The court appeared to put particular emphasis on the fact that the elements that gave the land the additional value were discovered before any valuation had been made and especially before any had been made by a court.

As to the additional 134 acres sought by the city, the Morelands argued that this land was not essential in the establishment of the reservoir and cited several cases to show that this same court had held, on prior occasions, that before land could be taken by condemnation it must appear absolutely necessary for the proposed project. The city, of course, contended that the land was absolutely necessary for the reservoir.

The court, in holding that the land was absolutely necessary, said that the city needed the land for three reasons:

1. It would enable the city to run straight lines in establishing the boundary and that this would facilitate the boundary line and the legal description of the property.
2. If the boundary were to run in a contour line it would require an engineer to determine if anyone were trespassing.
3. The additional property would aid in maintaining the sanitary conditions of the reservoir.

The court, in giving these reasons, seemingly departed from the approach generally followed by other courts: that a court will leave the matter of necessity for determination by the condemning agency and will not undertake a review of this determination unless there is an abuse of discretion or unless fraud is present.[3]

West Virginia.—In a condemnation case involving property abutting the Beckley-Mabscott Road in the City of Beckley, the State road commission sought to acquire certain of the owner's property and, in addition, to extinguish his right of direct access. The commission's goal was to relocate the highway and convert it to a controlled-access facility. The owner was to be provided with indirect access to the highway. In the pleadings, the commission alleged its findings of necessity for the construction based in part on anticipated future traffic conditions.

While admitting that the applicable statute allowed the road commission to base its finding of necessity on reasonably anticipated future traffic conditions, the landowner claimed that the commission's mere finding of necessity was insufficient and that it should have been required to prove actual facts showing such necessity. In other words, the owner contended that the burden of proving necessity should be on the commission; otherwise, the owner would have to prove a negative.

The high court refused to review the commission's determination of necessity. Once the court found that the purpose for which the property was condemned was in the public interest, said the court, the judicial function ended. The propriety of the particular taking belongs to the legislative discretion. The court held that in the absence of a finding of such bad faith, caprice, or fraud, which would overcome the presumption that public officials act in good faith, it would not interfere with that discretion.[4]

3/ City of Little Rock v. Moreland, 334 S.W. 2d 229, April 1960. See Memorandum 126, December 1960, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 434.

4/ State v. Professional Realty Company, 110 S.E. 2d 616, October 1959. See Memorandum 119, March 1960, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 419.

Use of Revolving Fund for Advance Acquisition of Highway Right-of-Way.

Although the Federal-Aid Highway Act of 1958 (as amended in 1959) authorizes Federal participation in the cost of land acquired up to seven years in advance of construction, many of the State highway departments have been hard put to find funds to cover their share of such costs. As a means of surmounting this obstacle, the Ohio Legislature in 1959 passed a law providing for the use of pension and welfare trust funds for advance acquisition. The constitutionality of this act was upheld during the past year by the State Supreme Court in a decision that will undoubtedly have far-reaching consequences. A review of the act appeared in a previous memorandum of this series.[5]

Ohio. —Under the act, in brief, the Public Employee's School Teacher's, and School Employees' Retirement Boards and the Industrial Commission are each authorized to enter into agreements with the Director of Highways whereunder the director acts as agent for the particular board in purchasing property in the board's name for future highway projects. Although title would be in the board, the director has complete management authority, the income to be placed in the highway right-of-way acquisition fund out of which would be paid taxes and other costs. The director must then repurchase the property from the board before letting of a construction contract or within five years of the original purchase date, whichever is earlier. The repurchase price is to include the original purchase price plus interest to be determined by negotiations between the board and the Director of Finance, with approval by the State Controlling Board. The interest rate in the instant case was 5 percent.

The court was required to pass on several issues. Notable among these were claims that the act: (a) created a debt beyond the legal limit and bound future legislatures, (b) was not directed to a legitimate highway purpose, (c) allowed whole tracts to be taken when only part might be needed, and (d) constituted an impairment of the contract rights of the beneficiaries of the retirement trusts.

The court, in disposing of all these contentions, noted the first two as raising the only serious objections. It acknowledged that there would be an inevitable period of time intervening between the time a claim accrued and its actual presentation and payment. During this period the claim would exist unpaid. "But to hold that for this reason a debt is created, would be the misapplication of the term debt." The acquisitions are provided for, with respect to the fiscal year, "with a view to immediate adjustment and payment" and are therefore not to be considered debts.

The claim that the potential five-year span would bind future two-year legislatures was met by a statutory construction that the exercise of the option to renew after each two-year period (not to exceed an aggregate of five years) would create a new and separate contract and therefore would not bind future legislatures. Finally, with respect to the allegation of impairment of contract, the court held that "the vested contract interest of the employee is in the right to receive the pension and not in the management of the fund in relationship to the investment policies thereof." The General Assembly by acting within its legislative power may authorize and change investments without impairing the obligation of a contract.

The final question considered by the court was whether acquisition for future use was a legitimate highway purpose. The court held that acquisition of rights-of-way was clearly a highway purpose and the fact that such acquisition was made far in advance of actual construction would not change this status. The court noted that mushrooming metropolitan areas and the expansion of suburban living made the planning and construction of highways a long-term procedure. "To wait until there is a present actual need for construction purposes before acquiring the right-of-way is neither economical nor practical." Further, advance acquisition obviates the increased costs of construction

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5/Ohio Rev. Code, Sec. 5501.112. See Memorandum 113, August 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 396.

in developed areas and, said the court, "affords an opportunity for the planned development of the communities themselves."[6]

One of the greatest obstacles in the path of State highway improvement is the increasing cost of acquiring rights-of-way. As land becomes more valuable due to the population explosion, its essential character in many instances completely changes. Land that was agricultural in nature suddenly skyrockets in value as it becomes available for subdivision or for commercial or industrial purposes. To surmount this obstacle, a number of methods of reserving land that will eventually be needed for planned highway projects have been developed. These include the denial of permits for building in the bed of mapped streets and the closely-related device of filing plans indicating ultimate street widths, thus putting the landowner on notice of a future improvement that includes a portion of his property. That these and other methods of reserving land must be executed with the utmost caution and with meticulous consideration for the rights of the property owner is illustrated by two court decisions handed down by the courts of Texas and Pennsylvania during the past year.

Texas.—The ultimate question posed by this case was whether the denial by the City of Houston of a building permit to make property improvements amounted to a taking of the property by eminent domain or a governmental function.

In February 1956, the landowners applied to the city for a building permit to construct a $10,000 garage on their lot. The permit was refused on the basis that the property would eventually be needed for highway purposes. Thereafter, the owners requested the city to purchase the property. The city refused, claiming that it could not consider purchasing it until certain litigation concerning a "wheel tax" was successfully litigated. Their property having continued to be thus "tied up", the owners brought this action, in the nature of inverse condemnation, for damages, on the theory that the city's action was tantamount to a taking.

The landowners relied on three general bases for their allegation of damages: (a) that the city's proposed highway project was, at best, speculative and remote because no money had ever been appropriated, no legal authority had ever approved the project, nor, in fact, had any other property been condemned or any other landowners notified of the proposed scheme; (b) that the denial of the permit amounted to a confiscation of their property and its beneficial use and constituted an unreasonable and intentional appropriation of their rights with the intent to deprive permanently, thus amounting to a taking; and (c) that in the alternative to the second claim the city had effected a partial taking, damaging, and destruction of their property and the increments of the proceeds, thus diminishing its value and preventing its being used for the highest and best use. The owners went on to claim that the refusal was based on the city's "general policy of refusing building permits so that the property would depreciate in value and it would cost the city less if it decided later to take the property." In sum, the owners claimed that they had been deprived of the free use and enjoyment of the property, although required to pay taxes on it, and that such use had been "destroyed by the exercise of the power of eminent domain under the guise of the police power to issue or refuse building permits."

In answering the allegations of the landowners, the city relied on its claim that the granting or issuing of building permits was a governmental function under the police power. Under this theory, the city would not be liable in damages for its officials' negligent conduct or decisions. Although this situation was one where the action was deliberate rather than negligent, the appellate court put the two classes of cases in the same category. The court also acknowledged that the city's action was indefensible—thus accepting the owners' first claim regarding the speculative nature of the highway project. Assuming all this, the court held that the landowners had made out a clear

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6/State v. Ferguson, 166 N.E. 2d 365, March 1960. See Memorandum 120, May 1960, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 421.

case for mandamus, or injunctive relief (i.e., compelling the city to issue the permit), or even for allowing the owners to proceed with their improvements and bring an action for trespass in the event the city should attempt to interfere. This holding, however, did not dispose of the case because the landowners had instead brought their action for damages.

The court adopted a definition of "taking" that required some invasion of the owners' property of a physical or tangible nature or an interference with their use of the property in its present state. The owners' contention that there had in effect been such a taking was rejected by the court. It found, rather, that the property as it stood had not been injured. Although finding that the city had "arbitrarily and unreasonably denied the permit," such was in the course of a police power governmental function and therefore it was not liable in damages.[7]

Pennsylvania.—In April 1958, the owners of the land in question petitioned the Court of Quarter Sessions of Franklin County for the appointment of viewers to determine the amount of compensation due them as the result of an alleged condemnation by the State highway department. The owners alleged that the department's widening of an abutting 30-ft right-of-way, to a width of 50 ft constituted a taking of property for which they were due compensation. The highway department claimed that the landowners had had notice of the proposed improvement since 1924, that the 6-yr statute of limitations applicable to petitions for damages had run, and that they were therefore barred from claiming relief.

The facts indicated that the road was originally opened in 1878 to a width of 30 ft. In 1924, the Governor of the Commonwealth approved plans submitted by the highway department for reconstruction and improvement that included a 16-ft paved strip and 5-ft shoulders on each side, all 26 ft to be within the original 30-ft width of the right-of-way. These plans were filed in the office of the Secretary of Highways and included some penciled lines that indicated a proposed "Ultimate Right of Way" of 50 ft. Following these plans, the above mentioned 26-ft improvement was made in 1924. No action was taken on the "Ultimate Right of Way" until January 30, 1956, when the Governor approved plans to widen the road to 50 ft. The highway department contended to the Board of Viewers that the filing of the plans with the penciled markings in 1924 put the landowners on notice of the proposed widening of the road. The board rejected this contention, as did the lower court on appeal.

Justice Musmanno, speaking for the high court, affirmed this decision and lectured the highway department on the meaning of due process. The court alluded to the story of Caligula, the Roman emperor who, seeking legal means to inflict cruel punishment on the people, posted laws on signs so high that they could not be read and then punished those who disobyed them. The court noted that expecting farmers from Franklin County to travel to Harrisburg "to search through the labyrinth of offices and files for plans which could possibly affect their property rights is no more reasonable than what Caligula did 2,000 years ago."

The justice went on to say "that the manner in which the 50-ft right-of-way was simply hinted at in the 1924 plan (followed by concealment of this hint from the property owners directly involved) suggests a covert and surreptitious method of doing business which has no place in a government dedicated to open planning openly arrived at."

The court noted, however, that it did not have to reach the issue of due process and constitutionality of the law because the applicable statute as amended required the highway department to give notice by filing the plans with the recorder of deeds of the proper county. Inasmuch as this required step was never taken by the department, the statute of limitations never began to run and the landowners were within their rights in petitioning to the Board of Viewers.[8]

7/Kirschke v. City of Houston, 330 S.W. 2d 629, January 1960. See Memorandum 123, October 1960, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 429.

8/Angle v. Commonwealth, 153 A. 2d 912, June 1959. See Memorandum 119, March 1960, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 419.

Severance Damages

The conventional test for determining compensation when a portion of a landowner's property is taken is the difference in market value of the whole tract before the taking and of the remaining land after the taking, based on the property's most reasonable use. With this general formula as a guide, courts are often faced with related questions of law or fact. For example, problems as to what comprises correct evidentiary admissions (e.g., comparable sales, highest and best use of the property) must be considered, as well as whether or not there was unity of use between the condemned land and that remaining. Several cases illustrating these points are summarized. It will be noted that in one case where there was in effect no deleterious effect on the remaining land due to the taking the court refused to award damages.

Georgia.—The State highway department condemned 3.909 acres of land from a 15-acre tract in Chattooga County. The property was acquired for right-of-way for a highway that ran generally in a north-south direction with the land sloping westwardly from a ridge on the eastern side of the road. The right-of-way split the property, with approximately 10 acres remaining on the western side of the highway and 2 acres on the eastern side. Expert testimony was presented at the trial relating to drainage culverts, various maps and surveys, and elevation—all in addition to general valuation evidence. The jury returned a verdict of $350 per acre for land actually taken and $1,000 damages to the remaining property, which damages the court characterized as "consequential". From this verdict the landowners appealed.

Basic to the owners' appeal was the contention that the trial court misstated the law in its charge to the jury relating to severance damages. To understand the nature of the condemnees' claim, it is necessary to set out the instruction complained of:

> Now, here is how you must decide that. You will temporarily ignore that strip of land which is now missing from the Maddux and Justice tract, because you have already to pay them for that. But look at the two tracts that are left on each side of the strip, and answer this question: Are those two tracts in the shape they are in, with the highway there, are they worth more than they were before there was any highway there; are they worth more now than they were before there was any highway; or are they worth less now than they were before there was any change made in the land? (Emphasis added.)

The landowners claimed that the instruction was in error, did not state a sound "abstract principle of law," and amounted to an instruction not to consider the damages to the property as a unit but rather to find damages to each portion of the remaining property separately.

In sustaining the lower decision, the appellate court felt that, by instructing the jury temporarily to ignore the strip taken, the court had correctly informed it that no severance damages were to be awarded for that portion. The court went on to note that the instruction regarding the before and after value of the property was, in fact, calculated to direct the jury's attention to the remaining property as a unit even though it split in two. The court held that the instruction clearly defined the remaining property alleged to be damaged and therefore affirmed the lower court judgment.[9]

Arizona.—The Jay Six Cattle Company and P.C. Getzwiller owned a total of 6,360 acres of land in fee and the Jay Six Company had leases to several more acres of land. The State, in order to convert an existing road into a controlled-access highway, condemned a total of 39.88 acres of the land either owned by Jay Six and Getzwiller or leased by Jay Six. The land condemned comprised a narrow strip along the entire highway footage of these landowners. The award of compensation in the trial court was favorable to the landowners and the State appealed to the State supreme court.

9/ Justice v. State Highway Department, 112 S.E. 2d 307, December 1959. See Memorandum 125, November 1960, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 432.

The landowners claimed compensation for the value of the land taken and severance damages to the remaining property caused by the reconstruction of the highway and the condemnation of their rights of access thereto. The State based its appeal primarily on the argument that the court erred in allowing expert witnesses to testify to the value of the land in terms of front footage when prior sales in the immediate area disclosed that they had been made in terms of acres. The landowners' witnesses testified that the highest and best use of the land here was for commercial and residential purposes and the State objected to this because the land was being used primarily for grazing purposes and there appeared to be no market for such use.

In refusing to accept the argument of the State, the supreme court said that the fact there were few prior sales in the area and the sales that had been made were on an acreage basis did not preclude expert testimony that the land had a market value on a front foot basis. Prior sales, said the court, were only one means of determining market value but they were not conclusive. Here the essential point was the witnesses testified that the use to which the land was being put was not its highest and best use. The court went on to say an award that did not take into consideration the highest and best use of the land in question would not be the fair market value and therefore would be inadequate compensation. An owner, said the court, who was making only a minor use of his property could not be deprived of its value for a higher use if that higher use meant a higher market value.

The State also contended that the trial court erred in permitting severance damages to the remaining property because it was separate and distinct from the property taken. The State contended that severance damages could be awarded only for land having the same use as the land taken. Here the land taken was allegedly commercial property whereas the remaining land was allegedly residential. The court said that dependency of the value of the condemned land on the remaining land was the proper test and not identity of uses. There was considerable testimony at the trial to show that the value of the remaining land was dependent on the availability of commercial land having access to the highway. That is, the remaining land was valuable as residential property only because the land between it and the highway was usable as commercial property and that both parts of the land had access to the highway. The court said evidence showed that the substantial severance damages resulted from the taking of the commercial land and from the partial deprivation of access to the highway.

In this case there was a strong dissenting opinion that expressed misgivings as to the rationale of the majority view. The dissenting judges felt that the majority opinion was based on remote and speculative factors, since there was no competent evidence that the land had a present value for commercial or residential purposes.[10]

Vermont. — Mr. and Mrs. Donald W. Record were owners of three trailer parks in the area of Brattleboro. They first owned the Glen Trailer Park, which consisted of 37 trailer lots. In October 1955, they purchased a 16-acre tract, which they developed into the Black Mountain Park. In June 1958, the State highway board condemned 11.3 of these latter 16 acres, which at the time of condemnation were improved by various water, sewage, and telephone facilities and which accommodated 50 trailers renting at $18.00 per month. Of the 50 lots then developed, 41 were taken by the State; of the 9 remaining, 5 were left unusable; hence, only 4 lots remained that could be used.

In August 1958, the owners opened a third trailer park known as Mountain Home Park. The court indicated that the Records had virtually no competition in the area. This was borne out by the fact that by the date of the condemnation hearing, in October 1958, they had increased the over-all number of trailer lots rented to 97: Glen still had 37, Black Mountain had 29, and Mountain Home had 31. The owners appealed the board's award of $27,000 and were awarded $32,000 by the Windham County Court, from which judgment they again appealed, this time to the State supreme court.

10/ State v. Jay Six Cattle Company, 353 P. 2d 185, June 1960. See Memorandum 125, November 1960, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 432.

The primary ground on which the owners based their appeal was the refusal of the county court to apply capitalized income as a measure of business damages. Vermont statutes (19 V. S. A. § 221 (2)) permit loss of value of a business to be reflected in the damages resulting from the taking or use of property by eminent domain. The owners claimed that, particularly where there was no evidence of comparable sales in the area, the capitalization of income method presented the best available evidence of damages. The county court refused to apply this method of valuation as it found that the nature of the venture was too uncertain and speculative. The court applied the more conventional test for severance damages, i.e., the difference in market value before and after the taking based on the property's most reasonable use. The court further found that in any event there was no demonstrable loss of business.

In affirming, the Supreme court held that the county court had properly applied the law to the facts that it found and, inasmuch as the award was within the range of evidence, there was no reversible error. The owners argued, to no avail, that their good fortune in developing a like business at another place should not be used to mitigate their business damage. The high court held otherwise, however, noting that the taking of land did not injure the income or operation of the business—a conclusion that, said the court, was supported by the fact that the displaced trailer sites were successfully relocated. [11]

Offset of Special Benefits

Two interesting decisions were handed down by the courts of Alabama and Louisiana during the period covered by this report. In both instances, the courts allowed the offset of benefits derived from the highway improvement itself and, in Alabama, against the value of the land taken as well as the remainder. The Louisiana court took pains to declare that such an increase could not be offset against the value of the land actually taken. The Louisiana court also denied the landowners' allegation that the benefits derived from the improvement were of a general rather than a special benefit.

Alabama.—In a condemnation proceeding brought by the County of St. Clair involving the taking of 1.8 acres for highway purposes, the probate court awarded the landowners $2,000 damages. The sum was based on the report filed by the appointed condemnation commissioners.

The property, used solely for farm purposes, was located less than 1 mi from the city limits of Leeds. The taking consisted of a 60-ft wide strip of land running through 40 acres of the landowners' property to be used for an access road to a new controlled-access highway. The property had been served by a very rough road at the boundary of the 40 acres. Because no access was provided at the point of intersection with the new highway, the usefulness of this road was destroyed.

The county appealed the $2,000 award to the circuit court. A jury trial was had and the landowners were awarded no damages for the taking. The landowners then took the present appeal to the supreme court, claiming that every witness qualified to testify as to the question of damages had appraised the damages as ranging from $600 to $20,000 and that the preponderating opinion placed the amount at the $20,000 figure. On this basis the owners contended that an award of no damages could not have been based on the evidence.

In affirming the trial court's failure to award damages, the supreme court relied on two points. First, it noted that there were in fact two witnesses, one for each side, who had testified at the trial that the presence of the new highway would actually increase the value of the property by raising its highest and best use from farm land to subdivision purposes. The court felt bound to accept the trial court's evaluation as long as it was supported by this last testimony, particularly in view of the second point, that by consent of both parties the jury had had an opportunity to view the property. [12]

11/ Record v. Vermont Highway Board, 154 A. 2d 475, September 1959. See Memorandum 118, February 1960, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 414.

12/ Posey v. St. Clair County, 116 So. 2d 743, December 1959. See Memorandum 123, October 1960, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 429.

Louisiana.—In this case the parish condemned 0.834 acres of land owned by Jules T. Edwards and others for use as a right-of-way. After the trial court had handed down its decision, the parish appealed, alleging that the award was excessive, while Edwards sought to have the award increased to include severance damages.

Although the appeal of the parish was based on evidentiary problems concerning the weight to be given expert testimony, of interest here are the court's pronouncements regarding the offset of special benefits. The landowners argued that they should be given severance damages because the value of their remaining property had sustained a diminution in value as a result of the condemnation. The basis for this argument was that the new right-of-way destroyed their frontage upon another thoroughfare.

The court in refusing to accept this argument found that the construction of the proposed hard-surfaced road would not only increase the market value of the land by its very presence but also provide ready access to the existing thoroughfare. The court felt that, although the construction of the new road might possibly have impaired the value of the remaining part of the land, the benefit it would bring would outweigh any detriment it might have otherwise caused. The court said that any benefits that accrued to the landowners by reason of the condemnation could be credited against the severance damages to the remaining property. However, the court was very careful to point out that a State statute prohibited offsetting benefits against the value of the property actually taken. In other words, this procedure of crediting benefits against losses was applicable to severance damages but was not available with regard to property actually taken.

The landowners attempted to overcome this by arguing that the benefits that accrued to them were those that accrued to the general public. The court said that when road improvements enhance the value of property fronting thereupon, this enhanced value is not shared by the public at large. The court went on to say that the distinction between general benefits and special benefits is that general benefits are those that arise from the fulfillment of the public object that justified the taking whereas special benefits are those that arise from the peculiar relationship of the land in issue and the particular improvement.[13]

Leasehold Interest

Court actions often revolve around the rights of a leaseholder, and the problems arising in this field are among the most difficult to solve due to the complexity of the relationship between landowner and lessee. The three decisions noted in this area during the past year involved such matters as (a) the compensable interest, if any, of a lessee in Minnesota whose lease expired after the filing of the condemnation action but before the date of the award, (b) the inclusion in the lessee's award of compensation for increased transportation costs brought about as the result of a taking in Arkansas, and (c) the matter of whether separate deposits for the lessor and the lessee were necessary in Louisiana before the State might take possession of the property condemned.

Minnesota.—Late in 1955, the State filed its petition to condemn a tract of land 50 ft x 165 ft with a frame building thereon, located in Richfield. The building had been erected by the lessee whose lease expired in December 1956. Under the terms of the lease the building and all improvements were to be considered as personal property belonging to the lessee who was given the right to remove them upon the expiration of the lease.

In early 1957, the commissioners appointed by the county district court awarded damages to the various owners of the property in the aggregate amount of $12,500. The lessee was not included in the apportioned award but was ordered to remove his property within a reasonable time. He thereupon appealed, claiming that the filing of the condemnation suit, which occurred before the lease expired, had had the effect of

13/ Parish of East Baton Rouge v. Edwards, 119 So. 2d 175, March 1960. See Memorandum 126, December 1960, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 434.

giving the State the sole right of possession, thus terminating his interest in the property. He claimed that he was entitled to the fair market value of that interest and, further, that the commission lacked power to attach the condition requiring removal. The district court denied the appeal and the lessee appealed to the supreme court.

In sustaining the lower court, the high court noted that ordinarily the value of condemned property is measured at the time of taking—which in this case was the date of the commissioner's award—and not at the time of instituting proceedings. At the time of the award, the lessee had no compensable interest in the property because his lease had expired some weeks before. The provisions in the lease, said the court, must determine his rights to the property; his only right under the lease was to remove the building with improvements upon the expiration of the lease or, as the court had ordered, within a reasonable time thereafter.

The court noted, in addition, that the order requiring the lessee to remove was neither contrary to nor prohibited by any statute or decision. The lessee had no right to continue to occupy the land and was therefore not damaged by the removal.[14]

Arkansas.—The State supreme court held that, in arriving at compensation for a leasehold interest covering land containing "select material" being used by the lessee in the performance of a contract with the State highway commission for construction of the highway for which the land was being taken, the comparative expense involved in finding another source of such material for the performance of its contracts might be considered.[15]

A jury returned a verdict of $2,127.50 for the leasehold interest and the highway commission appealed (on this and other matters) claiming the award was excessive.

The court noted that the "select material," which was a high-quality porous sand, was difficult to find and that its value varied according to its proximity to road construction projects. It was shown that increased hauling costs in the present case would amount to $34,476, and one of the lessee's witnesses testified that the leasehold interest was worth this amount. The court stated that, even though increased transportation costs were not themselves the measure of damages in a case of this kind, such evidence was regarded as a proper aid to the jury in its effort to determine the market value of the lease.

Louisiana.—The State brought an action to condemn certain lands owned by Johnie E. Sumrall, one portion of which was being leased by Oren Russell and Oren W. Russell as a filling station. The State deposited $83,925 in the registry of the court, estimated to be the just compensation for the land and the improvements on it. Acting pursuant to the State statute, the State then obtained an order of expropriation from the district court. The landowner, Mr. Sumrall, then filed an exception contending that the State was not entitled to this order because it had not made separate deposits in the court for the landowner and for the lessee. The lessee then filed a similar exception with the court. The trial court found for the landowner and the lessee and as a result divested the State of the title to the property in question. The supreme court of the State reversed this decision of the trial court.

The landowner contended that the lessee's right to possession was a separate property right distinct from ownership of the land and as the owner of a separate property right the lessee was entitled to separate compensation upon condemnation of the property. The landowner and the lessee argued that separate deposits were required on the premise that apportionment of the deposit between the landowner and the lessee was required

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14/ State v. Pahl, 100 N.W. 724, January 1960. See Memorandum 124, November 1960, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 430.

15/ Arkansas State Highway Commission v. Cochran, 327 S.W. 2d 733, September 1959.

in order to permit the withdrawal of the deposit by each in his own right. The court said that the applicable constitutional provision was silent regarding this matter but that the statutes referred to it. The court said that the statute providing for the withdrawal of the deposit was "confected with a view toward some reasonable delay in distributing the fund in some instances." Thus, the court said, there did not appear to be any absolute right to the withdrawal of the fund and therefore the basic premise relied on by the landowner and the lessee was invalid.[16]

Removal Costs

In two recent cases, arising in Illinois and North Carolina, the respective supreme courts handed down virtually identical opinions denying compensation based on removal costs. The latter court, for all intents and purposes, adopted the reasoning of the former, which in turn cited and adopted the Federal position as enunciated by the United States Supreme Court. The cases are of especial interest because they present a fully documented textbook exposition of this important and controversial issue—the North Carolina court placing particular emphasis on precedent cases involving condemnation for highway purposes.

The Kosydor (Illinois) case involved the housing authority's taking of more than two acres of property used for an automobile salvage business. The owner was awarded $113,000 by the lower court for the real property taken and $27,000 compensation for the cost of moving all personal property from the premises. On appeal, the owner claimed that denial of compensation for these removal costs would amount to a confiscation of his stock and trade.

The Williams (North Carolina) case involved the condemnation of a leasehold estate in a grocery store building and premises by the State Highway Commission for the relocation, reconstruction, widening, and improving of the Asheville Expressway. The leaseholder was denied removal costs. He appealed, claiming $750.00 for expenses incurred in his moving to another location and $7,500.00 for loss and interruption of business and loss of customers and good will.

Neither court allowed recovery for the removal costs or other consequential damages claimed. Both cited Federal authority to the effect that, with the exception of a temporary taking, just compensation does not comprehend moving expenses as an element of damage and, absent this exception, a condemnee's right of compensation is limited to the fair market value of the property taken. The courts noted that the condemning authorities had not condemned the personal property, equipment, stock, etc., nor was it likely that such a taking of property that they could neither need nor use would be constitutional. It was further pointed out that costs of moving are the natural results of any sale, particularly so in the case of leaseholds.

The courts recognized that an expected return on investment might have been frustrated by the exercise of the power of eminent domain, but likened this to frustrations involved in the denial of other incidental losses such as continuing payrolls during time spent in moving and loss of good will. All of these losses, absent legislation to the contrary, were considered to be "a part of the burdens of common citizenship."[17]

Mineral Rights

North Dakota.—On December 10, 1959, the supreme court handed down a decision that the oil, gas, and mineral rights in certain property held by the State for highway purposes had automatically become revested in the original owners of the property even though the State still held a determinable fee interest in the property exclusive of such

16/ State v. Sumrall, 121 So. 2d 724, May 1960. See Memorandum 125, November 1960, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 432.

17/ Housing Authority of City of E. St. Louis v. Kosydor, 162 N.E. 2d 357 (Ill.), November 1959; Williams v. State Highway Commission, 113 S.E. 2d 263 (N.C. 1960). See Memorandum 120, May 1960, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 421.

oil, gas, and mineral rights. This decision was based on the fact that the property was originally acquired for highway usage by means of proceedings instituted under a 1927 statute that provided in part that the State at any time "may vacate" the rights in the land acquired under the statute and that upon such vacation title "shall revest" in the original landowners, their heirs, successors, and assigns.

The State had taken the land here in question and had constructed a highway thereon. Subsequently, the State had leased the oil, gas, and mineral rights to a third party while still maintaining a highway over the land. Suit was brought to quiet title. In handing down the above decision, the court reasoned that the act of the State in leasing the oil, gas, and mineral rights indicated that the State no longer intended to use such oil, gas, and mineral rights for the highway purposes for which they were condemned and that, consequently, by virtue of the statutory language "shall revest," the title to such oil, gas, and mineral rights automatically reverted to the original owners.

Following this decision, the State petitioned for a rehearing and the court granted the petition to the extent that it permitted reargument on the case. As a result of this the court withdrew its first opinion and instead, on February 29, 1960, rendered a superseding opinion in which it still found for the original owners, but on a different rationale.

In this opinion, the court made pointed reference to Section 100 of Chapter 177 of the 1953 North Dakota Session Laws. This section in effect stated that since oil, gas, and fluid minerals were not an essential for highway purposes, all such rights theretofore taken were vacated and returned to the parties in whom the title was vested at the time of taking, their heirs, administrators, executors, and assigns. This section also provided that such a reconveyance should be "subject to any existing contracts or agreements covering such property," but further stated that all rights and benefits of such contracts should accrue to the grantee of such reconveyance.

The State contended that such a revesting as designated by this statute was in violation of Sections 20 and 185 of the North Dakota Constitution because its effect was to grant special privileges and to make gifts or donations to certain individuals by the State. The court however rejected this contention. It pointed out that the State legislature had enacted the statute under which the highway department had taken the land. The statute contained a provision for reverter to the original owners in the event that the highway department decided the land was no longer needed for highway purposes. Thus, the court reasoned, if the legislature could bestow upon the highway department the power to determine when interests in realty were no longer needed for highway purposes, the legislature also had the power to make such a determination of its own accord—which it did by means of the 1953 statute. Furthermore, since the statute under which the land was taken left a possibility of reverter in the original owners, the 1953 legislative act did not make a gift to such parties nor did it extend to them a special privilege; rather it merely gave effect to a right or future interest that already existed in them.

The court then proceeded to state that as long as the State held such oil, gas, and mineral rights (i.e., before the 1953 legislative act) it had the right to execute a nonoperating oil and gas lease inasmuch as the leasing of such nonoperating rights was not inconsistent with the use of the land for highway purposes. Because the lease in this case was apparently a nonoperating lease and because it was apparently executed prior to the reconveyance of oil, gas, and fluid minerals by the 1953 legislative assembly, the rights taken by the original owners as a result of this legislative reconveyance were subject to the lease, as was expressly provided by the legislative act.

But this statutory reconveyance also provided that the benefit of any such contract should thereafter accrue to the grantee of the reconveyance. Consequently the court held that in the situation presented by this case the original landowners were the titleholders of the oil, gas, and mineral rights in the property subject to a nonoperating lease on such rights of which they were the beneficiaries. This result still left the State with a determinable fee interest in all property rights other than the oil, gas, and mineral rights for as long as such property rights were needed for highway purposes.[18]

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[18] Wallentinson et al v. Williams County et al, 101 N.W. 2d 571, December 1959. See Memorandum 119, March 1960, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 419.

Immediate Possession of Highway Right-of-Way

To prevent delay in construction of needed highway improvements when the necessary right-of-way cannot be obtained by negotiation, many of the States have enacted legislation permitting the State highway departments to take possession of the necessary property at some time before actual determination of compensation by the courts. These laws have generally been found acceptable to the courts when adequate safeguards to protect the property owner's interests are included. That the courts are zealous in guarding these interests is borne out by a recent Tennessee decision in which the State supreme court held that a recently enacted statute requiring delay in the actual court determination of damages until six months after completion of the highway improvement was unconstitutional, on the ground that such a delay could not be considered reasonable.

Tennessee.—The State, acting through the Commissioner of Highways, brought a proceeding in which it sought to condemn certain land belonging to Katherine M. Catlett and others. The landowners did not question the right of the State to take their land but did question the method of payment and the procedures provided for in the Eminent Domain Act of 1959, alleging that the act was unconstitutional. The trial court ruled that the act was constitutional and the supreme court agreed to review the trial court's action as to this aspect of the case.

A portion of the eminent domain act in question read as follows:

> ***no trial shall be had until six (6) months have expired after the completion of said street, road, highway, freeway or parkway; provided, however, that if the same has not been completed within twenty four (24) months from the filing of said condemnation petition, said case shall be tried.

The act further provided that the condemning governmental unit would place the appraisal price on deposit in the circuit court. The landowner could withdraw this money from the court. If a trial court awarded more than the appraisal price, then the appropriate governmental unit would pay the difference. If the court awarded less than the appraisal price, the landowner would return the difference.

As to the provision concerning the time period that the landowner must wait before contesting the award, the supreme court held that it was unconstitutional. The court based its decision on a provision in the State constitution guarantying "that all courts shall be open; and every man . . . shall have remedy by due courts of law, and rights and justice administered without . . . denial or delay." By way of analogy, the court cited a Kentucky case[19] wherein a like provision was held unconstitutional as violating a similar provision of the constitution.

Under this constitutional provision, the court said, a reasonable delay would be perfectly satisfactory, but a delay, such as here, of months and possibly years was unreasonable in light of the fact that the act did not set forth any reason why there should be such a long delay. The court was very careful not to go into the question of what would constitute a reasonable delay. It said that this was a question to be decided according to the particular facts and circumstances of each case as it arose.

As to the other portions of this act, the court held that they were constitutional. The landowners contended that the provision authorizing the State to determine the amount of damages to which the landowner was entitled and then to deposit this in the court in which the condemnation petition was filed gave the State the power arbitrarily to set the award that the landowner was to receive. The court said that this provision of the act was to be read together with another provision that stated that damages to the landowner were to be computed in the following manner: taking the fair market value of the property at the time the petition was filed and then adding any incidental damages to which the landowner was entitled. From this amount any incidental benefits to the

19/ Commonwealth ex rel. Tinder v. Werner, 280 S.W. 2d 219, 1955.

landowner were to be deducted. The court felt that when these two provisions were read together this did not give the State an arbitrary right to establish the compensation to which the landowner was entitled. The court went on to say that it, the court, in the final analysis, could determine the amount of compensation to be paid because even though the State determined the amount of compensation to be paid in the first instance, this did not preclude the landowner from going into court if the State's determination was not to his satisfaction.

As to the deposit features of the act in general, the court felt that this was an innovation in the State's eminent domain statutes and one that it thought very beneficial to the landowner, because it allowed him to take the sum of money deposited without losing the right to appeal and thereby attempt to establish a higher valuation.[20]

Compensability of Noise Resulting from Highway Improvement

New York.—In a decision handed down by the Westchester County Supreme Court in December 1959, the court held that the noise, fumes, and light from trucks and busses might constitute an actionable nuisance to residents along the New England Thruway.[21]

The new thruway cuts through one of the old residential neighborhoods of Pelham Manor in Westchester County. The complaining owners sought an injunction to prohibit heavy trucks and busses from using the road from 8:00 P. M. to 8:00 A. M. The complaint was accompanied by affidavits of 27 residents, including physicians, lawyers, clergymen, professors, and community and business leaders, all attesting that the vibrations, noise, light, and fumes from these heavy vehicles interfered with sleep, health, conversation, recreation, and radio and television reception. Some even complained that they had had to resort to barbiturates and that their children were failing school due to loss of sleep.

The State contended that the thruway authority was immune to liability but the court held otherwise, stating that inasmuch as it had full jurisdiction over the thruway and its use, its possession and control were such as to make it responsible for an unauthorized or illegal use. The fact that it was a public corporation and a State agency would not exempt it from its responsibility for unreasonable use amounting to a nuisance.

The owners complained that the authority had failed in its promises to line the thruway with buffers of evergreens and hedges. The court noted that while fumes, noise, and lights from this heavy traffic "can be very annoying to persons residing along a highway," it is clear that this, if only incident to the reasonable use of the highway, would not be the basis for legal relief. It is also clear however, added the court, that a resident might have a cause for relief if a highway for this type of traffic were placed so near his door as to seriously affect his health and comfort and the value of his property. Such, said the court, might constitute an actionable nuisance. "If the [homeowners] are so substantially damaged by an unreasonable location and use of the thruway that they are being deprived of the ordinary enjoyment of their properties without just compensation, they should not be without remedy."

The court pointed out that an injunction, if warranted, would be required to be limited and conditional, and therefore, further proceedings giving full consideration to the relevant facts and issues would be necessary for a proper determination. The court added that should it be considered impractical for the authority to so restrict the bus and truck traffic, the resulting judgment might properly take the form of money damages.

CONTROL OF HIGHWAY ACCESS

Although the benefits to be derived from the construction of expressways—outstanding among which are the decrease of accidents, the savings in travel time, and the relief of traffic congestion—are so firmly established as to provoke little or no controversy, certain problems attendant on the creation of such facilities continue to arise. Perhaps

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20/ Catlett v. State, 336 S.W. 2d 8, May 1960. See Memorandum 125, November 1960, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 432.

21/ Matthewson v. New York State Thruway Authority, 196 N.Y.S. 2d 215.

foremost among these problems is the matter of abutters rights. When an abutting owner is denied access to a newly created expressway or to an old highway being converted to a controlled-access facility, is he entitled to compensation because of this denial of access, and if so to what extent? If his access is curtailed, must he be compensated? How much regulation can be accomplished under the police power rather than by the exercise of the power of eminent domain? The answers to these questions are far from clear at the present time, witness the court decisions contained in the following pages. The views of the courts of the several States are so often divergent, it might be concluded fairly that, for the most part, each individual case is being decided on its merits. No hard and fast principles can be assumed from the cases reported below, but they are of interest to the extent that they present a cross-section of the various courts' thinking on the subject.

Access Rights on New Highways

Late in 1959, a court decision in Iowa added this State to the list of those in which the courts have held that access rights to new highways are not compensable. In other words, when a new expressway is constructed, the owner of adjacent land, never having had access thereto, is not entitled to access as a matter of right.

Iowa.—In a condemnation proceeding by the State highway commission, involving the taking of a strip of land over the owner's farm to construct a controlled access highway, the State supreme court ruled that the owner had no right of access to the new road. The court noted that this question had never before been decided in Iowa.

The commission took a 3.4 acre strip across the owner's farm in order to relocate US 6 in and around Iowa City. The strip severed the farm, leaving 12 acres north and 104 acres south of the new road. The entire north-south length of the property (about four times its width) abutted a public highway on the west to which there was complete access. The new road did not interfere with this access except at the point of intersection. No access, however, to the new east-west highway was permitted.

Trial was had in the Johnson District Court. The highway commission appealed from an adverse decision citing as error the court's refusal to instruct the jury not to consider, in estimating damages, the deprivation of direct access between the new highway and the owner's adjacent land. The court did, however, instruct that the owner was entitled to compensation for the deprivation of access from one part of the farm to the other and any inconvenience arising therefrom.

The high court distinguished the denial of access to the new road itself from a land severance that resulted in inconvenience in going from one tract to the other. Such inconvenience was held to be properly considered in measuring the difference in market value before and after the severance. The court held, however, that in the case of a new highway, where no access right had previously existed, there was no condemnation of access for which compensation was due. Accordingly, the court ruled that it was error for the district court to have omitted the commission's requested instruction on this point. The decision was thus reversed and remanded for further proceedings to be held consistent with this ruling.[22]

Frontage Roads

Four recent court decisions—two in Arkansas, one in Arizona, and one in Mississippi—are of more than general interest. They have been grouped together because they illustrate three approaches to the question of compensation for damages incident to the construction of controlled-access facilities with frontage roads. The two Arkansas cases, Bingham and Union Planters National Bank, are distinguishable on their facts. In the former, property was taken along the property owner's frontage, all of his property

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22/Lehman v. Iowa State Highway Commission, 99 N.W. 2d 404, November 1959. See Memorandum 120, May 1960, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 421.

lying to one side of the road. The existing right of access to the highway was held to be undiminished by virtue of the construction of a frontage road, therefore there were no compensable damages due to impairment of access. In the latter case, the controlled-access facility bisected the property, effectively preventing unified use. On this basis severance damages were awarded.

In Thelberg, an Arizona case, the facts are somewhat similar to those in Bingham. Whereas the Bingham court denied compensation, relying on case authority that held there was no property right in the maintenance of traffic past one's door, the Thelberg case granted compensation on the theory that, where there is an actual taking of property, the measure of damages is the difference in market value before and after the taking.

In holding somewhat similar to that in the Arizona case, the Mississippi Supreme Court held that a highway reconstruction that rendered property of the abutting landowner less accessible constituted the taking of a compensable property right.

In still another case involving frontage roads, the Washington Supreme Court held that, although the State could validly exercise its police power to erect safety and control devices to regulate the flow of traffic on the highways, this right of regulation was limited to the users of the highway after they had gained access thereto. Restriction of the adjacent owner's access, by placing him on a frontage road, therefore, constituted a compensable damage.

In a somewhat different vein, although involving frontage roads, is a North Carolina case wherein the court held that a consent judgment between a landowner and the State did not obligate the State to provide frontage roads for the landowner's benefit.

Arkansas.—In a condemnation proceeding in which leased property was taken in order to construct a frontage road, the lessor and lessee sought compensation both for the property taken and consequential damages to the gasoline station arising from the alleged impairment of access. The Arkansas Supreme Court, following the reasoning of relocation cases, held that where the property had access to the frontage road there was no compensable impairment of access to the throughway.

The facility involved was the relocation of Highway 67-70, running east and west between Little Rock and Benton. The State highway commission acquired a right-of-way 200 ft wide for this purpose, with the ultimate plan of constructing two separate concrete strips—the northern strip (Strip No. 1) designed to carry one-way traffic from Little Rock to Benton, the other to carry traffic in the opposite direction. The lessor had acquired 5.6 acres abutting the northern strip and later the lessee erected a gasoline filling station with four driveways providing access. At this time, only the northern strip had been built and was serving both directions of traffic.

Sometime after the erection of the filling station, the commission redesignated the road as Interstate 30 and, in order to provide the necessary frontage roads, condemned a 50-ft strip on both sides of the original right-of-way. At the time of the instant proceeding, Strip No. 1 and both frontage roads were completed. The land actually taken from the owners amounted to a 0.945-acre strip off their south boundary. The result of the taking was to condemn all access to the throughway (Strip No. 1) and provide direct access to the frontage road. Indirect access to the throughway was permitted by an entrance a little more than a mile from the owner's property. It was conceded that the taking virtually destroyed the service station business.

After a hearing in the county circuit court, the jury awarded $9,000 to the lessor and $30,000 to the lessee based largely on severance or consequential damages caused by the resultant diversion of traffic. The only question considered on appeal was the commission's claim of error by the circuit court in permitting the "introduction of estimates of damages based solely on diversion of traffic away from the premises."

In a lengthy discussion of many leading cases throughout the States, the high court concluded that this was a diversion of traffic case. Applying the general rule that the property owner has no vested right to the continuation of traffic past his property, the court sustained the commission's contention, holding the admission of the previously mentioned evidence to be error. The court pointed out that this right, which the owner does not have, is not to be confused with his right to ingress and egress, which would

be a compensable property right. The court held, however, that this right was left "undiminished by virtue of the access road in front of its station." The court noted further that to hold the right to traffic compensable "would amount to erecting an almost intolerable barrier in the way of further construction of super-highways."

The court reduced the awarded damages to $6,159 for the lessor and $8,790 for the lessee. It arrived at these figures by taking the commission's highest appraisal testimony, which testimony it held to be based on proper and compensable criteria.[23]

Arkansas. —In a decision handed down on the same day as the Bingham case, the Arkansas high court held that landowners were entitled to severance damages resulting from the construction of a controlled-access highway that divided their property for its entire length of 3-mi thus preventing the operation of their plantation as a unit.

The landowners owned a 2,800-acre farm known as the Woollard plantation. Before 1952, no major highway traversed the property. In 1952, the State highway commission relocated a portion of US 61, condemning an easement 250-ft wide, running through the center of the property along its north-south length. At that time, the State had no authority to create a controlled-access highway. The owners continued to have access from one side to the other by crossing the new highway at four county road intersections and at least four private farm roads.

The State, in 1953, passed a new statute which permitted access control and required the acquisition of a fee simple for this purpose. Pursuant to this statute, the commission commenced the instant action to condemn the fee to the existing right-of-way and an additional acre, valued at $250, for frontage roads.

The evidence indicated that the original construction had not seriously interfered with the operation of the plantation and did not substantially lower its value. The new construction included two one-way double highways with controlled-access, bounded on either side by two-way frontage roads affording access to the inner lanes only at specified interchanges. No interchange was provided within the limits of the plantation, the nearest access being overpasses approximately ½ mi to the north and south. The effect of this new development was to separate the east and west portions of the property thus rendering them incapable of continued unified use, according to the court. The owners would have to build new headquarters buildings and acquire additional machinery in order to operate the plantation as two farms rather than one.

The jury had awarded $75,250. The commission on appeal did not contest this amount (assuming the damage to be compensable at all) and the supreme court noted that there was ample expert opinion in the record to the effect that the owners' total severance damages would materially exceed this amount. The commission raised two objections: that, in fact, the severance damage was not compensable because the right to cross from one side to the other had been taken by eminent domain in the original proceeding, or, in the alternative, that this right could now be taken by an exercise of the police power without compensation.

The court rejected the first contention by pointing out three salient facts. First, these damages had not in fact been considered in the original proceeding, due to the many public and private crossings that were open to the landowners at the time. Second, the owners could not have been legitimately expected to raise the point inasmuch as they could not anticipate future legislation enabling the controlled-access facility. Finally, even if the owners had raised the point, the lower court would have been required to dismiss it because controlled-access facilities were impossible at the time under applicable law. Any anticipated damages for contemplated total severance would have been pure speculation.

23/Arkansas State Highway Commission v. Bingham, 333 S.W. 2d 728, March 1960. See Memorandum 121, June 1960, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 423.

The court found the commission's second contention, that it had effected a mere traffic regulation under the police power, a more perplexing one. It noted that most of the commission's case authority for this contention was based on situations such as the Bingham case where all the property lay on one side of the road. In general, the court found that, upon the condemnation of the underlying fee and the conversion of this conventional type of highway into a controlled-access highway, prohibiting direct access from one part of the farm to the other, this form of severance damage arose. The court further found that the equities were clearly in favor of the landowners.

The lower court award of severance damages was therefore affirmed. The high court did, however, reject the inclusion in the awarded court costs of $1,280 in fees for the landowners' expert witnesses. Other than this modification, the lower decision was affirmed.[24]

Arizona. — Upon rehearing, the Arizona high court reversed its October decision (State v. Thelberg, 344 P. 2d 1015, October 1959) and declared that where property abutting a conventional road is taken to build a frontage road that would render access to the main thoroughfare indirect, the resulting severance damage is compensable.[25]

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 landowners' 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. Access to the highway was by means of the one-way westbound frontage road leading to a ramp 170 ft beyond the property.

The court originally held that the impairment of access was the result of the noncompensable change in grade, likening this police power measure to relocating the road. From this conclusion the court reasoned that the frontage road did not impair access but rather aided it. Severance damages, therefore, were to be considered without reference to the noncompensable impairment of access.

In reversing earlier State law on the subject, the high court announced what it considered to be the weight of authority, that "an abutting property owner to a highway has an easement of ingress and egress to and from his property which constitutes a property right" that cannot be taken or damaged without just compensation. The court held that the measure of damages for the destruction or impairment of this access right was the difference between before and after market values of the remaining property.[26]

Mississippi. —In connection with relocation and reconstruction of a portion of US 49 near Hattiesburg, the State highway commission condemned 0.55 acre needed for the construction of a frontage road. Before the taking, the landowner had about 12 acres of property abutting the northern side of the business route of US 49, on which he operated a gasoline service station. The service station extended along the highway approximately 612 ft with two access driveways. The opinion indicates that the owner's right of access to this conventional highway was neither controlled nor limited in any way other than being subject to the commission's right to regulate entrances to the highway reasonably.

24/ Arkansas State Highway Commission v. Union Planters National Bank, 333 S.W. 2d 904, March 1960. See Memorandum 121, June 1960, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 423.

25/ See Memorandum 116, November 1959, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 408.

26/ State v. Thelberg, 350 P. 2d 988, April 1960. See Memorandum 121, June 1960, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 423.

The 0.55-acre strip sought to be condemned varied in width from about 50 ft on the southeast corner of the property to 12 ft at the southwest corner. The two-way frontage road was to be constructed on this strip with a neutral portion dividing it from the main business route. Where before the taking the owner had had direct access to the highway, after the taking he abutted the frontage road that connected with the business route both by an interchange at the southwest corner of the property and at a point some 600 ft southeast of the property. The evidence indicated that the service station would not be visible from the southeastern connection so that the northwest-bound motorist, in order to reach the station, might, as a result, have to travel past it to the interchange and then drive back to the station (see Figure 1).

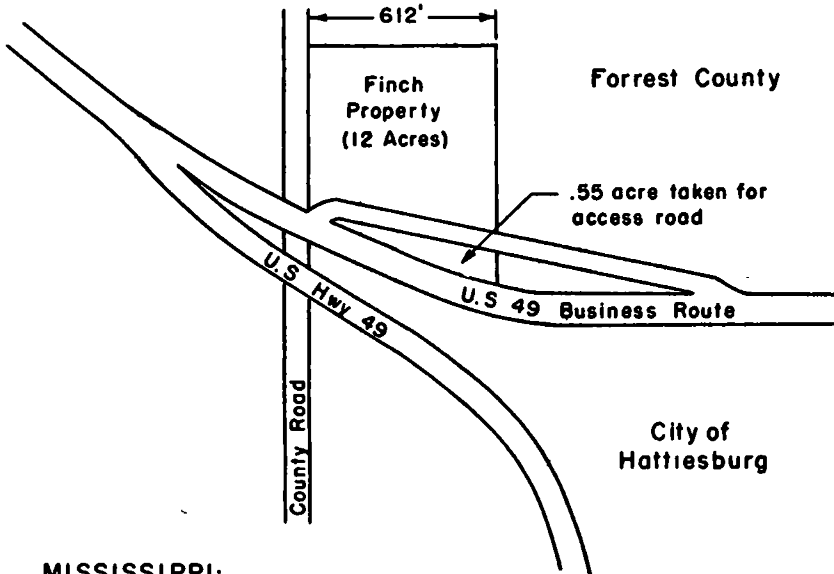

Figure 1.

The lower court awarded damages for the taking and included compensation for the impairment of direct access. The commission appealed from this award claiming that the owner's access rights had not been condemned and the impairment of access was not compensable.

The commission's contention was that no access rights had been taken from the landowner. The high court rejected this contention and found that since the plan called for a highway designed for through traffic with a parallel road auxiliary to the highway for service to abutting property, it fell within the highway act's definitions of controlled-access and service road facilities. The court held that without question the "manifest purpose of the commission in condemning the land in question was to convert the existing highway into a controlled-access facility." The commission's contention was, therefore, without merit.

Regarding the commission's second contention (i.e., that the limitation of the landowner's access was not compensable), the court cited several Mississippi cases that held that a highway reconstruction that renders property of the abutting landowner less accessible constitutes the taking of a valuable and compensable property right. In other words, said the court, compensation was required for the taking of direct access. The

court noted that the commission's police power right to regulate traffic and entrances to the main highway did not extend to converting an existing highway into a controlled-access without payment of just compensation.[27]

Washington.—McMoran, whose property abutted Washington State primary highway No. 2, brought an action in the superior court for damages allegedly due to the State highway department's obstructing his direct access by building a concrete curb in front of his property.

The subject property abutted the southern edge of the right-of-way, but 35 ft south of the traveled way. Prior to the highway department's action, the landowner had direct access to the traveled portion by first crossing the untraveled part. The department then constructed a concrete curb along the outer edge of the traveled lane and paved the remaining 35 ft of the right-of-way in order to provide the abutting landowners with a frontage road. Direct access to the thoroughfare was provided by a curbcut that was placed 30 ft east of the McMoran property line (See Figure 2).

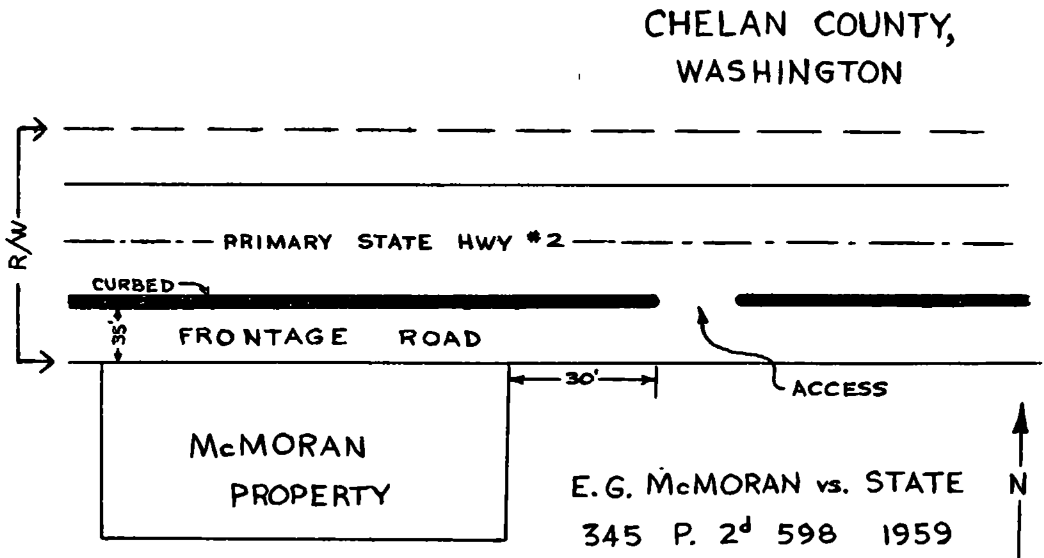

Figure 2.

At the trial, the superior court concluded that construction of the curb was intended to separate a through-traffic lane from one used for local traffic and such purpose was a proper exercise of the State's police power. The court held that there was no taking or damaging of access rights and, for this reason, granted the State's motion for summary judgment of dismissal. The landowner appealed to the State supreme court.

In reversing, the high court held that, while the State could validly exercise its police power to erect safety and control devices to regulate the flow of traffic on the highways, this right of regulation was limited "to the users of the highway, after they have gained access to the thoroughfare where the general traffic flows." In applying this principle to the facts at hand, the court dismissed as being without merit the State's contention that since McMoran retained direct access to the right-of-way he still had

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27/Mississippi State Highway Commission v. Finch, 114 So. 2d 673, October 1959. See Memorandum 122, July 1960, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 414.

direct access to the highway. It held that the abutting landowner was entitled to free and convenient or direct access to the thoroughfare where the traffic flows. The court reversed the trial court, holding that the State was liable, and remanded for a determination of just compensation by a trial on the merits.[28]

North Carolina.—W. L. King and his wife owned approximately 17 acres of land near US 15. The State, pursuant to its condemnation powers, obtained an easement of right-of-way across this land for the construction of US 15 By-pass. As a result of the State's action, King instituted proceedings to recover compensation for the taking of this easement. King and the State reached an agreement and subsequently entered into a consent judgment by which the State paid to the Kings $2,500 for the easement and agreed to "furnish the Kings access to the main paved lanes of the highway by means of service roads to be constructed by the highway commission on each side of the main paved lanes at its own expense." King later sold his land to George W. Ferrell and his wife, who brought the present action seeking to have the State compelled to construct the frontage roads mentioned in the quote from the court's opinion above or to pay adequate damages.

Ferrell contended that the phrase "service roads constructed or to be constructed on each side of the main paved lanes" constituted a contract to construct frontage roads on each side of the main paved lanes. The court, in refusing to compel the State to construct such roads or to pay damages, refused to accept the contentions of Ferrell. In so holding, the court laid particular emphasis on the fact that the words "including the limitations of access" were repeated several times in the consent judgment. From this fact the court reasoned that the purpose of the consent judgment was not to assure or provide for access but rather to limit it. Therefore the court said that "...access will be limited to service roads constructed or to be constructed." The provision concerning the service roads was, in the courts opinion, a negative, not a positive, provision.

Calling attention to the fact that the description of the limitation of access provided that the frontage roads were to have access to the main paved lanes only at points selected and provided by the commission at its discretion, the court reasoned that if there had been an intent on the part of the contracting parties to obligate the commission to construct these frontage roads, it was reasonable to assume that the contract would have definitely stated the specific location, materials to be used, specifications, and time of construction. Since the contract (the consent judgment) did not provide for these matters, the court felt that there was no clear, definite, specific, and unqualified agreement to construct these frontage roads, and the action was dismissed.[29]

Regulation of Access

In a number of decisions handed down in 1960, the courts were called on to determine whether certain restrictions on adjacent owners' rights of access to the highway under consideration constituted actual takings for which compensation was due or whether the regulations imposed could be accomplished by means of the police power. In two of the cases noted —one in Ohio and one in Indiana — the matter at issue was whether the construction of a median strip causing circuity of travel constituted a taking under eminent domain. In both cases, the courts held that it did not.

Almost diametrically opposed were the decisions of Kansas and Georgia courts relative to the imposition of restrictions on the number of access points allowed the affected landowner. The Kansas court allowed damages where the owner was restricted to one point of entrance on the ground that this was an unreasonable restriction. The Georgia court held that the landowner should not be compensated because he was not entitled to access to his land wherever it happened to abut on the highway.

28/ McMoran v. State, 345 P. 2d 598, November 1959. See Memorandum 118, February 1960, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 414.

29/ Ferrell v. North Carolina State Highway Commission, 115 S.E. 2d 34, June 1960. See Memorandum 126, December 1960, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 434.

Ohio. —The New Family Laundry owned 180 ft of commercial property abutting on the westerly half of Summit Street in the city of Toledo. The city erected a concrete divider strip, 7 in. high, in the middle of this street thereby eliminating left turns from and onto the laundry's property from the easterly half of the street. In order for one traveling along the easterly half of the street to reach the laundry, on the other side of the street, it would be necessary to travel one mile in one direction and two miles in the other.

The laundry owner brought suit to recover damages, alleging an interference with the egress and ingress to his property as a result of the divider strip. The court of common pleas, returned a judgment for the laundry that was subsequently upheld by the court of appeals. The supreme court of the State reversed lower court decisions, saying that the erection of the divider strip did not constitute such an interference with th owner's right of ingress and egress as to call for damages.

The supreme court cited a previous opinion that it had handed down as being in point (State ex rel. Meritt v. Linzell, 126 N.E. 2d 53, 1955.). In this case the court had held that "an owner of property abutting on a public highway possesses, as a matter of law, not only the right to the use of the highway in common with other members of the public, but also a private right or easement for the purpose of ingress and egress to and from his property, which latter right may not be taken away or destroyed without compensation therefor." In the same case the court had also held that "mere circuity of travel, necessarily and newly created to and from real property does not of itself result in legal impairment of the right of ingress and egress...."

The court went on to say that an owner of real property does not have the right to the continuation of the flow of traffic past his property and that the diminution in the value of property occasioned by a public improvement that diverts the flow of traffic away from the landowner's property in noncompensable. The change in the flow of traffic in such a case is the result of the exercise of the State's police power and is not the taking or the damaging of a property right.

The court, in the present case, felt that the erection of a divider strip by the city and the resulting circuity of travel did not constitute a legal impairment of the right of ingress and egress and that it was merely an inconvenience to be shared with the general public.[30]

Indiana. —The landowners operated commercial property known as "Little America," located at the southwest corner of 62nd Street and Keystone Avenue in Indianapolis. The State condemned an irregularly shaped 7/10-acre strip (averaging a width of approximately 25 ft) from the eastern boundary of the property, which fronted on Keystone, for a highway widening project. This project, in addition to widening Keystone Avenue, provided for the construction of a median strip that would run unbroken between 61st and 62nd Streets, thus preventing traffic congestion caused by left turns into the landowners' property by northbound travelers and into a shopping center across the street by southbound travelers. Access to Keystone Avenue was retained for use of southbound traffic (See Fig. 3). The court-appointed appraisers awarded damages in the amount of $16,625 and both the owners and the State appealed, demanding a jury trial.

At the trial, it was shown that, although northbound traffic could no longer turn left to enter the property on its Keystone Avenue entrance, access could be had by continuing to the 62nd Street corner, turning left, and traveling approximately one-half block to the street's entrance. Evidence was introduced by the landowners purporting to show that the value of the strip taken was $75,000 and that the damages caused by the resultant impairment of access was $157,650. The owners asserted that they were entitled to severance damages for the depreciation in value of their remaining property caused by interference with the public's ingress and egress along the highway.

30/ New Way Family Laundry, Inc. v. City of Toledo, 168 N.E. 2d 885, July 1960. See Memorandum 125, November 1960, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 432.

The State denied that the median strip caused a compensable impairment of access, claiming that it was not a direct result of the taking. The trial court, however, granted the owners' jury instruction to the effect that a property owner's right of access includes ingress and egress "for the full length of the abutment of said real estate upon such highway." The jury brought in a verdict of $127,733. The State appealed, citing as chief error the trial court's granting of the quoted jury instruction.

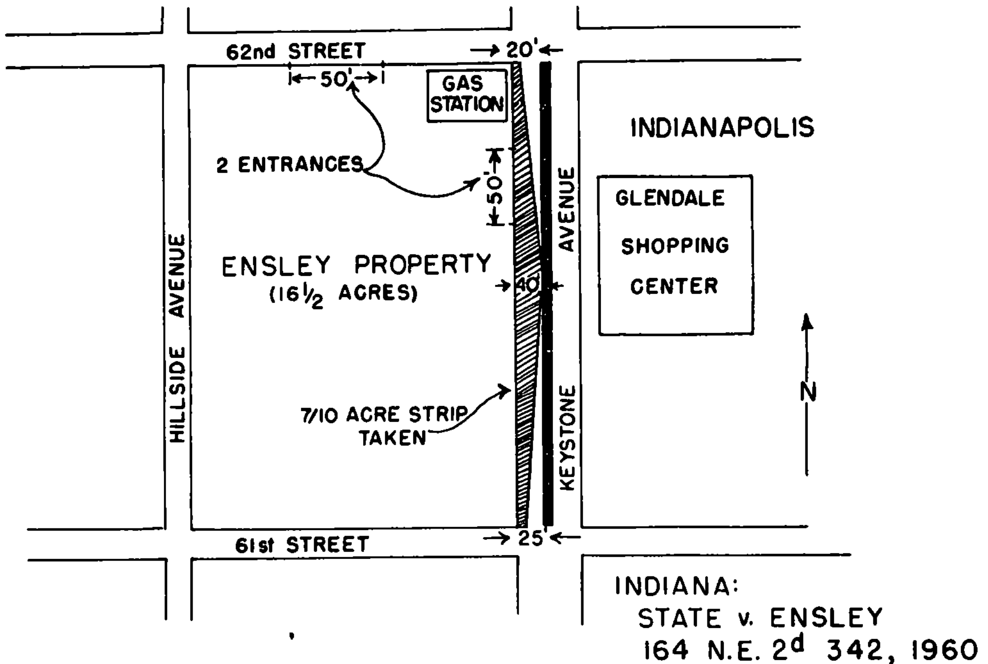

Figure 3.

In reversing the trial court, the supreme court held that the widening of the highway and the installation of the median strip, though contemporaneous and part of the same construction project, were separate improvements. The alleged impairment, therefored, did not constitute a taking within the law of eminent domain, but was rather incident to the manner in which the highway improvement was constructed.

The court cited as error the granting of the jury instruction and stated that merely making ingress and egress more circuitous did not constitute a "taking" of private property. A landowner has no right to the free and unrestricted flow of traffic past his place of business, said the court, and he is entitled to no damages for a "partial limitation and obstruction" of the right of access. The court held that such right, to be compensably impaired, must be substantially or materially interfered with or taken away. The case, was therefore, returned to the lower court with directions to grant a new trial.[31]

Kansas.—Pursuant to a statute empowering it to establish controlled-access highway facilities and to acquire private property including the right of access for so doing, the State highway commission proceeded to condemn both an easement for a channel change and borrow and also the access rights to the pre-existing highway along a portion of the landowner's frontage. The State contended that under the police power it could restrict

[31] State v. Ensley, 164 N.E. 2d 342, February 1960. See Memorandum 124, November 1960, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 430.

the owner's access without paying compensation because such action was in futherance of the public safety and welfare on a controlled-access facility. It fortified its position by noting that the owner had been permitted to retain the existing entrance. The trial court rejected the State's position and awarded damages for the access rights taken, based upon the difference in value of the property before and after the taking, whereupon the State appealed.

In sustaining the lower ruling, the State supreme court pointed out that although the State might reasonably regulate an owner's enjoyment of property rights in the name of public safety, it could not take an abutting owner's "common law" right of access to a public road without just compensation. Although attaching no legal significance to the fact that the State had left the owner's 40-ft entrance intact, the court did qualify its holding by announcing that an abutting property owner did not have a right of access to his land at all points on the highway boundary and that access could be "reasonably regulated" by the State but not "wholly prohibited." The court considered such a distinction to be one of "reasonableness" inasmuch as the line of demarcation would fall in the twilight zone between eminent domain and the police power.

In applying the above tests to the facts of the instant case, the court found that, with respect to the abutting property line exclusive of the entrance, the State had completely prohibited access, hence, the lower court's award was properly made and not excessive. Beyond its determination based on the quality of "reasonableness," the court did not define at what point the police power regulation stopped and the eminent domain taking began.

As the determination of "reasonableness" is so much a matter for judicial discretion, it is not surprising that a rather lengthy dissenting opinion was filed favoring reversal of the judgment on the ground that the entrance left to the owner did in fact provide reasonable ingress and egress. It was stressed that this was particularly so in light of the owner's testimony that he did not need any further entrance facilities. The dissent pointed out an apparent inconsistency in that the majority had affirmed an award for restricting the right of access along a strip of highway and at the same time had held that the owner did not have a right of access at all points between the land and the highway.[32]

Georgia.—D. L. Johnson owned a filling station and restaurant on a tract of land lying on the west side of US 25. The State highway department constructed a concrete "header curb," an oval type of structure, one side of which was immediately adjacent to the eastern side of the "island" on which the gasoline pumps were located. The State highway right-of-way line divided the concrete island and the curb. Thus the concrete header curb was constructed on land owned by the State.

Johnson argued that the presence of the header curb prevented his selling gasoline to more than one vehicle at a time, because it prevented vehicles from parking on the eastern side of his gasoline pumps. Apparently there was adequate parking space on the premises but, according to Johnson, the header curb made it appear to approaching vehicles that there was insufficient parking space between the pumps and the building housing the restaurant. Johnson sought an award of compensation alleging that the construction of the header curb, by interfering with the egress and ingress to his property, constituted a taking of his property for a public use without compensation.

The court refused to grant compensation to Johnson. According to the court, although the highway department could not deprive an owner of abutting property of his easement of access without paying compensation, in order to warrant a deprivation of this easement it must appear that there had been some direct physical disturbance of this right

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32/ Smith v. State Highway Commission, 346 P. 2d 259, November 1959. See Memorandum 123, October 1960, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 429.

and that by reason of this disturbance he has suffered an injury in excess of that sustained by the public at large. The landowner, said the court, was not entitled to access to his land wherever it happened to abut upon the highway, if he had been given a convenient access to his property and his means of ingress and egress had not been substantially interfered with.

The court was of the opinion in the present case that the landowner's ingress and egress had not been substantially interfered with, noting that before the construction of the header curb the only reason Johnson had been able to accommodate more vehicles was that he had them park on land owned by the State, i.e., on the State's right-of-way. The court felt that, inasmuch as Johnson was not entitled to use the State's right-of-way, there had not been a substantial interference with the ingress or egress to his property.[33]

ROADSIDE REGULATION

Cases pertaining to regulation of the roadside noted this year fall into two categories. Three cases deal with the authority to regulate outdoor advertising, and a single Georgia case discusses the legal effect on a lessee's obligation to his lessor when the State refused to grant a driveway permit containing an irrevocable right of access to the main artery of travel.

In the billboard cases, the courts stressed the reasonableness, or lack of reasonableness, of the attempted restrictions, whereas in the Georgia case the court noted that the inherent power of the State to exercise control of ingress and egress was still subject to reasonable restrictions.

Regulation of Outdoor Advertising

Oregon. —The supreme court was called on to pass on the constitutionality of a State statute regulating the erection and maintenance of advertising signs within view of State highways.

The State refused to issue the required permit for certain signs advertising a zoo at Blalock, under a provision of the statute requiring an interval along the highway of at least ½ mi between signs advertising the same commercial enterprise. Webb, the owner of the zoo, maintained 150 signs on the same side and within view of US 30. All but seven were within ½ mi of each other, and therefore, according to the State, not eligible for permits. Other standards contained in the act included general interval restrictions ranging from 300 to 500 ft based on combined advertising area and the prohibition of all signs the length of which exceeded 60 ft. It should be noted that the propriety of these standards was not questioned.

The provision in question granted to existing signs (other than those in the "same commercial enterprise" category) a five-year period of grace, dating from the effective date of the statute. As long as those signs had been validly erected prior to passage of the act, they did not have to conform to the new standards for five years. Since the period of grace did not extend to signs violating the ½-mi provision for single enterprises, the advertiser claimed that, in this respect, he was denied his 14th Amendment right of equal protection of the law. He therefore sought an injunction restraining the State from removing the signs in question. The lower court dismissed the suit and the advertiser appealed.

The high court recognized the State's right to regulate the spacing of signs and to classify them but noted that such supervision must be reasonable. The court indicated that had the distinction been based on considerations of safety it would have been valid, but such was not the case. The court could find no distinction that made the removal of the instant category of signs expedient while not the others. The court held that there was a "clear case of unlawful discrimination against the plaintiff" that made the statute unconstitutional. The State was, therefore, enjoined from removing the advertiser's signs.[34]

33/Johnson v. Burke County, 115 S.E. 2d 484, June 1960. See Memorandum 126, December 1960, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 434.

34/Webb v. State, 340 P. 2d 968, June 1959. See Memorandum 117, January 1960, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 409.

Louisiana. —A New Orleans ordinance, popularly known as "The Gas Sign Ordinance," sought to prohibit signboard advertisement of prices by retailers of gasoline and other petroleum products except by signs no larger than 12 in. in height and 12 in. in width. These signs were to be located on the pumps from which the gasoline was dispensed and on other equipment where such products were dispensed. For violating the ordinance, a fine or a prison term could be imposed, or both, at the discretion of the court.

A filling station owner attacked the constitutionality of the ordinance on the ground that it violated the 14th Amendment of the United States Constitution as well as a similar provision of the Louisiana Constitution. The district court upheld his contention and expressed the opinion that the ordinance was not a valid exercise of the police power, because it had no real, substantial relation to the public safety, health, morals, or general welfare. It recited the familiar principle that, in order to be a valid regulation, the means employed must bear a relation to the objectives sought to be obtained.

Commenting on the power of the city to pass ordinances involving aesthetic considerations, the lower court stated that "while it may be within the powers of the city, for aesthetic considerations, to pass a general ordinance applying to all business signs situated on or near the public streeets, it is not within its power to single out one business or industry and regulate only its signs."

The State supreme court concurred in the judgment. It cited the case of City of Lake Charles v. Hasha, 116 So. 2d 277, 1959, where it had previously declared that "business practices, such as the one against which this ordinance is directed, have no detrimental effect on public health, peace, morals or welfare...... The ordinance on its face accomplishes little or nothing of an aesthetic value. Obviously on its face, it is designed to restrict competition and foster monopolistic practices, and is not a legitimate exercise of the police power."[35]

Connecticut. —A lessee had maintained on his property for more than 25 years a billboard that carried an advertisement of a restaurant in another town. In 1946 the Town of Wilton passed a zoning ordinance that forbade signs such as the one maintained by the lessee in a residential zone. In 1955 an amendment was added that required every sign constituting a nonconforming use in any district to be discontinued.

The lessee applied to the town for a variance to permit the continued location of the sign on the premises. The town denied his application on the ground that the hardship of which he complained applied equally to all the land in the town zoned for residential purposes, and not his land alone. The lessee appealed after the lower court dismissed his plea.

The supreme court agreed with the lower court in its conclusion that there was nothing in the record to indicate that the town acted in an arbitrary or illegal fashion. The court said, "a hardship which under the statute would permit the lessee to vary the application of the zoning regulations must differ in kind from the hardship imposed on properties in general by the regulations." In the court's opinion, it did not appear that the operation of the regulations affected the property of the lessee differently from, of created a situtation not applicable to, all other properties located in a residence zone in the town.[36]

Regulation of Driveways

Georgia. —The lessee of a filling station applied to the State for permission to construct driveways from the main arteries of travel of the highway to the site of a proposed service station to be operated by the lessee. The State refused to grant a permit without a clause to the effect that it reserved the right to withdraw its permission at some future date if conditions so required. In that event, all service stations would be denied direct

35/ Sears, Roebuck and Company v. City of New Orleans, 117 So. 2d 64, January 1960.

36/ Murphy Inc. v. Board of Zoning Appeals of Wilton, 161 A. 2d 185, May 1960.

access to the main arteries of travel and would be required to do business from "service roads" that would parallel the main arteries and that would provide access to the main highways at interchange point.

The supreme court noted that the evidence in the lower court showed that there was merely a possibility that the State would deprive the service stations of direct access. The lessee in the lower court had argued that he was relieved of his duty to pay rent to the lessor. He based his contention on a provision of the lease that stated that its effectiveness was contingent on the ability of the lessee to obtain from the authorities proper and adequate permits to maintain its business. Judgment was rendered in the lower court for the lessee by directed verdict.

In reversing the judgment, the supreme court stated that the lessee had the burden of proving its defense that it could not obtain a permanent right of direct access and was therefore relieved of the obligation to pay rent under the terms of the lease. The high court commented that, had the highway department not placed any restriction in the permit, no additional vested right would have been in the lessee to go directly from the leased premises to the main arteries of travel. The court called attention to the fact that under State law the highway department could declare certain existing highways as "limited access," but neither the State nor any agency created by it could recklessly and arbitrarily prohibit abutting owners or lessees the right of access to highways. The court noted that in approving an application from a lessee the State could not demand the future right to prohibit access to the property without paying just compensation.

In this case, the fact that the lessee had been advised that direct access might be restricted in the future was not, in the opinion of the court, tantamount to a refusal by the State to grant a permit to do business at the location. The lessee was, therefore, not relieved of his obligation to pay rent.[37]

PARKING ACCOMMODATIONS

The recent riot, or near riot, in Philadelphia over the imposition of a parking tax on automobiles brought into sharp focus the problem faced by cities in providing adequate parking facilities. Last year's report noted the decline in litigation involving the authority of governmental agencies to provide such facilities. A Massachusetts case this year reminds us that there are always special circumstances that will provoke litigation in this field. In this case, the State's high court was called on to rule on the validity of condemnation proceedings brought by the Massachusetts Parking Authority to acquire portions of the Boston Common for the purpose of constructing beneath it a parking garage. The court found the legislative declaration of public purpose sufficient to override any procedural ambiguities. An Ohio case also dealt with the necessity of taking property by a city for parking purposes, the court holding unconstitutional a statutory provision prohibiting the taking of land already devoted to parking purposes. In a somewhat related case, the Florida supreme court upheld the authority of the City of Tampa to condemn land to be exchanged for certain land owned by a railroad needed by the city for off-street parking facilities.

Although the zoning mechanism is quite commonly used both to require the provision of adequate parking space to serve the needs of newly constructed buildings and to permit off-street facilities where needed in zoned areas where it might be otherwise prohibited (e.g., residential), cases involving the validity of such regulations continue to come before the courts. This year, a New Jersey court upheld the denial of a building permit to a church congregation unless satisfactory parking space was provided, and Kentucky and Maryland courts upheld an exception to a zoning ordinance to permit off-street parking in a residential area on the ground that it would relieve traffic congestion.

In a case involving the validity of a parking meter ordinance, a Missouri court held that the City of St. Louis could not delegate to its parking commission such determinations as the location of the proposed parking meters, length of parking time required,

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37/Mansfield v. Standard Oil Co. of Kentucky, 111 S.E. 2d 151, September 1959.

fees, etc., on the ground that regulation of traffic was a governmental function that could not be delegated.

The above cases have been grouped under the following headings for purposes of reporting: "Authority to Take Land for Off-Street Parking"; "Provision of Parking Facilities Through Zoning"; and "Legality of Parking Meter Ordinance." It will be noted, however, that in two of the case reported (i.e., in Florida and Missouri) the courts commented on financial arrangements attendant on the provision of the particular facilities involved. The Florida court held that the City of Tampa might legitimately pledge revenues from its off-street parking facilities as security for the exchange agreement whereby the city acquired substitute land for a railroad to replace land taken from it for the parking facilities. The Missouri court, in invalidating the parking meter ordinance of the City of St. Louis, on other grounds, cautioned that in redrafting the ordinance care should be taken that parking fees being leveled not be so high as to amount to a tax levy but be reasonably related to the police power being exercised.

Authority to Take Land for Off-Street Parking

Massachusetts.—Residents of Massachusetts instituted a petition attacking the validity of two orders of condemnation brought by the Massachusetts Parking Authority. These orders related to the taking of portions of the Boston Common for the purpose of constructing beneath it a parking garage. The high court found the legislative declaration of public purpose sufficient to override what procedural ambiguities might be found in the legislation itself.

The court noted varying sections of the enabling statute that authorized alternative methods of acquiring the necessary property. Two sections combined to authorize acquisition of the specific Boston Common property by conveyance, subject to ratification, hence veto power, of the city of Boston, acting through its city council and the parks and recreation commission. Originally, the parking authority applied under these provisions but later withdrew this application before the two city agencies had voted their respective authorization and assent. Subsequently, the authority moved to condemn under the alternative section, which contained a general authorization to either purchase or acquire by condemnation any property "necessary for carrying out the provisions of this act." It was to this action that the petitioners addressed their attack, relying heavily on the canon of statutory construction that the more specific language should prevail over general provisions.

In addition to their interpretation of the statute, which in substance advocated the retention of the city's veto power, the residents also argued that the legislation was defective in that it passed the fee of the property from the city to the authority but left as open the question of when the authority was to commence construction of the parking project. The effect of this defect, they claimed, was to pass title from the city, which had the power and obligation to maintain the Common as a public park, to the authority, which had neither.

Although admitting the truth of this last contention, the high court felt, nevertheless, that its duty to discover the legislative intent was paramount. The court noted, in passing, "the statute, which is of great importance, is not expressed with a clarity commensurate with that importance.... We deplore that a more careful provision as to the reversion of the project to the city is not to be found...."

The court, turning to questions of legislative purpose, quoted the statute that declared, "that the free circulation of traffic of all kinds through the streets of the city of Boston is necessary...for the health, safety and general welfare of the public... and that in recent years the parking of motor vehicles in the streets of said city has so substantially impeded such free circulation of traffic as to constitute at the present time a public nuisance." The statute went on to state that "a public exigency exists which makes the provisions of this act a public necessity." Finding such a public

necessity so long delayed, the court held that the two orders of taking were valid. The petition was, therefore, dismissed.[38]

Ohio.—In an effort to prevent the City of Cleveland Heights from condemning their property for a municipal off-street parking facility, Charles and Catherine Simmons, who had operated an off-street parking lot on the property for over a year, brought an action in the Ohio Court of Common Pleas to enjoin the condemnation. The owners challenged the necessity of the city's action and its authority to condemn, and claimed that the city acted unreasonably and unlawfully. They based their claim of lack of necessity on the fact that the private enterprise was already fulfulling the need.

The basis for the Simmons' claim that the city acted unlawfully and without authority was Section 717.05 of the Revised Code of Ohio. The pertinent part of the statute in question granted authority to municipal corporations to acquire property by various means, including the power of eminent domain, in order to establish off-street parking facilities. The statute concluded with the proviso that the eminent domain power should not extend to property already being used for off-street parking, open to the public, and established for a period of one year prior to the proposed acquisition.

The court acknowledged that the Simmons' property fell within the limitation of the proviso but questioned the validity of that limitation. Turning to Section 3 of Article XVIII of the Ohio Constitution, which states that "Municipalities shall have authority to exercise all powers of local self-government...," the court noted that the State supreme court had ruled that "all powers of local self-government" included the power of eminent domain. The court further noted that the supreme court had also held, in this connection, that no constitutional provisions authorized the interference by general laws with the municipality's exercise of this power. Finding itself bound by these holdings, the court held that the remaining question was whether or not the proviso in question interfered with or restricted the municipality's exercise of the power of eminent domain. The court found that it did, and was therefore unconstitutional and of no further effect.

Regarding the owners' claim of lack of necessity, the court noted that the need for off-street parking was amply demonstrated by the existing use of the property. The court went further in upholding the showing of necessity by pointing out that the owners' manner of operating their parking lot was "rather liberal and loose;" that they had "varying arrangements with tenants, merchants, customers, and other persons;" and that there was no way of insuring that the property would continue to be used for parking purposes.

Since there was no showing of bad faith, abuse of discretion, or fraud, the court denied the injunctive relief and left the parties to their right of compensation, which would be ascertained in the pending condemnation proceedings.[39]

Florida.—The State appealed a final decree validating $935,000 of revenue bonds proposed to be issued by the City of Tampa for parking facilities. In a two-pronged attack, the State claimed that the city was illegally lending its credit and money in aid of private enterprise and had illegally contracted away its police power authority over on-street parking.

The Seaboard Airline Railroad Company owned Site A, located within the city and used as a freight station. The city wanted this site for use as an off-street parking lot. The State's first claim was directed at an "exchange agreement" that provided, in essence, that Seaboard would convey Site A to the city and remove its tracks and the city would acquire either another site or permit the railroad company to condemn one at the city's expense. The city limited its obligation for construction of the new freight station to $525,000.

38/Appliton v. Massachusetts Parking Authority, 164 N.E. 2d 137, February 1960. See Memorandum 123, October 1960, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 429.

39/Simmons v. City of Cleveland Heights, 160 N.E. 2d 677, April 1959. See Memorandum 118, February 1960, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 414.

The State contested the city's authority to condemn in this case. Although acknowledging that condemnation for an off-street parking facility is a valid public purpose, it claimed that this purpose was here only incidental and that the result of the agreement was primarily to benefit a private corporation (i.e., the railroad), which result was prohibited by the State Constitution. The court found that the city was obtaining property of equal value to the property and services it was giving the railroad. Noting that both parties to the transaction had the power of eminent domain, the court had no difficulty finding authority for the city's condemning land in order to exchange it for other land needed for a public purpose. The court characterized this doctrine as "compensation by substitution" and found no constitutional violation.

The State's second claim was directed at a covenant contained in the ordinance authorizing the issuance of the bonds, which in effect pledged the revenue from on-street parking meters as security for the exchange agreement. The city covenanted to continue operation of the existing meters at the same rates but reserved the right to relocate them when necessary to permit street widening or closing, to regulate traffic, or to relieve congestion. The right to relocate was subject to the condition that the relocations did not materially lessen the over-all revenue.

Although the State admitted that the revenue from parking meters could be applied legitimately to the financing of off-street parking facilities, it claimed that by the covenant the city had relinquished its sovereign duty to regulate traffic under its police power. In denying this contention, the court held that since the city could properly use these revenues to defray the cost of providing off-street parking, it followed that certain guarantees or security to the railroad should accompany the pledge. Particularly because the city reserved the right to make adjustments in the location of the meters, the court found no substantial relinquishment of its police powers. The bonds, therefore, were validated.[40]

Provision of Parking Facilities Through Zoning

Kentucky.—In a zoning case before the Court of Appeals involving the proposed rezoning of a residential area for off-street parking, the high court had occasion to distinguish between the often elusive concepts of variance and exception.

Included in a residential development known as Bon Air Estates No. 2, located in Louisville, are Lots Nos. 162 through 169, which encircle Lot 170. All the lots were zoned for one-family dwellings by the county zoning board except the northern portion of Lot 170, which was zoned as a commercial district in order to allow for a shopping center in the development. The developer, Bon Air Estates, Inc., requested an exception to the residential classification of the southern portion of Lot 170 in order to provide off-street parking facilities to serve the adjacent shopping center. This request was granted and certain neighborhood property owners objected. A trial de novo was had in which the circuit court supported the board's order and the property owners appealed.

The zoning board granted the developer's request under authority of a city ordinance which authorized the board to establish off-street parking areas in residential zones when to do so would relieve traffic congestion on the streets. The neighbors' appeal argued that the board acted in excess of its authority because the granting of such authority was an improper delegation of the city's legislative power to make and change zoning classifications, and further, that no showing of hardship was made. In support of this contention, they cited two cases that had held that the board had exceeded its authority in granting variances.

The high court expressed its disapproval of past decisions that used the terms "variance" and "exception" interchangeably and noted that the statute clearly distinguished the terms. The court agreed that the board had no authority to change the zoning regulation, but it could, under the statute, accomplish substantially the same

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40/ State v. City of Tampa, 113 So. 2d 844, July 1959. See Memorandum 117, January 1960, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 409.

result by granting a variance, provided there was a clear showing that, because of some extraordinary condition caused by the zoning classification, an undue hardship had resulted. All cases cited by the appellants supported this rule and the court as well as the developer acknowledged that no undue hardship existed in this case.

The court pointed out than an exception, however, was another matter entirely. Although a variance changes the classification, an exception amplifies it. An exception, rather than making a change based on a showing of hardship, must "comply as nearly as possible in every respect with the spirit, intent and purpose of the zoning plan." The court, in sustaining the board's action, found that the exception that the developer requested complied with the over-all zoning plan by facilitating the use of the shopping center and, at the same time, relieving the traffic congestion bound to result from such use.[41]

New Jersey. —The zoning regulation in question applied to places of public assembly that were likely to attract persons using motor vehicles and included theatres, restaurants, hospitals, and churches. Where a building was to be used for any of these purposes, the regulation required that an area be provided sufficient to accommodate off-street parking for one motor vehicle for each three seats installed in the building. The regulation defined the minimum area as 200 sq ft, exclusive of driveways, for each car.

The basis for this appeal was the denial by the Allendale building inspector of a building permit requested by the Allendale Congregation of Jehovah's Witnesses. The congregation had applied for a permit to construct a meeting hall on an irregularly shaped lot, less than ½ acre in size. The lot fronted on Hillside Avenue, a 40-mi-per-hour speed zone, and was located near a sharp bend in the road. The building inspector found that the proposed use would create an "exceptional risk of traffic congestion and public safety," and that the building specifications did not provide the required off-street parking area. The congregation's main contention was that the parking requirements, as applied to them, were invalid as abridging their constitutional rights of assembly and worship. The zoning board sustained the building inspector's denial of their application and the congregation appealed.

The high court held that there was no merit to the congregation's contention. Pointing to the fact that the requirements were made without discrimination for all buildings that tended to attract substantial numbers of motorists, it found the requirements to be well designed to promote the public safety and lessen traffic congestion. The court noted that such a requirement did not restrict the congregation's right of worship or assembly at its present quarters or at any future site that might be found and that could be made to conform to the zoning requirements. The court held that even freedoms as basic as assembly and worship were subject to reasonable zoning regulations and cited the reasoning of an Indiana case[42] to the effect that persons traveling to church are as entitled to protection against traffic hazards as are persons traveling to or from theatres or basketball games. In the absence of any showing that the regulations were applied in bad faith, said the court, the regulations must be held valid.[43]

Maryland. —Pursuant to the Baltimore City Zoning Code, the Mayor and City Council of Baltimore (subsequently referred to as the council) adopted an ordinance that permitted a landowner to establish, maintain, and operate an open area for automobile parking on property in a residential and office use district. The applicable provision of the code provided that notwithstanding other provisions of the zoning code, the council could authorize parking facilities in such areas when to permit the parking would benefit the health, safety, or general welfare of the community. The code further provided for adequate notice, public hearings, and referral to various commissions for recommendations.

41/Kline v. Louisville & Jefferson County Board, Etc., 325 S.W. 2d 324, June 1959. See Memorandum 118, February 1960, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 414.

42/Board of Zoning Appeals of Decatur v. Decatur, Ind. Co. of Jehovah's Witnesses, 117 N.E. 2d 115, 123 (Dissenting Opinion) February 1954.

43/Allendale Congr. of Jehovah's Witnesses v. Grosman, 152 A. 2d 569, June 1959. See Memorandum 117, January 1960, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 409.

A neighboring landowner contested the passage of this ordinance as being "piecemeal rezoning" or "spot zoning," and therefore arbitrary, discriminatory, and hence unconstitutional and void. Basing his argument on a case that held invalid the rezoning of similar property to permit the operation of a funeral home, he contended that the required elements of proof were equally absent here. The court, in the funeral home case, held that the rezoning could not be upheld without a showing either that there was error in the original zoning or a substantial change in the character of the neighborhood.

The court distinguished between the two cases by noting that a council ordinance was not involved in the funeral home case and there was in the instant case no question of rezoning; here, rather, was a finding of public benefit in the interest of health, safety, and general welfare. Since the validity of the code provision was not in issue, the court ruled that the only applicable test was whether or not the council's action was arbitrary, capricious, or discriminatory. Since this was not shown, the court sustained the ordinance.[44]

Legality of Parking Meter Ordinances

Missouri.—In an action contesting the validity of a St. Louis parking meter ordinance, the Missouri supreme court declared that there existed an unlawful delegation of legislative power to an administrative board, namely, the Parking Meter Commission.

The ordinance empowered the commission to determine where the parking meters were to be placed and whether to zone them for 30-min, 1-hr, or 2-hr periods. Under the terms of the ordinance, outer limits were specified both as to the fixing of fees and the time limitations. Within these limits, the commission was granted discretion for fixing these matters, to be guided only by general considerations of "public convenience and necessity."

The high court sustained the lower court in declaring that "the regulation of traffic, including the establishment of the parking zones, with their time limitations, and the fixing of the fees thereof are legislative functions which cannot lawfully be delegated." Inasmuch as this function was delegated without adequate criteria or standards, the ordinance was unlawful.

In addition to determining this issue, the court found it necessary to pass on whether the ordinance validly authorized the transfer of parking meter funds for off-street parking facilities. The court held that there was ample language in the ordinance to support a finding of such legislative intent. By finding the ordinance invalid in the first instance, however, the court found it unnecessary to pass on certain other contentions regarding its unconstitutionality. Particularly important among these contentions was the claim that the funds derived from the meters, and intended to be diverted to off-street parking, were so far in excess of the requirements of administering the parking meters that the meter charges constituted a tax rather than "fees reasonably related to the police power exercised." The court, though not passing on the specific contention, noted that in redrafting the ordinance the legislature would have to take care that the fees did not, in fact, amount to a tax levy but must be enacted under the police power.[45]

44/ Reus v. Mayor & C.C. of Baltimore City, 155 A. 2d 513, November 1959. See Memorandum 120, May 1960, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 421.

45/ Automobile Club of Missouri v. City of St. Louis, 334 S.W. 2d 355, April 1960. See Memorandum 124, November 1960, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 430.