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

DAVID R. LEVIN, Chairman, Chief, Special Studies Staff, Bureau of Public Roads

•THE COMMITTEE on Land Acquisition and Control of Highway Access and Adjacent Areas continued to give assistance to State highway departments and other governmental agencies interested in the formulation and promulgation of new methods and procedures in the fields covered by its charter (as indicated by the committee's title) so these phases of the highway program may be expeditiously and economically carried out.

In cooperation with the AASHO, the American Right-of-Way Association, the American Municipal Association, and the National Association of County Officials, the committee sponsored a study of liaison practices between utilities and street and highway departments, in connection with highway projects involving utility relocations or removals. Over 10,000 questionnaires were sent to State highway departments, utilities, and other affected agencies, and to cities and counties. Replies were received from the State highway departments of all 50 States, from approximately 2,000 utilities, over 400 counties, and some 90 representative municipalities. Preliminary analysis of these returns has been completed, and a draft of the report essentially completed. It is expected that, after review and approval by key people in this field, a final report, including the analysis, as well as recommendations for more effective liaison procedures, will be available in 1962.

Cooperation was also given to the AASHO Committee on Right-of-Way in its efforts to update land acquisition procedures through a series of studies of various phases of the problem. The first study completed by the committee is concerned with problems attendant on the removal of structures from land acquired for highway purposes. Approval was obtained from right-of-way officials of member States, and it is hoped that the report can be published early in 1962.

The committee continued its interest in severance damage studies and was pleased to note that some 42 States had such studies either in progress or planned at the end of 1961. During the year, a "Manual for Highway Severance Damage Studies" was prepared and, after review by interested parties, was distributed to State highway departments and many others. The committee's interest in and support of economic impact studies and studies of land use at interchange points continued during the year. In this latter connection, attention might be called to a series of studies prepared by a Transportation Research Group of the University of Washington for the Bureau of Public Roads. These studies were designed to identify land uses competing for sites in approach areas and areas adjacent to highway interchanges, the traffic-generating characteristics of such land uses, the congestion caused by such land uses, the adequacy of present land use controls at pertinent areas, and future needs and possibilities of control over land development at freeway approaches and highway interchange areas.[1] A paper summarizing the findings of one of these studies is included in this bulletin. Studies being undertaken in Georgia, Kansas, Oklahoma, and West Virginia also include land use at interchanges.

1/ Included in this series are "Measurements of Industrial Land Use Consumption by Major Industry Groups," Vol. 1, by Clark D. Rogers and Edgar M. Horwood; "Land Uses in the Vicinity of Freeway Interchanges," Vol. 2, by William L. Garrison; "An Evaluation of Land Use Controls at Freeway Approaches," Vol. 3, by Charles H. Graves, Edgar M. Horwood, and Clark D. Rogers; "Freeway Development and the Quality of Local Planning," Vol. 4, by Bruce C. Laing, Edgar M. Horwood, and Charles H. Graves; and "Land Development Policy at Highway Interchanges," Vol. 5, by Edgar M. Horwood.

Eleven monthly memoranda were issued by the committee during 1961 through the facilities of the Highway Research Correlation Service. These memoranda contain summaries of court decisions in the fields of the committee's interest, as well as new laws and administrative procedures adopted by the several States. During the year permission was requested by the American Right-of-Way Association to reprint some of the more significant court decision digests in this series in "Right of Way", the Association's official publication, in order that they be given wider circulation.

The committee maintained its continuing surveillance over new legislation in the fields of its interest and noted in this connection that, although 1961 was a year in which most State legislatures met in regular session, not a great many pertinent laws were enacted, and for the most part the bills that were passed consisted of changes in procedure of local interest. There was, however, considerable activity in legislation pertaining to such matters as regulation of outdoor advertising, relocation of public utility facilities, and payment of relocation costs to owners and tenants of residential and business properties These new laws are noted in the appropriate section in this bulletin.

As in previous years, the committee sponsored an open session during the Annual Meeting of the Highway Research Board held in Washington in January 1962. Four papers were presented at this meeting: "Economic Evidence in Right-of-Way Litigation," by Sidney Goldstein, Joseph Sweeney, Carrie Fair, and William Stanhagen; "Freeway Development and the Quality of Local Planning," by Edgar M. Horwood, Charles H. Graves, and Bruce C. Laing; "Benefits to Utilities from Highway Locations: Economic Implications of Utility Use of Highway Location in Utah," by Claron E. Nelson; and "Benefits to Utilities from Rural Highway Location in Oregon," by R. C. Blensly. The last two papers, together with a report on a similar study of "Non-Vehicular Benefits from Utility Use of Streets and Highways (in Colorado, Georgia, Texas and Wisconsin)," by James H. Lemly, are tentatively scheduled as a separate Board publication. The other two, together with a paper presented at an open session sponsored by the Committee on Indirect Effects of Highway Improvement—"Relocation of People and Homes from Freeway Rights-of-Way—Community Effects," by Rudolf Hess, —are reproduced in this bulletin.

Economic Evidence in Right-of-Way Litigation. —Taking cognizance of the vast expenditures of time and money necessary to acquire land for rights-of-way for the gigantic highway programs now under way, the authors suggest the use of severance damage studies as court room evidence in condemnation actions, to assist in the ascertainment of just compensation. The paper includes a discussion of research now available to the highway lawyer (including severance damage and economic impact studies), outlines the present status of the law of valuation and damages, together with rules of evidence applicable thereto (including comparable sales), explores existing legal practices relative to admission and the use of research evidence in courts of law, and suggests the need for similar factual data in condemnation proceedings

Relocation of People and Homes from Freeway Rights-of-Way—Community Effects. —In view of the growing agitation for the payment of moving costs to owners and tenants forced to relocate because of public improvements, this paper, outlining the experience of the California Division of Highways in handling this problem, is of more than general interest. California, as revealed by this paper, does not make payments to landowners and tenants for moving costs, but rather, renders assistance where necessary in obtaining new quarters, and more important, has used long-range planning of highway projects as a means of eliminating hardships of this kind resulting from so-called crash programs.

Freeway Development and the Quality of Local Planning. —The authors of this paper made an intensive investigation of local land use planning existing in the State of Washington to determine its adequacy to preserve the efficiency of freeway-type highway improvements, particularly at interchange points. The conclusion reached was that local planning at the present time was not sufficiently concerned with nor adequate to guide development at interchange points, and that perhaps the most feasible alternative

would be the extension of access control to approaches to the freeway. (A comment by Kurt W. Bauer, appended to this paper, indicates that his research in the State of Wisconsin resulted in the same findings relative to the adequacy of local planning.[2]

LAND ACQUISITION

At the present time, there seems to be considerable agitation for revision in State laws pertaining to the acquisition of land for public purposes (including highways, of course), particularly those laws pertaining to condemnation procedures. During the past several years, condemnation study commissions have been established in a number of States.[3] To date no great number of new laws have resulted from the work of these study groups, with the possible exception of Wisconsin, where substantial changes in eminent domain procedures were made by the State legislature in 1961, generally providing for payment to the landowner of several "out of pocket" expenses, such as moving costs, refinancing, loss of rent, and cost of plans under way as part of just compensation. The California commission has made a number of recommendations, pertaining to such matters as immediate possession, relocation of tenants, evidence in condemnation proceedings, and pretrial procedures, but only on the first of these has affirmative action been taken. The 1961 session of the legislature revised the immediate possession law to extend to all governmental agencies, with the legislature being made responsible for determination of the necessity for use of the quick-taking procedure. The new law increases the period of notice to the landowner of the condemner's intention to take possession from 3 to 20 days, and the amount of deposit made by the condemning authority, etc. The Michigan constitutional convention which considered, among other things, certain changes in laws pertaining to land acquisition (including restrictions on the right of immediate possession and a change in the determination of the necessity for highway takings from an administrative to a judicial function) has apparently finished its work without recommending such changes.

In a number of instances these study commissions appear, from the tenor of their considerations and recommendations, to have been motivated by a feeling that the landowner is not getting his just due when his land is taken for public purposes. To insure that the commissions are equally zealous of the public's interest in these matters and do not go overboard in protecting the landowner's interests, it is suggested that highway departments keep themselves informed of the work of these commissions, and seek the opportunity to present the condemner's viewpoint where bias may be indicated.

Although not a great deal of legislation pertaining to highway land acquisition was enacted during the 1961 sessions of the State legislatures, there was considerable activity in such matters as acquisition and disposition of excess lands and payment of relocation costs. Montana made extensive revisions in its land acquisition law in an effort to clarify and streamline procedures. Washington enacted a new law authorizing the use of retirement and pension funds in the acquisition of land for future highway use. There were also a number of court decisions involving the acquisition of highway rights-of-way. These developments are summarized in the following pages.

Acquisition of Land for Future Use

Washington.—The recent enactment of enabling legislation by the Washington State legislature gave further evidence of the growing interest among States in the utilization of public retirement and other funds to finance the advanced purchases of right-of-way for highway purposes.[4]

2/See "A Method of Attaining Realistic Local Highway System Plans," by Kurt W. Bauer, Southeastern Wisconsin Regional Planning Commission.

3/ Alabama, California, Kansas, Maine, Maryland, Michigan, Massachusetts, New Jersey, New York, Ohio, Pennsylvania, Virginia, and Wisconsin.

4/For the Ohio law on the same subject, and a subsequent court decision upholding its constitutionality, see HRB Correlation Service Memorandum 113, Circular 396, August 1959, and No. 120, Circular 421, May 1960.

The basic rationale and justification for the Washington law is forcibly stated in Section 1 thereof:

> It is hereby declared to be the public policy of the State of Washington to provide for the acquisition of real property necessary for the improvement of the state highway system, in advance of actual construction, for the purpose of eliminating costly delays in construction, reducing hardship to owners of such property, and eliminating economic waste occasioned by the improvement of such property immediately prior to its acquisition for highway uses.
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> The legislature therefore finds and declares that purchase and condemnation of real property necessary for the State highway system, reasonably in advance of programed construction, is a public use and purpose and a highway purpose.[5]

Under the terms of this legislation, the highway commission is authorized to enter into agreements with the State finance committee for the financing of this advanced acquisition program, on either an individual property basis of on a project basis. The finance committee, for its part, is authorized to purchase warrants drawn on the motor vehicle fund, using moneys available for investment by the teacher's and State employee's retirement boards, medical aid and accident funds, and from certain excess funds available for investment in the general State treasury. By legislative statement, the retirement boards are limited to a 10 percent maximum investment of their funds in these highway warrants, and the State treasury is likewise limited to 20 percent of its excess investment funds.

The warrants, as issued, are dated for a two-year period, with the highway commission holding the option to renew for subsequent periods not exceeding a total renewal period of four years. The commission may redeem the warrants at any time during the effective period, but are obligated to redeem whenever the highway improvement contract is let. Each agreement between the State finance committee and the individual funds contains a stated interest charge that is presumably determined in accordance with prevailing market rates for similar securities.

The Washington law apparently differs slightly from the Ohio statute in that title to the individual properties is taken directly in the name of the highway department, and not in the name of the particular investment fund, as is done in Ohio. Through this method, the financing provisions can be viewed as a direct highway financing obligation, and not be as subject to legal or auditing controversy. In addition, the previously quoted statement of legislative intent conceivably limits much of the argument used to attack the constitutionality of the Ohio statute; i.e., that it was not directed to a legitimate highway purpose.[6]

Marginal Land Acquisition

At least four States (Kansas, Montana, South Dakota, and Wyoming) enacted legislation providing for acquisition of uneconomic remnants of land by State highway departments. Nebraska authorized the taking of landlocked portions of land. Two of these laws (in Kansas and Montana) provide for exchange of such excess land if not needed for highway purposes. In this same connection, an Illinois law authorized the highway department to exchange any land, rights, or property no longer needed for highway purposes, or uneconomic remnants for equivalent interests in land needed for highway purposes.

5/Washington Regular Session, Chapter 281, Laws 1961, Senate Bill 288.

6/See Memorandum 134, September 1961, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 450.

Payment of Relocation Costs

Considering the present concern for the plight of the owner or tenant displaced from his residence or place of business as a result of public improvements, it is rather surprising to find that only one State (Wisconsin) passed legislation providing for payment of all or some part of the costs involved in such relocations during 1961. On the other hand, in Montana, which formerly had such a statute, the legislature repealed the provision in its 1961 session. Although legislation of this type was considered in one other State (California), it failed of enactment. A number of bills providing for payment of relocation costs, and business losses additionally in some cases, were introduced in the U.S. Congress. None was passed; however, it is expected that efforts to obtain an amendment to the highway law providing for Federal reimbursement of such costs in States where they are paid will be continued in 1962. At the present time, seven States now have legislation of this type.[7]

Necessity for Taking

Vermont.—In order that US 91 could be constructed into an Interstate limited-access highway, the State of Vermont condemned certain land The State filed the necessary papers with the appropriate county court and hearings were held. Subsequently two orders were entered by the court. The first of these held that the board had sufficiently established the necessity for taking the land required for the highway itself but had failed to establish the necessity for taking land for the construction of an interchange that had been set out in the condemnation petition. The second order held that sufficient necessity had been established for an interchange located approximately 2 mi from the site requested by the State in its petition The State appealed to this court on the second order because it wanted the interchange located in the place it had designated in its petition and not at the site fixed by the court.

The State supreme court noted that the 1957 legislature rewrote the State highway code as it pertained to condemnation procedures. Before 1957 the issue of necessity was required to be submitted to commissioners appointed by the court. The power of these commissioners was defined in the following manner:

> The court may accept or reject the report in whole or in part and by its order may establish, alter, resurvey, widen or change such highway, or make such other order as appears just...

The 1957 revision eliminated the hearing before the commissioners and placed the issue of necessity directly before the court. This was to be determined before the actual condemnation and award of damages. The court's authority was defined in these terms:

> Such court shall, by its order, determine whether the necessity of the State requires the taking of such land and rights and may modify or alter the proposed taking in such respects as to the court may seem proper.

The lower court proceeded, apparently on the theory that the 1957 revision had not materially altered the prior law. The high court, on the other hand, was of the opinion that the 1957 revision evidenced an intent by the legislature to limit the power of the court hearing the petition to a determination of whether or not the test of necessity was met on the particular land sought to be condemned by the State. In other words, the lower court was without power to reject the State's petition and establish a new site beyond the bounds of the condemnation petition.

According to the supreme court, the 1957 revision did not enlarge the authority of the highway department with respect to its powers of eminent domain, nor did it alter the standards of necessity. What the revision accomplished was to confine the court to the area covered by the petition. The court could reject or approve the petition or

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7/ Connecticut, Maryland, Minnesota, Nebraska, Tennessee, Rhode Island, and Wisconsin.

it could modify it as long as it stayed within the confines of the petition and did not establish new routes not set out in the condemnation petition.

The court also said that alternate routes could be considered by the lower court in determining whether the State had established the necessity for the land that it sought to condemn even though the court did not have the authority to approve these alternative routes.[8]

Taking of Time

Arizona.—In a decision handed down on December 21, 1960, the Arizona Supreme Court held unconstitutional a section of the State statutes, declaring that value of property being condemned was that existing as of the date the highway commission declared the necessity for the taking, if the State actually commenced the condemnation proceedings within a period of two years.

In this particular case the State passed a resolution on February 17, 1959, stating that a portion of a tract of land owned by one Griggs and wife was to be condemned in connection with improvement of the Casa Grande-Tucson Highway. Condemnation proceedings were filed on September 9, 1959. It was stipulated that the value of the property on February 17, 1959, was $21,000 and on September 9, 1959, $26,000. The trial court used the latter date in making its award, and the State appealed.

The statute in question (A. R. S., Sec. 18-155 (D)), in addition to establishing the date as of which compensation was to be determined, provided that

> ...no sale, lease, agreement or other transaction affecting such property made thereafter shall constitute evidence of its value; and improvements placed upon such property subsequent to the date of such resolution shall not be included in the assessment of compensation and damages.

It further provided that if action was not commenced by the State within a period of two years, the measure of compensation was to be determined as of the date of the summons.

The supreme court in declaring the statute unconstitutional, called attention to the fact that the use to which the land could be put by its owner in the interim period between the condemnation resolution and the actual summons was severely restricted—"...its saleability is reduced, leasing is made less feasible, and improvements effectively prohibited." Quoting from a previous case (Liddick v. City of Council Bluffs, 5 N. W. 2d 361, 1942) the court noted that when a person is deprived of certain rights in and appurtenant to the property, he is to that extent deprived of his property, although his title and possession remain undisturbed. Furthermore, the court thought the statutory provision offended the constitution to the extent that in allowing the State two years in which to decide whether to proceed with condemnation, the owner's rights were greatly inhibited. If the State decided not to condemn, the landowner must suffer whatever loss had been occasioned by the State's delay.

The State argued that the statutory provision was a justifiable exercise of the State's police power, asserting that "the legislature may constitutionally regulate the use and enjoyment of private property in the interest of the public health, safety or general welfare, so long as the means adopted is reasonably calculated to deal effectively with the problem." However, said the court, the State did not contend that the landowner's property was injuring the public health, safety or welfare, but argued that the statute would enable the commission to conserve money, admittedly at the property owner's expense, and that such savings would permit the State to make safer highway facilities for the movement of vehicular traffic. Under the State's reasoning, continued the court, any regulation that conserved money thereafter used to protect or better the public health or safety was a valid police measure In other words, the primary purpose of the statute, according to the court, was not to regulate the use of private property in the interest of

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8/State Highway Board v. Loonis, 165 A. 2d 572, November 1960. See Memorandum 129, May 1961, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 441.

the public health, safety, or welfare. The court thus held that the interference with private property rights prescribed by this section of the statutes was neither an appropriate nor a justifiable means for exercising the State's police power.[9]

California.—Farm property was condemned for use as part of a freeway project in southern California. An existing statute provided that the value of condemned property should be determined at the time the summons was issued. Accordingly, the case was first tried pursuant thereto. The highest testimony on behalf of the State was $417,000.00, but the jury returned a verdict of $610,763.00. On appeal by the State the case was sent back for retrial. On motion by the landowner the issue of the valuation date in the second trial was set for separate hearing prior to the impanelment of a jury.

The trial court held that the date of the second trial would be the date of valuation and the case was retried on that basis. Witnesses for the State testified that values had increased in the interim to the extent of approximately $170,000. Based on the new valuation date, the jury returned a verdict of over $650,000, which was higher than the verdict rendered at the first trial. The State then appealed from the judgment on the second trial.

The State advanced three arguments: (a) once the case is "tried within one year," as contemplated in the argreement between the parties, the date of value may not shift; (b) a retrial following a reversal must be a re-examination of an issue of fact previously tried, and the only issue in the condemnation proceeding is the valuation, which must be fixed as of the same date; and (c) the law of the case requires a retrial with the same valuation date, for otherwise the case is entirely different from the one reversed on the first appeal.

The supreme court noted that before the addition of a legislative proviso the code fixed the date of issuance of the summons as the date for fixing value and damages in all condemnation sections without exception. The proviso stated that "in any case in which the issue is not tried within one year after the date of the commencement of the action, unless the delay is caused by the defendant, the compensation and damages shall be deemed to have accrued at the date of the trial." However, reasoned the court, the legislative provision could not be given a literal interpretation. If it was construed literally, where the trial of the issue was delayed beyond the year, and the land decreased in the interval, the landowner would be entitled to the higher value at the date of issuance of the summons only if he caused the delay; conversely, if the condemner caused the delay the condemner would be entirely to the benefit of the lesser value at the date of the trial. Thus, said the court, in a situation where land values were decreasing, the advantage would innure to the benefit of the dilatory, instead of to the vigilant. The court interpreted the section as an expedition statute, meaning that a premium was placed on the condemner to get the case to trial within the year, and that a burden was placed on the condemnee, who for any reason delayed the setting of the trial beyond the one-year period. If the condemner delayed setting the case for trial beyond this period, it forfeited the right to have value and damages fixed as of the earlier date if the delay was caused by the condemnee.

Analogizing the situation before it to that of a case that arose under the penal code (In re Alpine, 265 P. 947, March 1928) the court stated that although a case may be reversed on appeal, if the defendant was brought to trial within the statutory period in the first instance, the second trial could commence beyond the period prescribed by the statute.

The supreme court stated that to construe the proviso as applying to a retrial of the issue after reversal of a judgment, and requiring the value and damages to be fixed as of the date of such trial, where the retrial occurs more than one year after the commencement of the action, would produce an unreasonable result.

Reviewing what had so far transpired in this case, the court noted the following: (a) the code expressly gave the parties the right of appeal in condemnation cases; (b) through no fault of the State an award was rendered in excess of the amount to which the

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9/State v. Griggs, 358 P. 2d 174, December 1960. See Memorandum 130, June 1961, Committee on Land Acquisition and Adjacent Areas, Highway Research Correlation Service Circular 444.

condemnees were legally entitled, and the State rightfully procured a reversal; and (c) on the retrial the State lost all benefit of the appeal by reason of the fact that the value of the property had increased in the interim, so that the second award was greater than the first. In effect, said the court, by invoking the right of appeal, the State had been penalized by having a retrial on new issues that were less favorable to it. The language of the proviso, "unless the delay is caused by the defendant, the court said," had meaning only if applied to the first trial, inasmuch as the statute was to apply to situations where the parties could exercise control over the litigation Once an appeal was taken, delays over which the parties had no control were bound to carry the second trial beyond the one-year limit. In conclusion, said the court, it was satisfied that, in the absence of a legislative provision providing for a change of valuation date on successive trials or retrials, the date for fixing valuation and damages was determined at the time of the first trial.[10]

Reservation of Right-of-Way

Maryland.—A developer acquired a tract of land of about 140 acres fronting Md 103, known as Montgomery Road, a conventional highway 60 ft wide. The Planning Commission of Howard County designated Montgomery Road as a primary road calling for a minimum width of 100 ft. The commission refused to approve the development plan, stating that it did not allow for a width of 100 ft, or 50 ft from the center of the existing Montgomery Road. It also claimed that the proposed lot areas were not sufficient to comply with pertinent zoning regulations, and the lots did not provide vehicular access by any of three prescribed methods—an access drive, a cul-de-sac, or a parallel street.

The developer contended that the planning commission's refusal deprived him of his property without just compensation in violation of the Maryland Constitution. He stated that reliance on zoning regulations was a mere pretext by the commission which resulted in the following injury:

1. He was required to lay out lots in excess of the present minimum of 20,000 sq ft because of the exclusion of the 20-ft strip along the road and enforcement of the 50-ft setback.
2. He was deprived of the use of the 20-ft strip reserved for future widening of the road, which might never take place and which the commission could not require the State Roads Commission to do in any event.
3. He was denied access to the road as it presently existed as a 60-ft way with access uncontrolled.

The court of appeals saw nothing illegal or arbitrary in the planning commission's refusal to approve the development plan. Rejecting the contention that bad faith was shown, the upper court reaffirmed the trial court's position noting that if the commission were powerless to require compliance with zoning regulations the whole purpose of highway planning would be frustrated.

Zoning restrictions, the court noted, were a proper exercise of the police power. Concededly, said the court, zoning regulations cannot be used as a substitute for eminent domain proceedings to defeat the requirement for just compensation, but there was nothing in the record to show a present taking, as distinguished from a regulation of use, or to indicate the owner would not be paid when the adjacent strip of land was condemned for purposes of widening the highway. In addition, the developer was not precluded from putting the 20-ft strip to whatever permissible use he pleased.

Commenting on the argument that limitation of access constituted a taking, the court reasoned that installation of service drives might prove to be beneficial to the owner and the public and enhance the value of the property The developer certainly could not, in the court's estimation show that he would suffer loss by compliance with

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10/ People v. Murata, 357 P. 2d 833, December 1960. See Memorandum 134, September 1961, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 450.

the regulations. In conclusion the court of appeals found the classification reasonable, and ruled that the commission had not by an abuse of discretion violated a constitutional principle.[11]

Nature of Interest

North Dakota.—In an action arising out of a controversy as to the ownership of the fee in certain land taken by the County of Williams, N.D., for the purposes of widening an existing State highway, the State supreme court held that inasmuch as the county possessed only an easement in the original right-of-way, in the absence of specific language in the deed transferring the additional land required to grant a fee, it must be assumed that the county possessed only an easement for highway purposes. Thus, ownership of minerals, oil, and gas interests in or underlying the tracts in controversy remained in the landowner.

The highway in question was a section line highway declared by the State legislature to be a public road. The court noted that the right of the public in these section line highways was in the nature of an easement for right-of-way purposes first vested in the Territory of Dakota and later in its successor, the State of North Dakota. Therefore, the adjacent landowner, the court said, continued to be the owner of the fee subject to the easement in behalf of the public.

The court said that although North Dakota statutes state that a fee simple title is presumed to pass by a grant of real property unless it appears from the grant that a lesser estate was intended (Sec. 47-1013 NDRC 1943), this presumption is not conclusive. The estate or interest conveyed must therefore, according to the court, be determined by the intention of the parties to the deed if that is possible. In this connection, the court noted that as general rule, the right acquired by the public in land for highway purposes was ordinarily an easement. Furthermore, statutory enumeration of the uses for which a fee might be taken for public use did not include roads or streets. Thus the court concluded that the county acquired only an easement in the additional land taken for widening the highway.

The court went on to say that the deed covering the additional land excepted the fee title to the original highway. Thus, if the deed were construed to convey a fee title to the additional land, it would completely divide the grantor's fee to the original road from the remainder of her land. The county's purpose was satisfied by the acquisition of an easement, because it could not have acquired, in any event, the fee title by eminent domain.[12]

Special Benefits

North Dakota.—The North Dakota Supreme Court held reversible error a trial court's jury instruction regarding special benefits and granted an additur in favor of the landowner.[13]

The county commissioners condemned 8.66 acres of land for a right-of-way on which to locate an interchange in connection with Interstate 94. The owner appealed from the commissioners' award of $4,914.00 and obtained a jury award in the trial court in the amount of $5,374.00. The elements of this award were broken down by the jurey and included a $1,000 reduction for special benefits accruing to the remaining land as a result of the highway improvement. The owner appealed, claiming that the trial court had erred in submitting to the jury the issue of special benefits.

The only evidence relevant to the highway benefit was that of a State highway department expert who testified that being located on an interchange gave the owner immediate access to a four-lane divided highway, which fact had the effect of enhancing value. The

11/ Krieger v. Planning Commission of Howard County, 167 A. 2d 885, February 1961. See Memorandum 133, August 1961, Committee on Land Acquisition and Adjacent Areas, Highway Research Correlation Service Circular 449.

12/ Lalim v. Williams County, 105 N. W. 2d 339, October 1960. See Memorandum 128, March 1961, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 440.

13/ Boyland v. Bd. of County Commissioners (N. D. Sup. Ct. #7857, October 3, 1960).

witness could not, however, put the offsetting advantage in terms of dollars. The high court sustained the landowner's contention, holding that if the expert could not place a dollar valuation on the prospective benefits the question was too conjectural and speculative to put to the jury. Accordingly, the supreme court granted an additur of $1,000 or, if not accepted, a new trial.[14]

Unity of Use

Kansas.—A recent decision handed down in Kansas may necessitate that State's changing its rules concerning the description of land. Only time will tell what the possible ramifications of this decision are.

J. F. and Eva Luecke were the owners of 320 acres of land in Ellis County, described as the northwest and northeast quarters of section 27 in township 13. The State highway commission sought to condemn a portion of this land for highway purposes. In its condemnation petition, the commission described the Luecke's property as consisting of two separate tracts. Appraisers appointed by the court, in filing their report, also appraised the land as two separate tracts. The owners, being dissatisfied with this report, appealed from the award granted therein. On this appeal the owners described the land as consisting of two separate tracts, as the commission had done in its original petition. After a trial was held, the commission appealed to the State supreme court alleging, among other things, that the trial court erred in submitting the case to the jury with instructions that treated the land in question as being composed of two separate tracts rather than as a contiguous whole.

In making its allegations of error the commission explained that the reason the land was described as the northeast and northwest quarters was that this manner of describing land was used in Kansas for purposes of identification, and that this had no relation to the matter of eminent domain. The State contended that because there was unity of use and unity of ownership the land should have been treated as a contiguous whole and not as separate and distinct parcels. The State also felt that in treating the land as two separate parcels the trial court deprived the jury of considering the land's highest and best use.

The court, in refusing to accept the commission's arguments along this line, said that because the land in question had been treated as two distinct parcels throughout the condemnation proceedings the State could not, on appeal, claim that it should have been treated as a contiguous whole. The court went on to say that the record of this case in the trial court showed that the highest and best use of the northwest quarter was for residential development whereas the northeast quarter's highest and best use was for agricultural purposes. The court apparently felt that this decision did not violate the concept of "unity of use" because the highest and best use of this land was not the same for the entire portion and therefore it should not have been treated as a contiguous whole. The court in passing on this point said that the trial court's instructions to the jury were not prejudicial to the State's case.

Another allegation of error by the State was based on the trial court's allowing one of the landowners' witnesses to testify on direct examination as to the sale price of two specific tracts of land in the immediate vicinity of the land in question in this case. The court said that the general rule in that State was that on direct examination testimony relating to the purchase price of a specific tract of neighboring land, the circumstances not being shown, is inadmissable to prove market value of the condemned land. The court went on to say that opinions pertaining to the value of property should be limited to the property sought to be condemned, except that on cross-examination the value of adjoining property may be inquired into for the purposes of testing the knowledge and competency of the witness. The court said that even assuming that there was error in admitting this testimony the error was not prejudicial to the State's case because on cross-examination the State's witnesses testified that they were acquainted with land values of property in the vicinity of that sought to be condemned. The court went on to

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14/ See Memorandum 127, February 1961, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 439.

point out that the record of the trial court established that the jury was not confused or misled by this objectionable evidence in view of the award made by it. The court found the award to be proper and not excessive.[15]

Relocation of Utility Facilities

As in previous years, there was considerable activity, both legislative and judicial, pertaining to legal responsibility for relocation costs of utilities made necessary by highway improvements. Four States passed laws providing for reimbursement by the State highway department—Alaska, Georgia, Indiana, and Tennessee. Alaska and Indiana laws restrict reimbursement to projects on the Federal-aid system. In Georgia, the law affects only municipally-owned water and sewer facilities, whereas in Tennessee, municipally-owned and privately-owned facilities for which municipality has assumed responsibility for removal costs are included. Legislation introduced in three other States (New York, Oregon, and Pennsylvania) failed of enactment.

There were at least three court decisions handed down during the year in which the subject of reimbursement was involved. The Delaware State Supreme Court upheld the constitutionality of a 1957 law providing for reimbursement on Federal-aid highways. In Louisiana, where no specific statute providing for reimbursement has been enacted, the supreme court held that the State must reimburse a utility for the cost of relocation of facilities made necessary by construction of a section of the Interstate system. Both of these decisions are summarized. A third decision, by the Washington Supreme Court, on the other hand, held that the cost of relocating utility facilities was not an expenditure "exclusively for highway purposes" that could constitutionally be taken out of the State motor vehicle fund, and further that such an expenditure of funds was not a proper exercise of the police power.[16]

Delaware.—Franchises granted by the State Highway Department and the City of Wilmington to the Delaware Power and Light Company provided that the company would relocate any of its facilities at its own expense, whenever they interfered with changes on the highways.

However, under the Federal-Aid Highway Act of 1956, it was provided that the Federal Government would reimburse any State that had paid the nonbetterment costs of relocation of utility facilities necessitated by the construction of projects on the Interstate Highway System to the extent of 90 percent of such costs, if sanctioned by statute. Accordingly, in line with the Federal legislation, a State statute was passed directing the State to reimburse the owners of public utilities, where the State itself was reimbursed from Federal funds to the extent of at least 90 percent. Pursuant to this statute, agreements were made with the utility company providing that it would be reimbursed for expenses incurred in relocation of public facilities. The Federal Government, however, notified the State that all aid for the reimbursement of utility costs would be deferred until the validity of the State statute had been determined. Consequently, the State asked the court to rule on the constitutionality of the statute.

The supreme court noted that the State was presently engaged in the construction of these Interstate highways, and that in the construction of these highways, the utility owners would be required to remove and relocate a large amount of facilities at an estimated expense of approximately $5 million. The constitutional questions that directly affected the rights of both parties, were in the opinion of the court (a) whether the statute was a constitutional exercise of police power and (b) whether the expenditures authorized by the statute were for a public purpose.

The supreme court observed that the legislative history of the Federal law clearly showed that Congress was concerned as to the impact the cost of payment for the relocation of utility facilties would have on the communities owning utilities and on the

15/ Luecke v. State Hwy. Commission, 352 P. 2d 454, 1960. See Memorandum 127, February 1961, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 439.

16/ Washington St. Hy. Com'n. v. Pacific N. W. Bell Tel. Co., 367 P. 2d 605, December 1961. (A digest of this decision will be included in a forthcoming Highway Research Correlation Memorandum of the Committee on Land Acquisition.)

smaller utilities. An apparent inability to pay these costs, stated the court, and a desire to avoid unnecessary delay in the completion of the program, led to the reimbursement clause in the Federal Act. It also seemed evident to the court, therefore, that by the inclusion of this provision in the statute Congress contemplated the passage by the various States of acts complementing the Federal law.

The court regarded the question of whether the statute authorized the payment of money for a public purpose as controlling. It saw no difficulty in concluding that the statute constituted a valid exercise of the police power, inasmuch as there was nothing in the statute that provided for any unreasonable exercise of such power.

Under the act, stated the court, expenditures would in many instances be made to private corporations. Unless made primarily for a public purpose they would be considered invalid. Only an over-all evaluation of the purpose and results of the statute, continued the court, would provide an answer to the vexing question of what constituted a public purpose.

From a practical viewpoint, reasoned the court, to depend on smaller communities and utilities to provide for removal expenses would in many instances not only bankrupt such communities, but might cause considerable delay in the completion of the project. Users of these facilities constituted practically the whole of the different communities that the highways would serve. Also it would seem that to provide for the State to bear the cost of relocation would produce a more equitable result than if the owners were compelled to pay the costs. Many persons, continued the court, who would benefit from the use of the highways, would pay nothing toward the cost of the relocation of the facilities, if this burden was placed soley on the utility owners. Finally, as an additional practical consideration, the court pointed out that if a State failed to comply with the Federal-Aid Highway Act that State would be paying a general tax that would inure to the benefit of States receiving Federal-Aid, while the State itself would not derive benefit therefrom.

In conclusion, the court noted that, as far as the question of public purpose was concerned, the majority of other State decisions held that an appropriation of public funds for the purpose of paying relocation costs constituted a public funds for the purpose of paying relocation costs constituted a public purpose. Certainly, said the court, utility facilities were important to the well-being of those who reside in communities; they undisputably serve all the people and now constitute one of the important purposes for which highways are constructed. Therefore, appropriations under the statute, concluded the court, should be considered for a public purpose.[17]

Louisiana.—The Southwestern Electric Power Company was a public utility that operated under a franchise from the City of Shreveport granting the right to operate an electric transmission within the city. The Department of Highways of the State of Louisiana was engaged in the construction of Louisiana Interstate I-20, a project undertaken by the State in cooperation with the U.S. Government. The State agreed to reimburse the city for costs incurred in connection with its relocation of publicly-owned facilities and installations in the construction of the Interstate highway.

Under the provisions of Federal statutes, Federal funds were allowed to be used for payment of relocation costs of utility facilities to the extent of 90 percent, unless such action would violate the law of the State, or there was a contract in existence between the utility company and the State prohibiting such reimbursement.

The lower court held that the Department of Highways was not authorized to require the company to relocate their facilities at their own expense. The State appealed and asked the court of appeal to rule on the question of whether it could require the utility company to remove at its own cost installations within the City of Shreveport that were located on streets encompassed by the highway project.

In the opinion of the upper court, the controlling issues to be determined were (a) whether the highway department was vested with the right to exercise the police power of the State, and (b) whether the attempt to impose the cost of operations on the company constituted a valid exercise of the police power.

17/ State Highway Department v. Delaware Power & Light Co., 167 A. 2d 27, January 1961. See Memorandum 135, October 1961, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 456.

The court ruled against the State on both questions. The language of the constitution relied on by the State, authorizing "... the acquisition, by expropriation or otherwise, of rights-of-way...," stated the court, did not justify the interpretation that the police power of the State had been conferred on or delegated to the highway department as a governmental agency. The word "otherwise," said the court, should reasonably be interpreted to refer only to conventional agreements such as donations or purchases.

In addition, the court rejected certain statutory provisions as indicative of any conferred authority. The statute recited that

> the department shall supervise and regulate all traffic on the public highways of this state;...investigate the public highways and effect methods and practices relative thereto ...and enforce them as an exercise of the police power of this state.

The court found no reason to apply the doctrine of the exercise of the police power solely for the purpose of attempting to escape payment for damages to private property (italics supplied by the court). Concededly, continued the court, there were instances where the police power could be exercised as opposed to the power of eminent domain, where the taking was directly related to the health and welfare of the community. However, in the instant case, the argument made by the State, that construction of the highway extensively would contribute to public safety, was in the opinion of the court merely a generalization that was insufficient to justify the exercise of the police power.

The court noted that any interference and danger caused by the utility facilities to the City of Shreveport was attributable to the State in its construction of the new highway. It considered as applicable a statute that read

> When a highway is constructed across (such) an existing facility or utility, the agency constructing or causing the construction of the highway shall be responsible for the construction of an appropiate and adequate crossing and for its subsequent maintenance.

Certainly, reasoned the court, it was the construction of the limited access highway that required the removal and relocation of the company's facilities.

Furthermore, it was evident that the State, in the absence of a showing that the Federal-aid law violated any contract between the State and the utility, was determined to avail itself of Federal funds for relocation of publicly-owned utilities. Therefore, stated the court, there was no validity to the argument that the constitution forbade "the use of credit of the State for the benefit of ... any person or persons, associations or corporations, public or private"; for, if it would be a violation to use the funds for the benefit of the company, it would be equally illegal to use such funds for the benefit of a public corporation—the City of Shreveport.

As a further development pertinent to this litigation the Louisiana Supreme Court has decided that the State does not have the police power to order utilities to remove their facilities at their own expense from city or parish public rights-of-way needed for Interstate Highway construction. If the city or parish cannot be induced to order the utility company to remove its facilities at its own expense, the State must pay the cost of the utility adjustment required. There is a possibility that the State will delay construction of these sections until laws can be enacted giving the State Department of Highways power to order utility companies to remove their facilities from public rights-of-way at their own expense. (State v. Southwestern Electric Power Company, 127 So. 2d 309, February 1961.)

Right-of-Way Costs and Land Values

Again this year, there was an increase in dollar value of farmland throughout the United States, according to the U. S. Department of Agriculture.[18] During the period

18/ "Farm Real Estate Market Developments." Economic Research Service, U. S. Department of Agriculture (June 1962).

from March 1961 to March 1962, the over-all increase amounted to 5 percent, with a number of States reporting increases of 6 percent or more, and only three States less than 1 percent, as shown in Figure 1. This increase resulted in a total estimated value of all farm real estate to $138 billion, or an average of $123.18 per acre, a record high.

Net farm income in 1961, according to the Department of Agriculture, was $12.7 billion, the highest point reached since 1953; it is expected to remain substantially at this point during 1962. Individual farm operators are expected to receive a larger proportionate share of total net income in 1962 than in 1961, inasmuch as there are fewer farms in existence.

These estimates are of interest to those engaged in the acquisition of land for highway purposes, because farm land values necessarily have an influence on prices paid for rights-of-way in rural areas.

EXPRESSWAYS

As in previous years a rather large number of court decisions were handed down during 1961 involving matters pertaining to control or regulation of access. As is usual in cases where the courts must rule on the eligibility for damages due to curtailment of access in a particular case, or the amount thereof, it is extremely difficult to isolate any fixed principles universally applied. In other words, the courts, though often noting that injuries resulting from circuity of travel, diversion of traffic, noise, and other similar disturbances are not per se compensable, tend to judge each

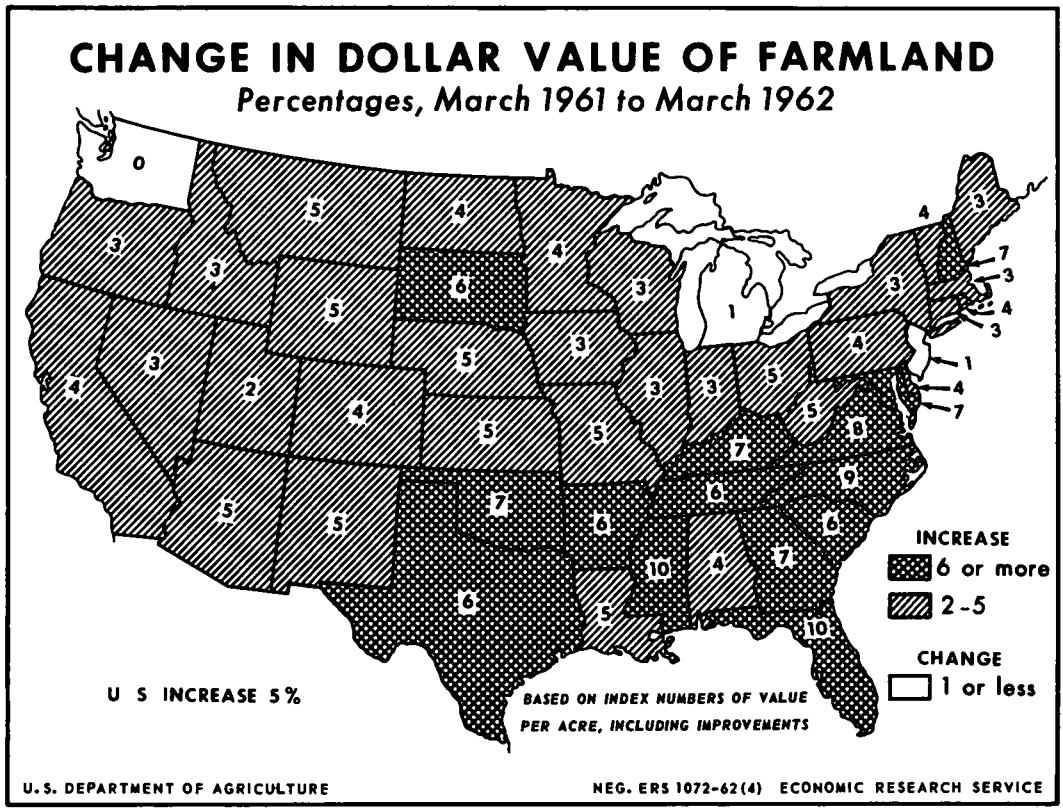


Figure 1.

particular case on its merits. Where there is actually a taking involved, any reduction in market value resulting from these noncompensable injuries is apt to show up in the before-and-after appraisals. In this connection, in a preponderance of the cases reviewed this year, no land was actually taken for the improvement for which compensation was claimed, and in practically every instance the courts held that the landowner was not entitled to damages.

An attempt has been made in the following pages to summarize the courts' decisions under the central point involved. However, attention is called to the fact that in a number of instances several points are actually considered. Cases discussed under "Frontage Roads," for example, may include a discussion of diversion of traffic, a subject also discussed under "Relocation of Highways."

Access Rights on New Highways

Texas.—The Court of Civil Appeals (San Antonio) of Texas recently held that the State, pursuant to its powers to construct highways and to provide for traffic control, was not liable for any loss of business that an abutting landowner might suffer due to the construction of a new highway, and the denial of an access easement to the new highway which he never had.

In the instant case, the Pennysavers Oil Company was the owner of 3.66 acres of land lying just west of US 77, on which it operated a gasoline service station. The State condemned 0.157 acre of this land in connection with the construction of a controlled-access highway, or freeway. Before the freeway was constructed, the oil company had complete access to old US 77. It had, however, only limited access to the freeway, also known as US 77, by means of old US 77, now a frontage road furnishing access to the new freeway. For a motorist to reach the service station from the freeway, the court noted, such circuity of travel was involved that few attempted it, and as a result the service station was forced to close (see Fig. 2).

The oil company sought recovery for this alleged loss of business. The trial court found that their access to the new highway was of no value and denied recovery, whereupon the oil company appealed.

The court of civil appeals noted that there was no doubt that the oil company had lost the trade it one time enjoyed, inasmuch as access to through traffic had been taken from it by the construction of the freeway, which, together with its one-way lane, barriers, and police regulations made it difficult for people traveling on the freeway to reach the service station.

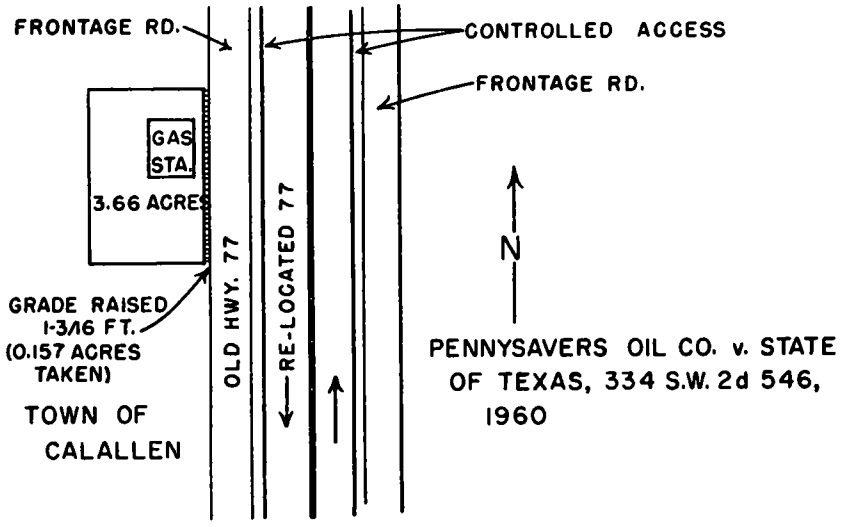


Figure 2.

The court further noted that if the freeway had been built in such a manner as to deny the landowners any access thereto, where he theretofore had full access to a conventional highway, then unquestionably his right of access had been taken from him, and the taker must pay him for the property right thus taken. Such loss would generally be shown by the before-and-after market value of the property. But, said the court, where, as here, all that had been done was to reduce the conventional highway on which the oil company abutted to a frontage road providing limited access to the freeway that had been constructed just beyond the old road, the landowners had not lost their full right of access to the new freeway, because they never did have anything but a limited right of access thereto, and this they still had.

The court pointed out that if the State had decided to build the freeway a block or a mile from the oil company's property, it would likewise have lost its trade. However, continued the court, no abutting property owner has a vested interest in the traffic passing in front of his property, and if this traffic is diverted by the State building a road at another place and the traveling public prefers to use the new road, the State could not be held liable for any loss of trade suffered by an abutting landowner on the old abandoned road.

The appellate court concluded that the jury correctly found, in effect, that the State had not damaged the oil company by taking from it an access easement that it never had. [19]

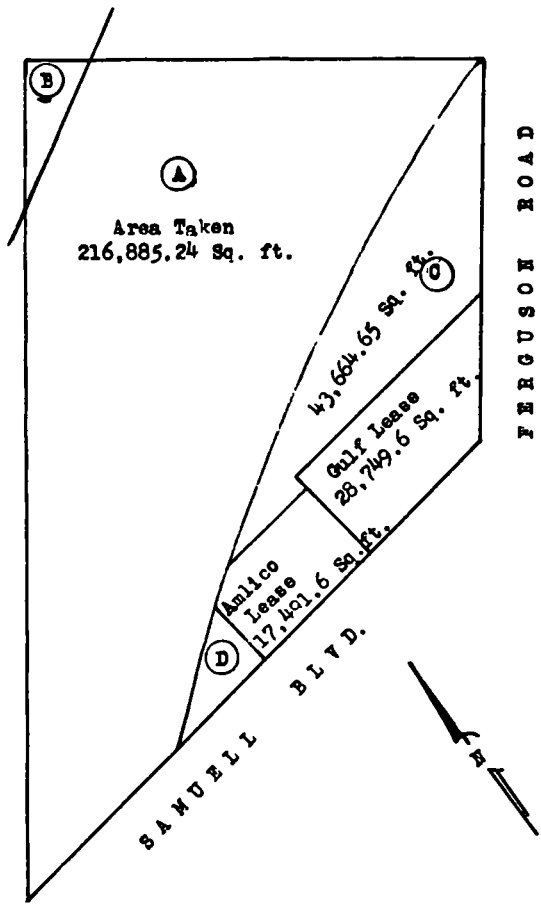
Texas.—Where a landowner previously had full access to a conventional highway, the court of Civil Appeals (Dallas) of Texas recently held that the building of a limited-access highway in such a manner as to deny the landowner access to the old as well as the new highway was a taking of his right of access for which he was entitled to compensation.

In the instant case, certain property owned by James F. Albright and his wife was located on the eastern side of Dallas at the intersection of Samuell Boulevard and Ferguson Road (see Fig. 3). The tract contained approximately seven acres, out of which the owners had previously leased two service station sites under long-time leases. By agreement, the case was tried on the theory that the property embraced by these leases did not constitute a part of the remainder of the subject property. The area included in these leases occupied the corner of Samuell Boulevard and Ferguson Road, and along both streets from the intersection, leaving approximately 6¼ acres in the tract prior to condemnation Those remaining areas (plats C and D, Fig. 3) also fronted on both Ferguson Road and Samuell Boulevard, and although certain legal issues arose concerning these plats, there were no questions of limited access. Subsequent to condemnation, however, plat B became a land-locked triangle having no outlet to a public street without trespassing on the lands of others.

Concerning damages to this plat, the trial court (a) overruled the State's motion to suppress evidence that access to the new controlled-access highway was to be denied; (b) admitted testimony over the State's objection that access to the proposed facility would be denied; and (c) refused the State's requested instruction to the jury that denial of access should not be deemed as grounds for special exemplary damages. The State appealed, contending that under a State statute (Art. 6674w-1, Vernon's Ann. Civ. St.—Acts 1957 Legislature) denial of access to a new controlled-access highway cannot be considered on the question of damages.

The court did construe the statute to provide that along new controlled State highways, abutting property owners should not be entitled to access to such new highway location as a matter of right, and any denial of such access should not be deemed as grounds for special or exemplary damages. However, noted the court, no such issues were presented here. Although the intent of the Legislature was to grant to the highway department full authority to limit or control access, the court said that this power was not to be construed to alter the existing right of any person to compensation for damages suffered

19/ Pennysavers Oil Company v. State, 334 S. W. 2d 546, March 1960. See Memorandum 128, March 1961, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 440.



TEXAS: STATE V. ALBRIGHT
337 S.W. 2d 509, 1960

Figure 3.

as a result of the exercise of such powers by the State highway commission under the State constitution and laws.

The court referred to the Texas case of Pennysavers Oil Company v. State, 334 S.W. 2d 546, March 1960 (See HRB Memorandum 128-1, March 1961, Circular 440) in deciding that the existence of access, or the lack thereof, to a new street being constructed on the part taken is germane to the question whether and how much the remainder has been damaged. Indeed, said the court in upholding the trial court's actions, it would be impossible for the jury to determine the question of damage to the remainder unless this fact were elicited.

In the Pennysavers Oil Company case, the landowner still retained access to the road lying tangent to his property, even though it was a mere frontage road. Here, however, the landowner's tract was completely isolated, and ingress and egress was necessarily trespassing. Inasmuch as this situation had not existed before the condemnation, and because it had arisen as a direct result of the condemnation, the court held that the landowner's right of access had, in fact, been taken from him. For this taking, the State was liable.[20]

20/ State v. Albright, 337 S. W. 2d 509, July 1960. See Memorandum 132, July 1961, Committee on Land Acquisition and Adjacent Areas, Highway Research Correlation Service Circular 447.

Frontage Roads

New York.—In this case the State reconstructed a boulevard that carried a heavy flow of traffic. To accomplish this reconstruction the grade of the boulevard was lowered and the boulevard itself was rebuilt in such a way as to deprive adjacent landowners of direct access thereto. One of these adjacent landowners brought a suit against the State claiming that his property had been damaged by the reconstruction of the boulevard. The lower court awarded the landowner damages holding that his property had been damaged because it no longer fronted on a main boulevard, there no longer was immediate access to the boulevard, and the lowering of the boulevard's grade affected the view of the adjacent landowners. The court overlooked the fact that there was access to this property from a frontage road, a part of the boulevard system, and that a street, constituting the rear boundary of the property, furnished complete access.

The supreme court unanimously reversed the lower court's verdict and granted a new trial. The court said that there was no evidence showing a complete destruction of access or the absence of suitable access to the property and without such evidence an award for consequential damages was not proper. The court went even further and said that the matters considered by the trial court as entitling the landowner to compensation could not even be considered in evaluating the property as a whole. That is, such things as the fact that the property no longer fronted on a main boulevard, that the landowner no longer had immediate access to the boulevard, and that there was a loss of view, could not be considered in determining if there was a diminution in the market value of the remaining property before and after the taking

Therefore, the appeals court ruled that these factors not only were insufficient to justify an award for consequential damages by themselves but were not even to be considered among other factors in determining if an award should be made.[21]

New York.—Martha Selig owned eight acres of land adjacent to Central Park Avenue. The property contained four stores on the Central Park frontage, ten buildings containing 174 apartments, and a group of garage buildings for housing tenants' automobiles. Prior to July 12, 1954, Central Park Avenue was a busy public street 100 ft wide and at the same level as Yonkers Avenue and McLean Avenue (Fig. 4).

The State constructed the limited access New York Thruway along the center portion of the old Central Park Avenue route, and finished February 18, 1957. The thruway was depressed to pass under McLean and Yonkers Avenues and was elevated 6½ to 11 ft directly opposite Selig's property with a 3-ft retaining wall above the level of the highway. On each side of the thruway were two service roads, Central Park Avenue North and Central Park Avenue South, for north and southbound traffic, respectively. Central Park Avenue South, adjacent to the Selig property, remained at the same grade as the old Central Park Avenue. Those leaving the Selig property had free and uninterrupted access to Central Park Avenue South as well as Midland Terrace and St. John's Avenue. The center portion of the thruway being a limited-access highway, it was no longer possible to get directly from the east side of Central Park Avenue to the Selig property. This traffic, after the thruway was established, had to travel on Central Park Avenue North and cross over at Yonkers Avenue which was about ten blocks north of Selig's property or at McLean Avenue which was about eight blocks south of it.

Martha Selig sued for damages resulting from the construction of the thruway and the resulting "change of grade, and the interference with the ingress, egress, access, light and air of her property." No evidence was given as to the claimed interference with light and air, and the court said that Selig had no easements of light and air. No claim was made for damages due to change in grade of the street immediately adjacent to the property (Central Park Avenue South) because it remained at grade. No part of Selig's property, nor any interest therein, was appropriated for the thruway.

21/ A. E. Nettleton v. State, 202 N. Y. S. 2d 102, July 1960. See Memorandum 129, May 1961, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 441.

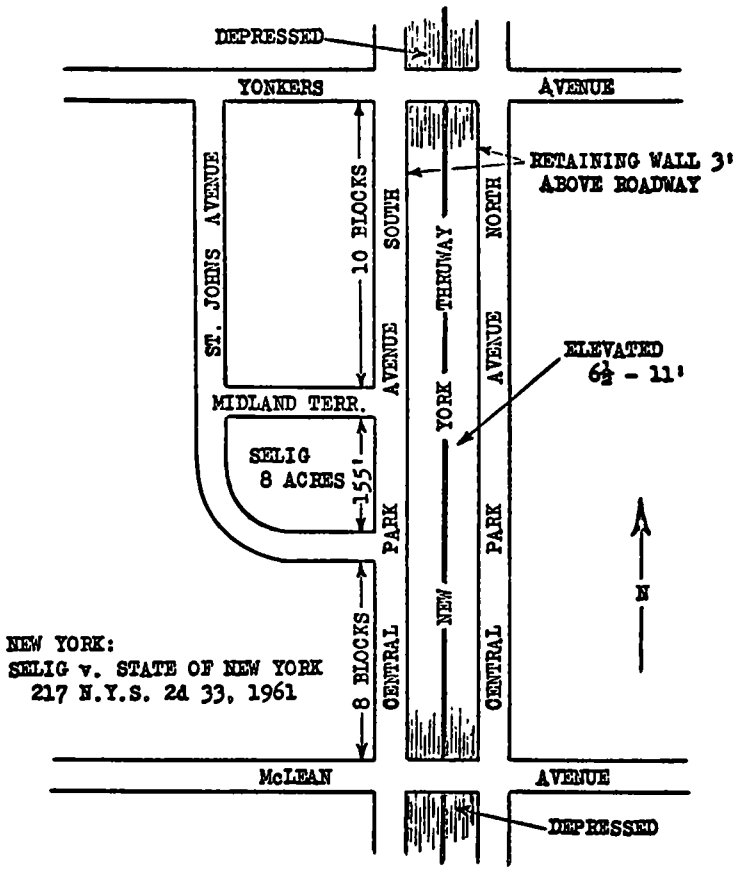


Figure 4.

Whether Martha Selig could recover any damage depended on the construction of two State statutes (24 N. Y. Ann. Sec. 347, Sub. 14; 52 N. Y Ann. Sec. 99). These statutes provided that had the city undertaken the construction, and had there been a change in grade, the city would have been liable for damage. Inasmuch as the State built the highway, the court said the State would have been liable to abutting landowners for damages, caused by a change of grade. The supreme court had said that a city would have been liable and therefore the State should be liable.

The State, on this appeal from the supreme court, however, contended that Martha Selig was not compensated for change of grade because the grade of the highway to which she was adjacent was not changed. The State said that neither could she recover for loss of access because she was not deprived of access. What Selig wanted compensation for, it said, was diversion of traffic past her premises by the new thruway.

The Court of Appeals agreed with the State and reversed the supreme court. They said that damages resulting merely from circuity of access are not compensable. The street abutting Selig's property was not changed in grade. Change in grade and loss of access are not the same. The owner had no right to abut on a 100-ft heavily traveled highway. The court relied on precedent and concluded that "while this may 'appear to be at variance with natural justice' our reversal 'rests upon the soundest legal reasons'." They then refused to compensate Selig for the circuity of access and diversion of traffic.

A dissent by Chief Justice Desmond said that the only question was a factual one—whether Selig's loss was due to the change in grade or to the diminished access to her

property. He said that all of the judges below ascribed the loss to a change of grade and that an affirmance would interfere with no existing rule of law and would be just. [22]

Texas.—After a long delay the City of Sherman, Texas, condemned a portion of a tract of land on which the owner operated a motel, for improvement of a highway abutting the property. Before the condemnation there were 16 buildings. The city took six, including the office and living quarters for the owner. Testimony indicated the remaining buildings were too close to the new highway to be suitable for motel purposes. After the taking, the land had no direct access to the highway but abutted on a "turn around" access road. The new road necessitated motorists traveling north on the highway to go past the motel to a point where they could turn around, continue south past the motel and then circle back to the right on the access road to reach the motel.

Testimony of the city and the owner established that the remaining land was almost useless for motel purposes. The owner testified as to the impairment of access and claimed there had been a severe drop in business due to the highway improvement, because prior to the taking the city had denied him permission to make improvements to the motel to keep pace with his competitors. The trial court awarded the landowner $62,500, and the city appealed.

The city, on appeal, said that loss of access and loss of business were not compensable items of damage, and, therefore, evidence in regard to them was inadmissible.

The Court of Civil Appeals of Texas held that the testimony was admissible. As to the impairment of access, the court said that all "conditions before and after the taking, and all circumstances which tend to increase or diminish the present market value" may be used in determining the damage. Accessibility is one such factor. The evidence as to the resultant loss of business could be considered in a partial taking "not as a separate item of damage, but as affecting market value of the remaining land and improvements for uses to which they were adapted and were being put."

On a rehearing the appeals court held that where the jury awarded the condemnees $500 more than the highest estimate of damage, the condemnee must submit to a remittitur of $500 or go through a new trial. [23]

Street Closing

Mississippi.—In an earlier decision, the same landowner, Hamilton, was held entitled to an injunction to prevent the State Highway Commission from placing a median strip on Tom Bailey Drive where it crossed Hamilton Road, on which his property abutted. The supreme court in that case held that the commission's action in effect constituted a closing of Hamilton Road, and that such was beyond the scope of its authority. [24]

Subsequently, the highway commission adopted a new plan involving construction of a cloverleaf at the point where Tom Bailey Drive intersected Hamilton Road. The City of Meridian, at the request of the highway commission, adopted an ordinance that recited that portions of Hamilton Street (from 100 ft north of to a point 125 ft south of the centerline of Tom Bailey Drive) would be closed. This ordinance also recited that "the city council has determined that the closing of such portions of Hamilton Road will not result in damage of any kind to the abutting property owners."

Relying on the city ordinance, the highway commission built an interchange road extending from 22nd Avenue, which ran in a northerly and southerly direction east of Hamilton Street, in a westerly direction to intersect Tom Bailey Drive at a point west of Hamilton's property, on which was located a drive-in restaurant. A service road

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22/ Selig v. State, 217 N. Y. S. 2d 33, May 19, 1961. See Memorandum 131, July 1961, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 445.

23/ City of Sherman v. Gnadt, 337 S. W. 2d 206, 1960. See Memorandum 131, July 1961, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 445.

24/ Hamilton v. Mississippi State Highway Commission, 70 So. 2d 856, 1954.

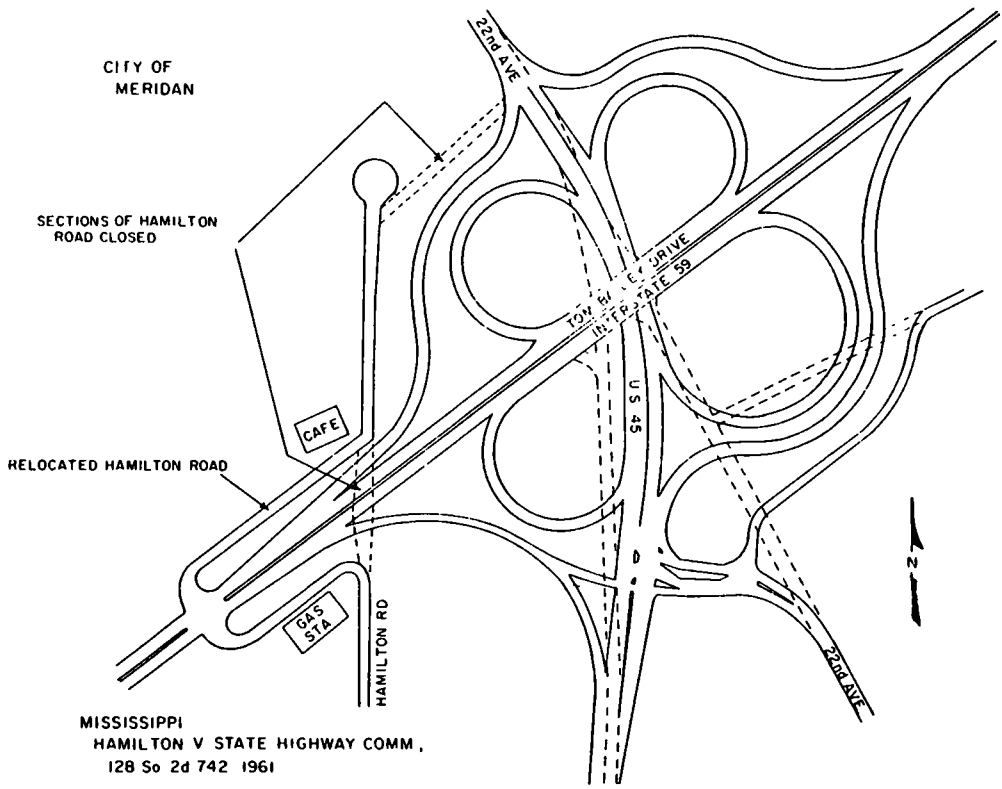


Figure 5.

was constructed from the point where the interchange connected with Tom Bailey Drive easterly to Hamilton's property. The owner's property on the south side of Tom Bailey Drive, on which was located a gasoline service station, and which formerly had access to Hamilton Road, now had access to the Drive only at a point some distance west of the service station (see Fig. 5).

A jury rejected the owner's plea for damages by accepting the State's theory that no damage had resulted. The owners appealed to the supreme court, where the decision was reversed. The reliance placed by the State on the city ordinance, stated the court, was completely improper. By closing the street, it acted at its peril and it could not use the ordinance to shield itself from liability. The State constitution specifically recited that no street or any portion thereof shall be closed or vacated except on due compensation first being made to abutting landowners. Because, said the court, no compensation had been made for the closing of Hamilton Street, the city's act was unlawful. The court, in remanding the case, ordered that the jury should accept the instruction that reconstruction of a highway which renders the abutting property less accessible to the highway or which makes the approach less convenient constitutes the taking of a valuable property right which is compensable. [25]

Relocation of Highways

South Dakota.—In this case Jay and Helen Darnall were the owners of certain land adjacent to US 14 and SD 79 in South Dakota. Their land contained a cafe, cabins, and

25/ Hamilton v. Mississippi State Highway Commission, 128 So. 2d 742, April 1961. See Memorandum 134, September 1961, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 450.

a gasoline pump. The State constructed Interstate 90, a controlled access highway in the vicinity of US 14 and SD 79. The latter highway was not altered in the construction of the Interstate highway and the Darnall's access to it remained the same. However, the old highway no longer carried the traffic that it had before the construction of the Interstate highway, and a concrete curb and gutter separated the Interstate highway, thus preventing traffic from entering and leaving it except at interchanges located about a mile north and south of the Darnall's property. The Darnalls, therefore, instead of being located on a fairly heavily traveled highway found themselves adjacent to what amounted to a frontage road (see Fig. 6).

The State supreme court ruled that the construction of a highway past a place of business gave the owners no vested right to insist that it remain there, and that no legal damages resulted because of the diversion of traffic that might result when traffic was diverted to a new highway

The court said that although a landowner whose property abuts a highway has a right to ingress and egress, and that this is a property right separate and distinct from that of the general public in the highway which cannot be taken without the payment of just compensation, this property right must be balanced against the State's right to use the police power to regulate traffic on streets and highways in the interest of the general public. The court felt that these two conflicting rights or powers could be reconciled if the landowner retained access to the old highway. The court went on to say that as long as the landowner had none of his land taken from him, and as long as his access to the old road was not materially changed, he had suffered no compensable damage. The fact that traffic has been diverted from the highway that he has access to is not a compensable damage. [28]

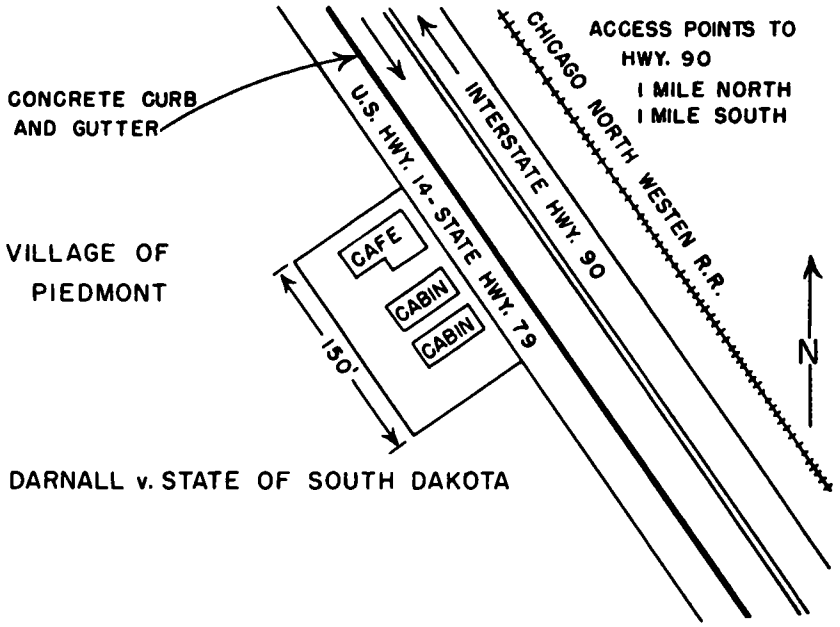


Figure 6.

26/ Darnall v. State, 108 N. W. 2d 201, March 1961. See Memorandum 128, March 1961, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 440.

Idaho.—The landowner's property abutted an Interstate highway, formerly designated as US 30, 20, and 26, and was also the local thoroughfare between Boise and Mountain Home, Idaho. Situated on the premises were a cafe and service station alleged to be worth $50,000.

The State constructed a new Interstate highway that used the right-of-way between Mountain Home and Boise except for a distance of about 4.7 mi east of the landowner's premises and for 3.5 mi west thereof.

By affidavit the landowner showed that the construction of the new highway totally destroyed access to his property from the west by reason of the State constructing a fence along the right-of-way of the new Interstate highway 30, 20, and 6 about 2 mi west of his property. He further alleged the State tore up and obliterated the old highway a short distance west of his land. Persons coming from the west, he stated, in order to reach his premises, had to travel along the new highway 5 mi beyond and 5 mi back along the old highway. The total effect was, therefore, to render his property valueless, because he contended the fencing and the obliteration of the old road to the west created a "cul-de-sac," and constituted a taking of the abutting right of access (Fig. 7).

The State argued that construction had resulted not in an impairment of access but in a circuitous route. It contended that the landowner was only entitled to a reasonable means of getting to the highway, and that an abutting owner had no vested right in the continued existence of traffic in front of his premises.

Conversely, the condemnee stated that the impairment of the right of access constituted an actual taking of property, even though unaccompanied by a physical taking. Therefore, he reasoned, he was entitled to compensation, and brought an action against the State. The district court dismissed his motion and he appealed to the highest court.

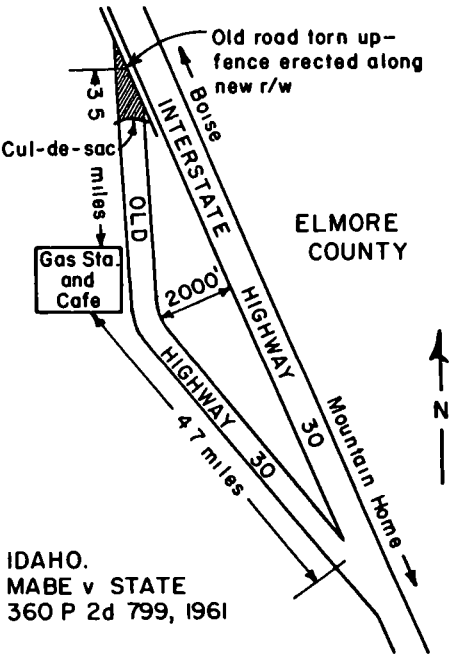


Figure 7.

The supreme court reversed the ruling of the lower court. It stated that Idaho was firmly committed to the proposition that access to land from an existing highway is a property right. The court critically examined the case of Winn v. United States of America, 272 F2d 282 (1959), which was cited by the State as controlling. In that case part of the landowners' property was taken for freeway purposes. The owners, said the U.S. Court of Appeals, were not entitled to compensation on the theory of loss of access to the new highway. The condemnees, reasoned the court, could still reach Boise via the old highway although it would entail traveling ten additional miles. In the court's opinion it had not been demonstrated that this inconvenience reduced the market value of the owners' "Rock Shop," a business which specialized in retail sales of rocks and trinkets to the public.

The highest court of Idaho differentiated the Winn Case from the instant case on the grounds that the latter involved impairment of access with resulting reduction in the value of the landowner's property.[27]

27/ Mabe v. State, 300 P. 2d 799, March 1961. See Memorandum 133, August 1961, Committee on Land Acquisition and Adjacent Areas, Highway Research Correlation Service Circular 449.

Oregon.—The State brought an action to condemn land owned by one Ralston for a highway widening in connection with an overhead crossing at the junction of Slavin Road and Barbur Boulevard in Multnomah County. The highway commission appealed the judgment of the circuit court, assigning as error the giving of an instruction to the jury which permitted consideration of loss of access to the landowner's property in the determination of damages. The lower court gave judgment for the landowner in spite of the fact that he had no access to Barbur Boulevard before it was widened and none thereafter. Reasoning that the instruction to the jury was justified, he cited the fact that the value of his property was diminished by the change in traffic flow on Slavin Road which resulted from the elimination of a nearby grade crossing and the construction of an overhead freeway crossing (see Fig. 8).

The supreme court in a direct and succinct opinion reversed the lower court. It was elementary, said the court, that the owner was not entitled to compensation where the State exercised its police power by increasing or decreasing the flow of traffic. Public regulation, said the court, is not a taking; therefore, the owner had no justifiable claim to compensation. [28]

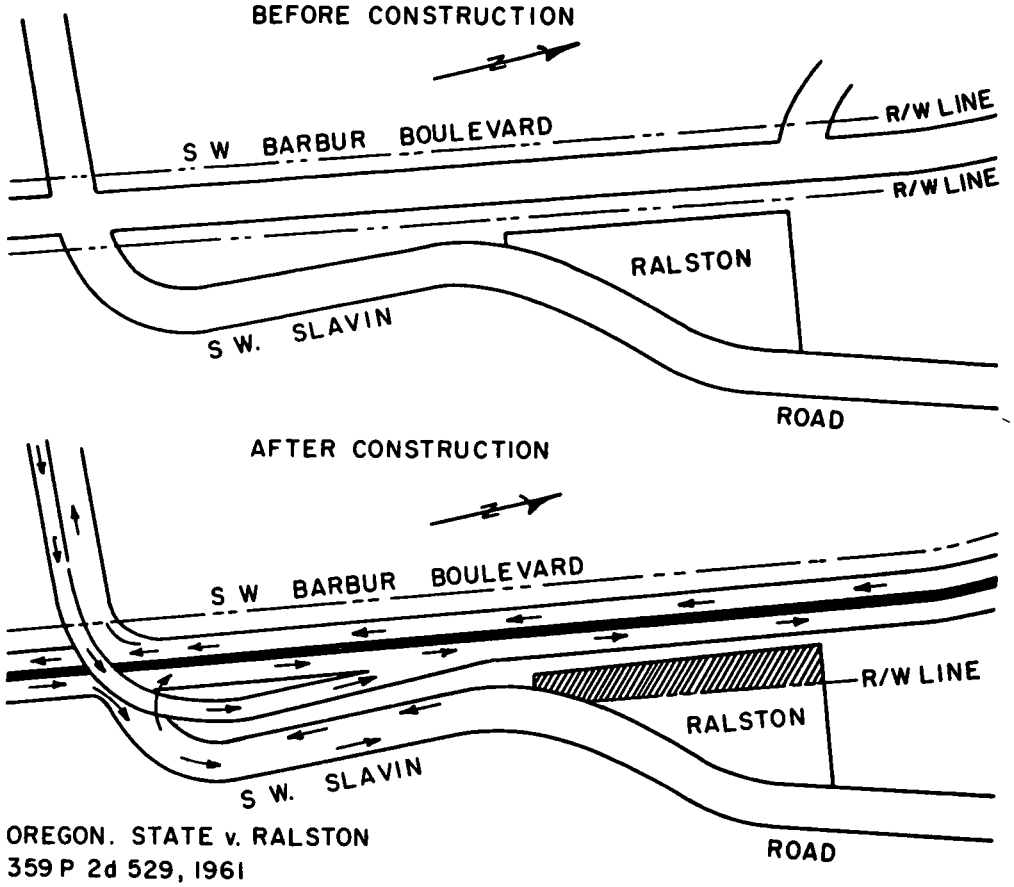


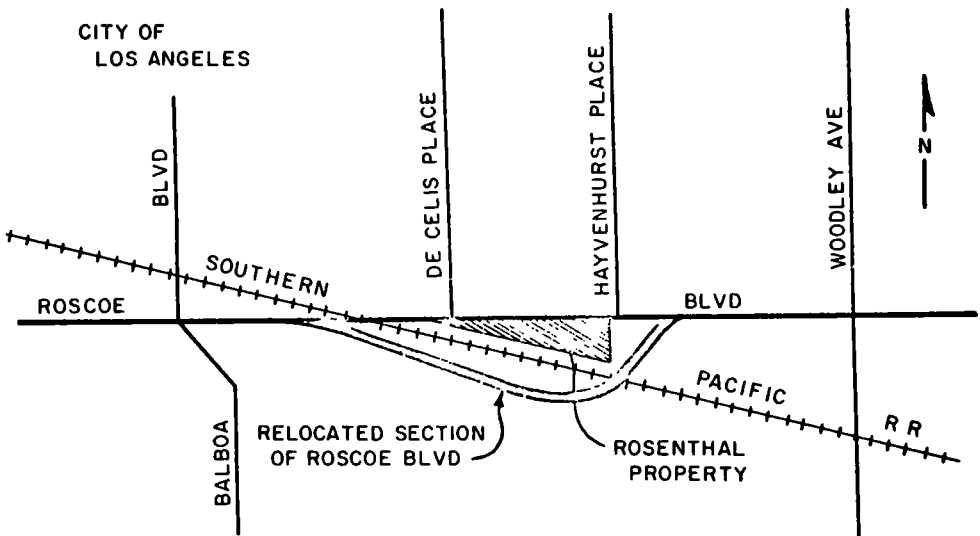
Figure 8.

28/ State v. Ralston, 359 P. February 1961. See Memorandum 133, August 1961. Committee on Land Acquisition and Adjacent Areas, Highway Research Correlation Service Circular 449.

California.—The landowners' property was situated in an industrial zone in the shape of a right triangle. It abutted the southern side of Roscoe Boulevard, an east-west street. The hypotenuse of the triangle was on the southern portion of the property and ran from Roscoe Boulevard on the west in an east-southeasterly direction until it intersected with the eastern border of the property. Adjacent to the hypotenuse and bounding it was a railroad right-of-way that intersected Roscoe Boulevard just to the west of the owners' property, thereby preventing access along Roscoe Boulevard from the west (see Fig. 9). Roscoe Boulevard formerly provided access to the owners' property from the east. Two north-south streets, DeCelis Place and Hayvenhurst with their southern termini located at Roscoe Boulevard provided access to the owners' property from the north.

As a result of the improvement here in controversy, Roscoe Boulevard as it approached the owners' property, turned southwest at a point east of Hayvenhurst. It then crossed the railroad right-of-way, turned west, and connected with its western counterpart west of the owners' property. Consequently, Roscoe Boulevard became a through street that bypassed the owners' property to the south. There were, in effect, two Roscoe Boulevards, and the owners' property could be reached only by approaching the old Roscoe Boulevard from the north on DeCelis or Hayvenhurst. The owners brought an action for inverse condemnation, alleging an unreasonable interference with access to their property from the east, without compensation. After judgment for the city, the owners appealed.

The district court of appeal stated the general proposition that the right of access to one's property was a right protected from undue encroachment. Noting that the right of ingress and egress to property was more extensive than a mere opportunity to go into the street immediately in front of one's property, the court unequivocally stated that "this right did not extend beyond access to the next intersection at either end of the street upon which the property abuts." This rule of law, said the court, indicated that the next intersecting street was the dividing line between injuries peculiar to oneself and those that one suffered in common with the general public. In the instant case, reasoned the court, the obstruction fell beyond the street that next intersected Roscoe Boulevard, namely Hayvenhurst. Therefore, the owners had not suffered a compensable injury, concluded the court.



CALIFORNIA ROSENTHAL V CITY OF LOS ANGELES
13 CAL RPTR 824, 1961

Figure 9.

The appellate court noted a recent case, People v. Symons, 357 P. 2d 451, December 1960, as a broader reason for its decision. In that case the State condemned land adjacent to the owners' as well as a portion of land for a cul-de-sac on a street that would otherwise lead into the freeway under construction. Symons argued that he should be awarded severance damages for loss of view, fumes, dust, and misorientation of his house. The court ruled that there was no actual severance of Symons' land that would suffice as a basis for an award of diminished value arising from construction of the freeway. In the Symons case there was, noted the court, even a loss of access to the next intersecting street. In the case at bar there was no severance whatsoever. In the opinion of the upper court, the Symons case unequivocally decided that diminished access was not compensable in the absence of a severance.

The court dismissed the owners' contention that previous cases had held that a rerouting of the street on which their property formerly abutted constituted an actionable interference with the "easement of access." In the cases cited by the owners, distinguished the court, the owners' properties were separated from the streets on which they formerly abutted. In the instant case the owners' property still abutted on, and the owners had access to the same street. Because traffic now flowed past the owners' property to the south was not grounds for compensation.

The owners' final argument was that the "next intersecting street" rule was merely one aspect of the test of whether substantial impairment of access had resulted; in addition they claimed that an abutting owner had a right to direct access to the adjacent street and to the through traffic along that street. The argument was shown to be factually incorrect by the court. Roscoe Boulevard never was a through traffic street at the point where that property was located, stated the court. In actuality, the owners, said the court, formerly could reach their property via three streets; they now could use two of the three, a minor inconvenience, but not something to constitute a substantial impairment of access.[29]

Change in Grade

Pennsylvania.—In 1925, the County of Allegheny established Bower Hill Road as a 60-ft right-of-way (see Fig. 10). In October 1926 the owner's (Henry) predecessor in title obtained permission and built a garage and house on his property abutting the right-of-way. A paved cartway 18 ft wide was built down the center of the right-of-way in 1927, but the contractor raised the centerline elevation a number of feet higher than established on the recorded plan. The cartway could be reached by crossing the unimproved portion of the 60-ft right-of-way.

In 1958 the county desired to utilize the whole of the 60-ft right-of-way for a paved highway, sidewalks, and curb. The height of the new highway was to be the same as the centerline elevations adopted by the contractor in 1927. Also taken was 550 sq ft of Henry's property for a slope easement to support the newly widened and improved highway (Bower Hill Road). Because of the height of the highway, which was several feet higher than on the 1925 plan, and the elimination of the unimproved portion of the right-of-way, Henry no longer had access to Bower Hill Road.

Henry sued for damages to his property arising from the increased elevations above those shown on the 1925 plan along the portion of right-of-way outside the 18-ft cartway and for the taking of 550 sq ft of his property for the slope easement. He conceded that any damage that may have arisen from the establishment of the right-of-way or by the building of the 18-ft cartway 8 ft higher than the designated plan was barred by the statute of limitations.

The lower court held that Henry's predecessor in title could have been compensated in 1927 for the slope easement and the grading of the entire 60-ft right-of-way at a higher level, and therefore Henry was barred by the statute of limitations.

29/ Rosenthal v. City of Los Angeles, 13 Cal. Rptr. 824, June 1961. See Memorandum 134, September 1961, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 450.

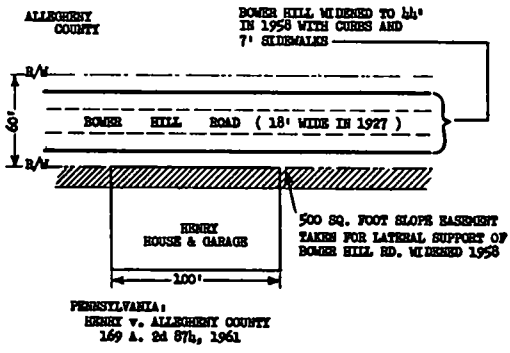


Figure 10.

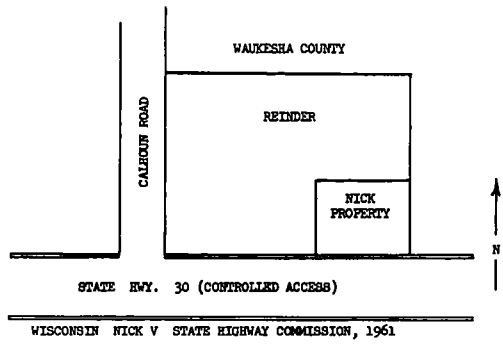


Figure 11.

The Supreme Court of Pennsylvania held that Henry was not barred by the statute of limitations. They noted the general rule that only something that substantially deprives the owner of the beneficial use of his property was compensable. The change in grade of Bower Hill Road was not approved until 1958 and no one was deprived of any use of the land until the highway was actually widened. Hence, there was no right to petition for damages until 1958. Also, inasmuch as there was no actual physical taking of the 550 sq ft for a slope easement until 1958, the right to petition occurred in 1958.

The court pointed out that Henry did not claim damages for anything encompassed in the 1925 condemnation plan but was claiming damage for a change in grade in contravention of the 1925 plan or according to the new resolution adopted in 1958.[30]

Curb Cuts

Wisconsin.—Reinders owned a tract of farm land in Waukesha County, Wisc., during the period before August 1951. His property consisted of 1,320 sq ft of land that was bounded by Calhoun Road on the west and Wis. 30 on the south. There had never been any driveways from this land to Wis. 30 and there was no evidence that anyone ever came to the Reinders land directly from Wis. 30 (see Fig. 11).

On August 20, 1951, the State highway commission declared Wis. 30 a controlled-access facility and prohibited direct access thereto from Reinders' land. Traffic between Reinders' land and Wis. 30 must go via Calhoun Road and its intersection with Wis. 30.

On December 30, 1955, Reinders sold a portion of his land to Marie Nick and her husband, since deceased. This parcel contained 330 ft on Wis. 30 and was 250 ft in depth. It was 990 ft to the east of Calhoun Road. Reinders retained the remaining land. Mrs. Nick applied for a permit to build a driveway from her land to Wis. 30 and when this was refused she filed a petition with the circuit court for inverse condemnation. She sought to have the court assign her case to condemnation commissioners to determine whether any of her land had been taken and if so to establish the just compensation. The circuit court dismissed her petition saying that "if the petition is granted, the entire purpose of the controlled-access law would be circumvented and become a nullity." Mrs. Nick then appealed to the State supreme court.

30/ Henry v. County of Allegheny, 169 A. 2d 874, April 1961. See Memorandum 132, July 1961, Committee on Land Acquisition and Adjacent Areas, Highway Research Correlation Service Circular 447.

The high court in upholding the lower court's decision said that an impairment of the use of property by a valid exercise of the police power of a State is not compensable where no land itself is taken. The court felt that establishing controlled-access highways was a proper exercise of the police power possessed by the State.

This case is significant in two other respects:

1. The court analogized the creation of controlled-access highways to the enactment of zoning ordinances. The court said that

> ...while they may adversely affect an established business, relocations of a highway, prohibitions against crossing it or against left and U-turns, the designation of one-way streets, and other similar restrictions and regulations have been upheld as proper exercises of the police power of the State and not of the power of eminent domain. As such they are not compensable....

The court went on to say that at no time did the State take any of Reinders' land. The control of his access to Wis. 30 had impaired the value of his land but it did not deprive him of any access to his land. At all times he had access to Wis. 30 by way of Calhoun Road and though this was somewhat circuitous the fact was that Reinders had some means of reaching Wis. 30 from his land.

2. The court also held that the question of damages was frozen from the time the highway commission declared Wis. 30 to be a controlled-access highway (August 20, 1951). Therefore, the grantee (buyer) of Reinders' land took it subject to the same limitations of access that he was under, exactly as a purchaser of real estate that has been zoned for restricted uses takes it subject to the zoning ordinance. Inasmuch as Reinder had no right to compensation before he sold the land, the purchaser could acquire no greater right to compensation after the sale. "It must be apparent that no right to compensation was created by fractional changes in ownership when no such right pertained to ownership of the whole."

In a concurring opinion, two justices noted that courts holding that compensation must be paid to an abutting owner in all cases where direct access to an existing highway was barred by statute even though indirect access remained acted on the assumption that access rights constituted property distinct and apart from the land to which they appertained. However, the concurring justices believed this erroneous, because access rights were but one of a bundle of rights appertaining to a parcel of real estate. Zoning legislation enacted in the interest of the general welfare, this opinion pointed out, might have the effect of extinguishing one or more of the rights embraced in the entire bundle without compensation being paid the landowner. The test employed in zoning cases was whether there had in fact been a taking that destroyed all beneficial use of the property without compensation being paid the owner. The same should apply to the barring of direct access rights by legislation enacted under the police power. In other words, the effect on the parcel as a whole should be considered in determining whether there had been a compensable taking. "If by reason of previously existing connecting highways, there is reasonable access to the controlled access highway, no taking requiring compensation should be held to have occurred."[31]

31/ Nick v. State Highway Commission, Wisconsin Supreme Court, May 1961. (109 N. W. 2d 71) (Rehearing denied 10/6/61) See Memorandum 129, May 1961, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 441.

Tennessee.—R. A. Williams owned land situated on a road adjoining and below property acquired by the State to construct a controlled-access highway. This road on which his property was situated led across an adjoining farm into an old road which crossed the highway at the point where the State had acquired a portion of land over which the highway was laid (see Fig. 12). The commissioner of highways erected a fence along the north boundary line of the new highway project for the purpose of controlling ingress to and egress from the project. Consequently, the owner could not use the access road and on two occasions trespassed on it, cutting a hole in the fence to reach his mailbox, allow his children to catch the school bus, or permit the doctor to reach his house, when occasion so required. The State applied for injunctive relief. The owner sought to prevent the highway department from maintaining the fence and require the State to build another access road for his use. At the same time that the question of the validity of the injunction was being litigated the landowner had brought an action in circuit court for reverse condemnation which is still pending.

The landowner was successful in having the injunction that was granted the State modified. An equity court ordered the landowner be permitted to cross the highway and prevented the highway department from erecting a fence. The highway department appealed.

The supreme court reversed the modification decree and declared that the equity court lacked jurisdiction to interfere in condemnation proceedings. In reversing the decision, the court noted that the State acted pursuant to a statute that placed the discretion and the right to locate highways in the authorities of the State. Under this allocation of power no person had any right of ingress or egress to, from, or across controlled-access facilities except at points designated by the State. Abutting owners, said the court, were in no way free from the regulations which affected the general public. In actuality the owner had not lost any rights, stated the court, because he still

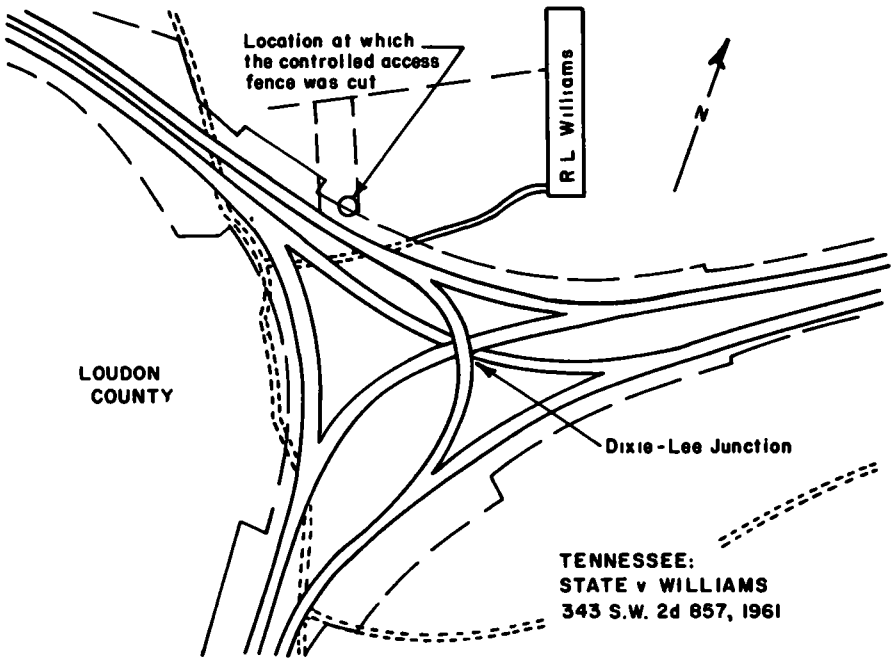


Figure 12.

had the right to institute a reverse condemnation suit as provided by statute. The State would still be responsible for any damages suffered by the landowner by reason of the State closing up the old road used in crossing the highway.

An argument that the State had made a binding commitment to acquire another right-of-way because of a promise made by a highway engineer to the landowner was completely rejected by the court. This was nothing more than an attempt to mitigate damages, said the court, in an action for reverse condemnation. In the case before the court the only issue at stake was the validity of the injunction. In any event, it reasoned, agreements made by the State were always subject to the right of the State to withdraw when public safety so required.

In the pending circuit court action for reverse condemnation brought by Williams, the State has taken the position that the owner's use of the right-of-way had not been adverse, as he claimed, but merely permissive.[32]

Noise, Inconvenience, Etc.

California.—Francis G. and Helen P. Symons were the owners of a parcel of land in Los Angeles that contained a single family dwelling, a garage, and landscaping. A portion of this land was condemned by the State to provide a turnabout area for a freeway being constructed. The land condemned for the freeway itself was immediately adjacent to the Symons' property but did not include any of the land taken from them.

The Symons were paid damages for the land actually taken from them. However, during the trial of their claim they sought to introduce evidence as to the decreased value of their remaining land which they claimed arose from such factors, among others, as the change from a quiet neighborhood to a heavily traversed one, loss of view, noise and fumes from the freeway, loss of access over the area now occupied by the freeway, and misorientation of their house on its lot after the construction of the freeway.

Expert witnesses offered to prove these factors but because they could not separate the damages caused by each individual factor the trial judge refused to permit their testimony, giving as a reason the fact that this testimony related to noncompensable items of damage and therefore was irrelevant and immaterial.

The State supreme court upheld the trial court's decision in this regard. The high court said that it has long been recognized that all injuries to private property resulting from the construction of a public improvement are not compensable. The court said that for damages to be compensable they must be damages to the property itself and not mere infringements on the owner's personal pleasure or enjoyment.

The court went on to say that the State constitution provided for the payment of compensation for damages actually done to the property, but merely rendering property less desirable for certain purposes or even causing personal annoyance or discomfort in its use did not constitute the damages contemplated by the constitution. The court further stated that the property itself must suffer some diminution in substance, or be rendered intrinsically less valuable by the particular public use. The court did not spell out this "diminution theory" other than to say that the erection of a county hospital or jail could impair the comfort and pleasure of the residents of that particular area and possibly render the property less desirable but that this would not constitute such an injury to the property as might an improvement affecting its use for a certain purpose. This appeared to be the only clue to the court's rationale on this point of the opinion.

The court said that if an improvement is constructed on land adjoining the property of one who claims to have been injured by such general factors as noise, dust, change of view, loss of access, to list a few, originating with the improvement, there can be no recovery if the complaining party has not had any of his land taken for the same improvement. The court cited a case that held that damages for which one may recover

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32/ State v. Williams, 343 S. W. 2d 857, March 1961. See Memorandum 133, August 1961, Committee on Land Acquisition and Adjacent Areas, Highway Research Correlation Service Circular 449.

compensation must result from the operation of the public improvement on property that has been taken from him.

The crucial issue in this case, then, became whether the improvement for which the landowners' property was condemned included the construction of the freeway proper. Strictly speaking, the Symons' land was taken for the construction of a turnabout area necessitated by the freeway, but their land was not used in the construction of the freeway itself unless this turnabout area could be classified as being a part of the freeway. The court avoided answering this question specifically by saying that regardless of how it was answered the landowners could not recover damages because they were unable to separate and allocate specific figures to each of the items for which recovery was sought. [33]

Temporary Loss of Access

Iowa.—The landowners owned and operated a sandwich stand and a gasoline station on Riverside Drive in Iowa City. The properties abutted the river on the rear, and the street in front of their business was temporarily closed for a four-month period by the highway commission for purposes of improvement. Consequently, all access to the property was temporarily destroyed. The owners brough a mandamus action against the Iowa State Highway Commission to compel them to institute a condemnation proceeding to compensate the owners for damages caused by the closing of the street. The State's motion to dismiss was sustained and the landowners appealed.

In considering the constitutional provision for just compensation for private property taken for a public use, the supreme court found that a temporary interference with the owner's use of his property causing a loss of profits was not a taking as comprehended by the constitution, but was merely a personal deprivation to the owner.

The court stated that it was willing to permit recovery for an unreasonable delay by the commission. It noted, however, that the complainants affirmatively declared that they were not basing their case on that premise. Their contention, said the court, that they were entitled to compensation for loss of business, ran contrary to the weight of authority.

An additional argument by the owners based on section 314.7 of the "General Administrative Provisions for Highways," which does not permit destruction or injury to reasonable ingress or egress to and from property, and does not allow natural drainage of surface waters to be turned to the injury of adjoining owners, was rejected by the court. In the court's opinion this provision of the code contemplates, as does the constitution, damages for permanent loss of access. Temporary interference with property rights, said the court, is in the nature of a sacrifice due by property owners for the benefit of the general public. [34]

Service Facilities

The one case reported under this heading involved the authority of a city to assess real estate taxes on a service station located on a limited access highway, the court holding that such a tax was valid.

Including the four States that enacted such legislation in 1961 (California, Florida, Idaho, and Maryland), there are now 34 States prohibiting the establishment of commercial facilities on the rights-of-way of controlled-access highways. A summary analysis of these laws is included in Table 1.

33/ People v. Symons, 9 Cal. Rptr., 363, December 1960. See Memorandum 128, March 1961, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 440.

34/ Mrs. James E. Blank, et al. v. Iowa State Highway Commission, Iowa S. Ct. June 1961. See Memorandum 133, August 1961, Committee on Land Acquisition and Adjacent Areas, Highway Research Correlation Service Circular 449.

TABLE 1

PROVISIONS OF STATE LAWS RESTRICTING SERVICE FACILITIES ON CONTROLLED-ACCESS HIGHWAYS[a]

State	Prohibits Establishment of Commercial Enterprise on Controlled-Access Right-of-Way	Authorizes Access or Service Roads to Permit Establishment of Facilities on Private Property	Authorizes State Management of Service Facilities	Authorizes State Regulation of Privately Operated Service Facilities	Authorizes Signs Indicating Service Facilities
Alabama	x				
Arkansas	x				
Colorado	x				
Connecticut	x[1]		[1]		
Delaware	x				
Florida	x				
Georgia	x				
Idaho	x	x			
Illinois	x				
Indiana		x			
Louisiana	x				
Maine	x				x
Maryland	x		[2]		
Massachusetts	[3]		[3]		
Michigan	x				
Minnesota	x				
Mississippi	x				
Montana	x				
Nebraska	[4]				
New Hampshire	x				x
New Jersey	x[5]	x		x	x
New Mexico	x	x			
North Carolina	x	x			x
North Dakota	x				
Pennsylvania	x	x			x
Rhode Island	x	x			x
South Carolina	x[6]				
South Dakota	x				
Tennessee	x	x			
Vermont	x				
Virginia	x				
West Virginia	x	x			
Wisconsin	x				
Wyoming	x				

[a] "Highway Transportation Legislation in 1961." National Highway Users Conference, p. 17.
[1] Excepts service facilities under lease, construction or contract for construction on October 1, 1959 along Merritt Parkway, Wilbur Cross Parkway or Wilbur Cross highways; excepts Connecticut Turnpike.
[2] State Roads Commission is authorized to acquire property to provide parking and service areas adjacent to "denied-access" highways but prohibited from building service stations, restaurants or motels on such areas.
[3] Law authorizing State to construct and operate commercial service facilities repealed in 1957, but continued permission for State to operate those facilities in existence or being constructed.
[4] Only in cities of the primary class.
[5] The New Jersey law provides that commercial enterprises shall not be authorized except as provided in the statute.
[6] Highway department prohibited from leasing or selling any part of State primary system or a controlled-access highway for commmercial activities, under certain circumstances.

Massachusetts.—The City of Newton assessed the Atlantic Refining Company for real estate taxes on a gasoline station, restaurant building, and the associated site, on a limited-access highway. Atlantic was the lessee of the Commonwealth. Atlantic, in turn, had sublet the premises to Howard Johnson Company and John C. Waller.

Atlantic and the Commonwealth contested the validity of the tax. Statutes of the Commonwealth exempted from taxation land owned by the Commonwealth except land leased to a lessee who "used or occupied (it) for other than public purposes"; in the latter circumstance the lessee was to be taxed as if he were the owner in fee.[35]

35/ G. L. Ann. chap. 59, Secs. 3a and 5.

Atlantic was to provide other services to the motoring public, in addition to the sale of gasoline and food for profit, such as free tourist information, water for radiators, and cleaning of windshields. If it failed to perform the services adequately, the lease would be terminated.

The court said that the property was held by the Commonwealth for a public purpose, but was used by private businesses for their business purposes. They said that the issue was whether the business use was significant in construing the statute.

The court held that the tax was valid and the business use was significant. The public purpose of the premises was of controlling significance as to whether the property was exempt from taxation. They said the statute referred to the purpose of the lessee "as the important, if not the dominant purpose to which the statute refers." The lessee here was occupied in a private business venture. The court continued to draw the distinction between the purpose of the Commonwealth in providing the premises, which purpose was to provide a public service to motorists, and the purposes of Atlantic in leasing the premises, which were private business purposes. The applicable statute looked to the purpose of the lessee and not the Commonwealth. Because the purpose of the lessee was not public, it was subject to the tax. "The significance of the business purpose of the occupants' use is not extinguished or made incidental by an increase in the concern of the Commonwealth with the particular way the private business is conducted." The court concluded that it was not unreasonable that the ultimate effect of the decision might be an allocation of revenues between the Commonwealth and the municipality.[36]

ROADSIDE REGULATION

Outdoor Advertising

Again this year there was a great amount of activity in the field of billboard regulation. Because Federal legislation pertaining to restriction of outdoor advertising in areas adjacent to the Interstate system, enacted in 1958, specified that to become eligible for the bonus payment provided for therein, a State must have entered into agreement with the Secretary of Commerce before July 1, 1961, to regulate signs within 660 ft of roads in the system in accordance with regulations promulgated by the Secretary, there was a rash of legislation in the early days of the 1961 State legislative sessions. Twelve States actually passed enabling legislation (Delaware, Hawaii, Maine, Nebraska, New Hampshire, New York, Ohio, Oregon, Pennsylvania, Vermont, Washington, and West Virginia) but because many of the States found it impossible to meet the deadline, Congress extended the time limit for two years, or until July 1, 1963. By the end of 1961, a total of 18 States had actually enacted legislation—Connecticut, Kentucky, Maryland, North Dakota, Virginia, and Wisconsin, in addition to those listed. Of these, only New Hampshire and Virginia had not yet entered into agreement with the Secretary of Commerce. It is expected that many more States will enact appropriate laws before the 1963 deadline.

There were a number of interesting decisions handed down by the courts during 1961. Two were directly related to implementation of the Federal policy with respect to restriction of billboards in areas adjacent to the Interstate system. New Hampshire asked its supreme court to give an opinion on the validity of a proposed State statute restricting outdoor advertising, one of the purposes of which was to obtain Federal funds. The court held that no constitutional provision would be violated. Wisconsins's new law was held to be a constitutional exercise of the State's police power for the promotion of safety by a lower court, which, however, found unfair and unreasonable a provision that permitted a certain number of signs within a certain distance and permitted issuance of permits on a first-come-first-service basis.

36/ Atlantic Refining Company v. Assessors of Newton, 172 N. E. 2d 827, January 1961. See Memorandum 132, July 1961, Committee on Land Acquisition and Adjacent Areas, Highway Research Correlation Service Circular 447.

Two New York decisions are of more than usual interest, one of which upheld a statute authorizing the New York Thruway Authority to restrict billboards as a reasonable exercise of the State's police power, inasmuch as the intent of the statute was to provide reasonable precautions to insure the safety and comfort of travelers on the thruway. The other decision denied the authority of the State highway department to condemn billboard easements, in the interest of safety of the traveling public, in the absence of a specific enabling statute.

A Kentucky decision held that a city had authority under a specific statute to deny a permit for a billboard on property where such signs were not permitted, with no appeal to the board of appeals permitted. A California court struck down an ordinance prohibiting moving signs but permitting flashing signs as reflecting an arbitrary and unreasonable classification.

An interesting decision was handed down in Florida where the court held that although aesthetics was a proper objective of the police power in a city such as Sarasota, a "center of culture and beauty," the ordinance in question did not define "a pattern calculated to protect and preserve the city's beauty" because it was unreasonable and discriminatory insofar as a distinction was made between "point of sale" signs which were not limited as to size and "non-point of sale" signs which were limited to 300 sq ft.

Reference to aesthetic values as appropriate objectives of the police power is found in several of the decisions already mentioned, being considered by the courts in some as a factor that might be considered among others, and in Florida, as noted, as a prime consideration. That there is increased awareness of the importance of aesthetics at the present time was indicated by the court in the California case which, though not willing to approve the ordinance on such considerations alone, did note that the indications were that ordinances based solely on aesthetic considerations would eventually be upheld.

All of these cases are summarized in the following paragraphs.

New Hampshire.—The New Hampshire Legislature asked the Supreme Court of New Hampshire whether any constitutional provision would be violated by restricting outdoor advertising if one of the purposes was to secure funds offered by the United States. The court said that no constitutional provisions would be violated:

> We must recognize that interstate highways are built with taxpayers' money to promote the general welfare and safety of the public by affording means of swift, safe and pleasurable travel for all, and not to secure commercial advantages for a limited number of advertisers. Whatever value billboards along such highways possess is due to the presence of the public whose tax money has constructed the highways. The safety, well-being and legitimate enjoyment of the public in the use of the highways is the paramount consideration of the bill...

The court held that the police power of the State was of broad application and "anything beside the road which tends to distract or confuse the driver of a motor vehicle directly affects public safety." Signs are designed to distract motorists. Also, New Hampshire was said to be peculiarly dependent on its scenic beauty to attract tourists; "it may thus be found that whatever tends to promote the attractiveness of roadside scenery... relates to 'the benefit and welfare of this state' and may be... subject to the police power." The court did not decide whether aesthetic consideration alone would furnish grounds for the exercise of the police power.

The court noted, however, that in a particular case the regulation could still be invalid if the sign involved was not in fact a nuisance. Its removal could then be required only on payment of compensation.

The fact that any legislation of this type might be induced in part by expectation of funds from the Federal Government, the court said, does not render such legislation unconstitutional.[37]

37/ Opinion of the Justices, 169 A. 2d 762, April 1961. See Memorandum 132, July 1961, Committee on Land Acquisition and Adjacent Areas, Highway Research Correlation Service Circular 447.

Wisconsin.—The Wisconsin Legislature passed a statute and the Wisconsin Highway Commission promulgated rules regulating the erection and maintenance of outdoor advertising adjacent to the Interstate system in substantial compliance with the Commerce Department's requirements in the same area. The compliance of the State would make it eligible for the 0.5 percent bonus over the regular amount appropriated to the State by the Federal Government for its highway program.

Property owners with roadside businesses and substantial investment in outdoor advertising structures on their own and others' premises along State Trunk Highway 41, which is part of the Interstate highway system, were duly notified by the State Highway Department to remove certain of their on-premise signs which were located within 660 ft of the outer limits of the highway right-of-way.

The landowners attacked the constitutionality of the statute and the regulation as a taking of private property without due process of law or compensation. They attacked the declared legislative purpose of the statute as having no reasonable basis in fact and no relationship to reality in that the controls imposed did not promote the safety, convenience, and enjoyment of the traveling public, did not aid in the free flow of commerce, etc. They further argued that the removal of all advertisements from the vicinity of an Interstate highway would not relieve monotony and fatigue of driving, did not constitute a safety measure, and that the advertisements aimed at did not constitute a driving hazard. The legislative findings and purpose read

> To promote the safety convenience and enjoyment of public travel, to preserve the natural beauty of Wisconsin, to aid in the free flow of interstate commerce, to protect the public investment in highways, and to conform to the expressed intent of congress to control the erection and maintenance of outdoor advertising signs, displays, and devices adjacent to the national system of Interstate and defense highways, it is hereby declared to be necessary in the public interest to control the erection and maintenance of billboards and other outdoor advertising devices adjacent to said national system of Interstate and defense highways....

The trial court said that the statute was a constitutional exercise of the police power of the State over a legislatively determined nuisance. It continued that there was no question but that the State could impose reasonable zoning regulations along and on public highways within its boundaries for all legitimate zoning purposes in the economically and socially desirable use of the land. The State might then zone to preserve the scenic beauty and aesthetic values of roadside properties for the general and motoring public. The court recognized that many experts and a large body of informed public opinion considered outdoor advertising "an undesirable intrusion upon the sensibilities of persons traveling along and upon the highway." The court concluded that the Legislature had an adequate basis on which to enact the restrictions "upon aesthetic considerations along."

As to the restrictions promoting travel safety the court noted that there were two conflicting considerations before the Legislature: (a) some distraction is conducive to travel safety in that it tends to break the monotony and resulting drowsiness caused by driving along a well-engineered highway, and (b) too many roadside advertising signs keep the driver's mind away from his driving and away from the traffic signs. The court held that on this state of the record the Legislature had basis for finding that the regulation of roadside advertising would promote safety. Further, the regulations did not amount to a taking of property without due process of law. The signs on another's property derive their value from the highway and amount to a servitude on it, hence there is no loss of any right; signs on one's own property are restricted by zoning but are not taken away.

The court also held that it could not be presumed that the State bargained away its police power to the Federal Government merely because it received a bonus; and that the statute and rules could give way if they unreasonably abridged the rights of freedom of speech and freedom of the press.

The court, therefore, upheld the constitutionality of the statute. However, the court found that the portions of the regulations of the State Highway Commission that permitted a certain number of signs within a certain distance and gave permits to erect these signs on a "first-come, first-served" basis were unfair and unreasonable with the built-in inducement for discrimination and favoritism. The court said that all businesses that serviced travelers should be allowed to advertise or none at all.[38]

New York.—In this case David Schulman owned, along with several others, land that was adjacent to a heavily traveled highway in New York. The State condemned an easement over part of this property so that it could eliminate advertising signs that were on this land. The State in condemning the easement acted pursuant to a State statute (Highway Law Sec. 30, subd. 2) that authorized the Superintendent of Public Works to acquire by condemnation any property necessary to improve safety conditions of a State highway.

The landowners sought to prevent the State from taking this easement, contending that the elimination of outdoor advertising signs would not improve the safety of the highway and therefore the easement to be condemned was not one that the State could legally acquire. The landowners instituted proceedings in a county court and when that court refused to dismiss their action the State appealed to the State supreme court.

The supreme court said that the statute authorizing the State to acquire any property that was necessary to improve the safety of State highways gave to the State, acting through the Superintendent of Public Works, an affirmative statutory mandate to do just this. Therefore, unless his decision to acquire property for this purpose was "a mere naked act of power....exercised without (a) rational basis" the courts should not interfere with his decision. The court felt that as long as a rational relationship existed between the purpose of the statute and the exercise of the power to acquire property pursuant to it, it was a settled principle of law in New York that the necessity of the taking was to be conclusively presumed. The court went on to cite a case that strongly intimated that advertising devices in crowded streets adversely affected the safety of those particular streets. This was a case decided in 1909 (Fifth Ave. Coach Co. v. City of New York, 86 N.E. 824) and the court said that if advertising signs adversely affected public safety, then the same certainly must hold true in these times of high-speed controlled-access highways.

The court went on to say that it was not necessary that full title to the land in question be taken; the portion necessary to effectuate the public purpose was enough.

The court also said that it was established in New York that public land acquired for highway purposes could be used in the interest of safety to erect a barrier to cut off the view of a sign thought to menace highway travel (Perlmutter v. Greene, 182 N.E. 5, 1932), and therefore, the thing sought to be accomplished here ought to be allowed inasmuch as it is not far removed from this principle.

In closing, the court pointed out, that the fact that some signs under certain circumstances (for example, the owners' own business premises) would not be prohibited when the State had acquired an easement did not destroy the public purpose involved. The court felt that safety was a matter of degree and that the State could prohibit some signs and permit others because public safety does not require an all-or-nothing approach. The landowner appealed.

New York.—A case cited by the State to buttress its argument was New York State Thruway v. Ashley Motor Court, Inc., decided the same day, July 7, 1961. Here the constitutionality of section 361-a of the Public Authorities Law had been upheld. This section prohibited the erection of any billboard or advertising device located within 500 ft of the nearest edge of the thruway pavement unless a written permit was granted by the State. The court had ruled that this was a valid exercise of police power of the State the interest of public safety.

38/ State v. Fieldler, Memorandum Opinion, Circuit Court, Dane County, No. 107570, May 1961. See Memorandum 130, June 1961, Committee on Land Acquisition and Adjacent Areas, Highway Research Correlation Service Circular 444.

The court of appeals considered this case to be in a sense the converse of the Ashley case. The court agreed with the assertion of the State that the portion of NY 17 was part of a limited-access highway similar in nature to the portion of the thruway involved in the Ashley case. However, the legislative enactment relied on by the State in each case produced different results. In the Ashley case, section 361-a dealt exclusively with the thruway. It forbade altogether without compensation the exercise of property rights in the form of negative easements. Here, the State sought under section 30 of the highway law to condemn on payment of just compensation property rights that could not be exercised under the law dealing specifically with the thruway.

Turning to the existing legislative provisions for the control of outdoor advertising, the court noted the following: (a) under a conservation law the erection of advertising signs near the border of any State park or highway was prohibited, but this statute could not be applied in the present case; (b) signs were forbidden by statute to be erected within so many feet of bridge projects, but NY 17 would not be included in this category; and (c) section 361-a dealt exclusively with construction of the thruway and had no validity when applied to NY 17. In addition, the court observed that four unsuccessful attempts had been made to secure passage of a bill which would grant the power to the State to control outdoor advertising along State highways not covered by special legislation.

Recognizing the fact that never before had the Superintendent of Highways asserted authority to condemn for the elimination of advertising signs, the highest court quoted section 30 relied on by the State as the basis of its legislative authority:

> The Superintendent of Public Works. . .may acquire by appropriation any and all property (including easements) necessary for the construction, reconstruction and improvement of State highways and bridges or culverts on the State highway system, including the appropriation of property for drains, ditches, spoil banks, gravel pits and stone quarries; also for the removal of obstructions, improvement of sight distance; also for appropriation of property for the reconstruction of existing highway-railroad separation of highway-railroad grades on newly laid-out highways; and for other purposes to improve safety conditions on the State highway system....

The upper court, in reversing the appellate court, held that section 30 of the highway law was not intended to authorize condemnation of easements of this character. It applied the rule of statutory construction which holds that when words of specific meaning and purpose are followed by words of general import, the application of any broad or general provision is limited to those words or things specifically enumerated; the general words become in effect an adjunct of the original outline, and may not exceed it in scope. The specific reference to drains, ditches, gravel pits, and quarries, which the superintendent was authorized to condemn, thus indicated the scope of the accompanying language on which the State relied, "and for other purposes to improve safety conditions on the State highway system."

Nowhere in the statute, said the court, did there appear a general power to prohibit advertising signs capable of being seen by persons of normal vision from the adjacent State highways. Any reference to acquiring land to improve safety conditions was intended, said the court, to apply only to situations particularly outlined. Furthermore, stated the court, it could see no correlation between a provision prohibiting advertising signs illegal under State or Federal laws and public safety within the meaning of the statute; statutes conferring the power of eminent domain were not extended by inference or implication.

In conclusion, the court stated that however desirable it might be to confer this power on the State, the court could not place its ideas of public policy ahead of the expression of the legislature.[39]

39/ Schulman v. State of New York, 219 N. Y. S. 2d 249, July 1961. See Memorandum 135, October 1961, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 456.

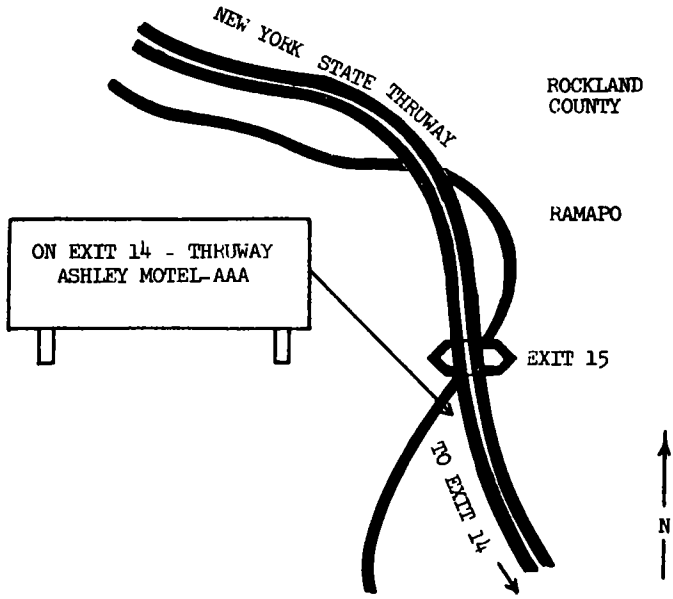
New York.—The Ashley Motor Court erected a sign advertising its location in 1937 on land owned by the Ramapo Land Company. In 1958, at the request of the State Department of Public Works, this sign was relocated on another site that was within 500 ft of the State thruway. The State, acting pursuant to section 361-a of the Public Authorities Law, obtained an injunction that perpetually enjoined Ashley from maintaining the existing sign and/or erecting any other advertising device within 500 ft of the State Thruway, without first obtaining a permit provided for by section 361-a. Ashley appealed the lower court's decision to this court alleging that the Public Authorities Law was unconstitutional (see Fig. 13).

The statute empowered the Thruway Authority to make regulations for the issuance of permits for advertising devices. In making such regulations, the authority was directed to

> provide for maximum visibility; prevent unreasonable distraction of operators of motor vehicles; prevent confusion with regard to traffic ... signals; preserve and enhance the natural scenic beauty or the asethetic features of the thruway; promote maximum safety, comfort and well-being of the users of the thruway.

In order that the Thruway Authority might carry out the purposes of the statute, it was given the further right to take into consideration in making its regulations "the amount of usage, population density, nature of the surrounding communities,... and the particular type of device sought to be erected, having in mind its size, design, lighting and other features."

The supreme court, appellate division, upheld the lower court and found the statute to be a reasonable exercise of the State's police power and therefore constitutional. The court said that the thruway was designed for high-speed travel with maximum visibility and this could well form the basis for the legislature's passing of the Public Authorities



NEW YORK THRUWAY AUTHORITY V. ASHLEY MOTOR COURT
210 N.Y.S. 2d 193, 1961

Figure 13.

Law which would use the State's police power so as to provide reasonable precautions to insure the safety and comfort of those traveling on the Thruway.

The court noted that the police power of the State was a broad and flexible power used to keep the government up to date on all the social and public needs of the people. What could be a violation in prior years might of necessity in an ever-changing world become legal in present society. "Our problem here," the court said, "is limited solely to determining whether the public need is best served by restrictions of advertising signs along a new and modern conception of present-day transportation." The court went on to say that the State might establish regulations that it considered necessary to secure the general welfare of its citizens by the exercise of the police power even if, in so doing, individual rights were abridged.

The court noted that it had been held previously that the police power could be used to prohibit and regulate advertising devices in the interest of public safety. The traditional approach was to equate public safety in regard to billboards with fires and structural defects and resulting collapse which could cause injury to passers-by. In two cases (Fifth Avenue Coach Company v. City of New York, 221 U.S. 467, 1911, and Perlmutter v. Greene, 259 N.Y. 327, 1932), public safety and billboards were equated with public use of the highway. These cases held that advertising devices could cause accidents by diverting the attention of motorists. The older cases apparently wanted a closer causal connection between the billboard and public safety. They seemed to require that the billboard itself directly cause the injury (such as collapsing on a passer-by), whereas the Fifth Avenue and Perlmutter cases were a little farther removed.

This court adopted the rationale of the latter two cases and said that there was "an inseparable relationship between the advertising device on private property and its effect upon the user of a nearby highway." Therefore, the court felt that the regulation of advertising devices was a proper exercise of the police power of the State and upheld the constitutionality of the statute in issue here.

The court of appeals affirmed the judgment of the lower court. It noted that the statute attempted "to promote maximum safety, comfort and well-being of the users of the thruway, and to preserve the aesthetic features of the thruway system." In addition the statute sought "to prevent unreasonable distraction of motor vehicle operators."

The argument of the owners that the section was invalid because it was not reasonably related to the public health, morals, or safety of the community was completely rejected by the court. Concededly, said the court, some persons may dispute whether billboards interfere with safe driving and constitute a traffic hazard; this divergence of opinion, however, was not sufficient to cast doubt on the statute's validity. It was clear that the aim of the legislature, reasoned the court, was to make the thruway safe for the public by providing for maximum visibility and by preventing unreasonable distractions. Therefore, unless manifestly unreasonable, the legislative judgment would not be disturbed.

The court saw no reason to concern itself with the question of whether the preservation of "natural scenic beauty" would in and of itself be a sufficient consideration for the legislation. From the wording of the statute, stated the court, it was apparent that aesthetic considerations constituted only one element of the statute, and should be considered as an integral part of the whole.

Turning to the final argument that the statute deprived the owners of their property without due process of law, the court noted the relationship between construction of the thruway and the increased value in the land. The signs, observed the court, were relocated and placed in their present position years after the effective date of the statute. Inasmuch as billboards are obviously of no use, reasoned the court, unless there is a highway to bring the traveler within view, it seemed that the regulation took only what value was added to the land by the construction of the thruway. Admitting, said the court, that valid property rights actually existed, the State, by invoking the police power, would still be capable of serving the public need. The rights of private property may therefore be curtailed, if the means employed are reasonably related to the legislative ends.[40]

40/ New York State Thruway Authority v. Ashley Motor Court, Inc., 218 N. Y. S. 2d 640, July 1961. See Memorandum 135, October 1961, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 456.

Kentucky.—A realty company was denied permission to erect a 14- by 26-ft sign on its property by the Department of Building and Housing Inspection. The company appealed to the Board of Zoning Adjustment and Appeals which approved the erection; the department still refused to issue the permit. On an action brought by the realty company, a lower court ordered the department to issue the permit. An appeal from the order was taken.

The zoning ordinances regulated the building of all types of structures and a variance could be granted by the Board of Zoning Adjustment and Appeals to erect a billboard. However, there was also a sign ordinance that did not allow a sign on the type of property here involved and did not permit an exception or variance. There was no provision for an appeal to the Board of Appeals in the sign ordinance.

The court of appeals reversed the order of the lower court. It said that a specific statute will prevail over the general statute especially where the special act is later in point of time as it was in this case. There was no ambiguity in the special act and no authority to issue the permit. Neither did the board have any right to review the original denial by the department. "The municipal legislative body, having seen the necessity for creating ordinances pertaining to signs, has pre-empted from the general ordinances those provisions which are specifically covered by the special ordinances."[41]

California.—The City of Santa Barbara, Calif., passed an ordinance prohibiting moving signs and permitting flashing signs as a safety measure for the community. Under the section of the ordinance dealing with amortization, it was provided that every moving sign visible from any public way or thoroughfare should be altered to prevent such movement within one year from the date of adoption of the ordinance.

In the lower court, the Modern Neon Sign Co., a corporation, successfully contended that the ordinance as applied to them was unconstitutional. The court found that the ordinance reflected an arbitrary and unreasonable classification with respect to moving and flashing signs, proscribing the former and permitting continued use of the latter. It also ruled that the ordinance prescribed an unreasonably short amortization period, and by not providing for compensation for what amounted to a taking or damaging of the corporation's property, the ordinance violated due process of law. In addition, the court held that the signs did not constitute traffic hazards as defined by the ordinance. The City of Santa Barbara then appealed.

The court of appeal affirmed the judgment. In its opinion it saw no natural, intrinsic, or constitutional distinction which either furnished a reason for or justified the classification of moving and flashing signs furnished by the ordinance. Certainly, flashing signs, reasoned the court, which produced an optical illusion of movement, had the same visual effect on the public as the moving signs prohibited by the ordinance.

Turning to the corporation's contention that the ordinance operated to take their property without compensation and without due process of law, the court held that the ordinance exceeded legitimate exercise of the police power. It noted that the signs had been erected under a previous ordinance and that the reasonable economic life of each sign was at least ten years. The court observed that the majority of signs were completed shortly before the passage of the new ordinance. It agreed with the lower court that if the corporation complied with the ordinance, "each sign would them become valueless as an advertising media," inasmuch as the functional design of the signs was suitable only as a moving sign.

Analogizing the present case before it to cases in the field of zoning, the court reasoned that if a zoning ordinance could not effect an immediate noncompensated impairment of property owner's vested rights, neither could an advertising sign ordinance do so. If, as the city contended, the value of the sign was not completely destroyed by the enforcement of the ordinance, it appeared to the court that it was substantially impaired, and that constituted a taking for which compensation should be made.

41/ Morton v. Auburndale Realty Company, 340 S. W. 2d 445, November 1960. See Memorandum 130, June 1961, Committee on Land Acquisition and Adjacent Areas, Highway Research Correlation Service Circular 444.

Only by ruling that aesthetic considerations alone would sustain an ordinance which impinges on private property rights, concluded the court, would the ordinance be upheld. However, though indications were that ordinances forbidding advertising displays on aesthetic considerations alone would eventually be upheld, it could not as yet say that such regulations were valid.[42]

Florida.—In this case the City of Sarasota, Fla., enacted an ordinance regulating the size of advertising signs in business and industrial areas and putting them into two separate categories denominated "point of sale" and "non-point of sale." In the first class, wall signs were not limited in size, whereas wall signs in the second class were limited to 300 sq ft. All other signs were limited to 180 sq ft. Sunad, Inc., a Florida corporation that erected billboards and leased them to advertisers, took exception to this ordinance. Apparently this was because most billboard advertising panels in the United States were a certain standard size. Consequently this ordinance, by limiting the size of billboards, could seriously injure their business, because now they could not use these standard advertising panels to the same extent as they had done in the past. Proceedings were instituted to test the constitutionality of this ordinance.

The chancery court and the district court of appeals both felt that aesthetic considerations could form the basis for the enactment of such an ordinance because Sarasota, like Miami Beach, was a center of culture and beauty. Both of these courts felt that the City of Sarasota was entitled to take into account the beauty of the community in exercising its police powers. The courts stressed the character of the city with regard to its beauty and culture, intimating however that aesthetic considerations might not be a proper basis for another city's enacting a similar ordinance unless it was "a center of culture and beauty."

The chancery court and the district court, although in agreement as to the matter of aesthetic considerations generally, disagreed as to this particular ordinance. The chancery court decided that it was unreasonable and discriminatory because it failed to make a rational distinction for imposing one set of limitations on signs in the "point of sale" class and another set of limitations on the class denominated "non-point of sale." It appears from the supreme court's opinion that the district court of appeals found the size limitations to be a valid exercise of the city's police power.

The State supreme court granted certiorari in order to review this case because it felt there was a conflict existing between some of its prior decisions as well as in some of the lower court's decisions on the matter of aesthetics. The court ruled that aesthetics was a proper subject for regulation by a city having the characteristics of Sarasota in that its primary appeal was its attractiveness, but felt that the ordinance in question did not define "a pattern calculated to protect and preserve the city's beauty" because it was unreasonable and discriminatory. In so ruling, the supreme court adopted rationale almost identical to that used by the chancery court. This court however seemed to go a little farther on the question of aesthetics than did either of the two lower courts. It held that the guaranties contained in the State constitution relating to the enjoyment of property should be stable but not so rigid that they could not yield a little to accommodate the public welfare. The court stressed that this accommodation should be held within the bounds of reasonableness.[43]

Junk Yards

A significant decision was handed down by the West Virginia Supreme Court of Appeals in which it was held that a State statute restricting the location of junk yards in areas adjacent to State highways from an aesthetic viewpoint was constitutional in its general

42/ City of Santa Barbara v. Modern Neon Sign Co., 11 Cal. Rptr. 57, February 1961. See Memorandum 136, November 1961, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 457.

43/ Sunad, Inc. v. City of Sarasota, 122 So 2d 611, September 1960. See Memorandum 127, February 1961, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 439.

scope, but not in its application to the particular property involved because the result would be to put the owner out of business.

West Virginia.—The landowner purchased a 9-acre tract of land near Oak Hill, Fayette County. This tract, on which the owner operated a junk yard business, was situated between the primary highway designated as US 21 (WVa 61) and the secondary highway known as Old US 21, which is now designated as West Virginia Secondary Routes 15 and 20. The widest portion of the tract between the two highwas was shown on the plat submitted to the court by the owner to be approximately 345 ft. According to the West Virginia statute relating to the operation of junk yards, such a business had to be maintained and operated more than 100 ft from any primary or secondary highway right-of-way. The view from the highway had to be obscured by a fence at least six ft in height. This requirement left only about 145 ft at its widest point for the use of the owner's business. The owner had an office building and other small buildings located within the 100-ft area adjacent to the present US 21. He alleged that he had spent over $10,000 in improvements, and that the cost of erecting the fence required by the statute would exceed $6,500. The case came before the West Virginia Supreme Court of Appeals, which was asked to rule on whether the statute violated both the State and Federal Constitutions.

The basic argument advanced by the owner was that the statute was founded solely on aesthetic considerations and, therefore, was not justified under the police power.

The court, in resolving the question of the constitutionality of an act of the legislature, noted that the power of the legislature was subject only to the limitations imposed by the State and Federal Constitutions. Every reasonable presumption, said the court, must be indulged in favor of the validity of a statute. Courts will not declare an act unconstitutional which is within the legitimate range of the police power and has a fair tendency to accomplish the end proposed.

Turning to a fundamental definition of the police power, the court observed that it is a constantly expanding concept. As society required new and greater power to promote the public welfare, so did the State employ the police power to insure to each the uninterrupted enjoyment of his own rights so far as is reasonably consistent with a like enjoyment of rights by others In essence then, the police power, stated the court, was coeval with Government.

In a thorough analysis of cases that were concerned directly with the question of how much weight may be given to aesthetics in the exercise of the police power, the court concluded that there existed adequate authority to support a legislative enactment reasonably predicated on considerations of unsightliness and enjoyment of surrounding property. In the court's opinion there was an absolute right by the legislature to regulate junk dealers; therefore, because the legislature, said the court, took into consideration a plan to promote efforts to attract tourists on the highway, with a view to promoting the economic general welfare, it could not view the statute as unconstitutional.

It must be borne in mind, stated the court, that the owner's property had not been taken nor his business prohibited. However, continued the court, because the effect of the statute would be to put the junk yard owner out of business, it then became arbitrary and unreasonable in its application to the owner. This case was an example, said the court, of where restrictions on the use of property may be valid in their general scope but invalid in their effect on particular property.

In an exhaustive dissenting opinion Justice Haymond disagreed with the majority view that the statute was a constitutional exercise of the police power by the State. In his opinion the provisions of the statute bore no real or substantial relation to the public health, safety, morals, or general welfare or the area affected. The view of the junk yard to be obscured is for the benefit of persons who possess no property rights or interests in the neighborhood that could in any way be affected by the presence of the junk yard. The real aim of the statute, therefore, said the dissent, was to keep transient travelers from seeing an unsightly junk yard, which was not immoral or unhealthful. No factor other than the aesthetic factor was considered by the legislature in its argument that "public pride and public spirit" would be aided by the statute.

Any improvements, reasoned the dissent, such as a new mercantile establishment or an apartment building will promote the "economic well being," but none of the instrumentalities cited is subject to the exercise of the police power of the State. If any was within the police power, such power would apply to every kind of activity and prevail over constitutional limitations of due process and the taking of private property without compensation.

Taking issue with the statement of the majority that a taking had not occurred, Justice Haymond regarded any statute that deprives an owner of the use or enjoyment of his property, or restricts his beneficial use, as in reality effecting a taking in the accepted legal sense, as supported by numerous constitutional decisions. It would seem, concluded the dissent, that the extension of the police power based on vague aesthetic considerations would lead to the violation or destruction of property rights that the constitution was intended to protect.[44]

Destruction of Shade Trees

Ruling on the troublesome problem of removing trees to accommodate highway projects, a Kansas court held that although the abutting landowner had an interest in shade trees planted adjacent to the existing street, which entitled him to protest their unauthorized unjustified destruction, the fact that the land on which they were located had previously been dedicated for highway purposes and that the trees would interfere with the proposed widening of the street, the owner's interest must yield to the greater interest of the general public.

Kansas.—Pursuant to a city ordinance the State Highway Commission was authorized to act for the city and in its place to obtain benefits and assistance in improving US 77 in Marysville under a Federal-aid program.

The owners' property affected by the project consisted of two lots located on the east side of South 10th Street, a north-south street, which was also designated as US 77. Originally, when that part of the city was platted, a strip of land 80 ft in width was dedicated to the public for 10th Street.

Due to the design of the project the city felt that it was necessary to remove four hackberry shade trees belonging to the owners. The final plans called for widening 10th Street 22 ft. The east and west curbs were to be moved 11 ft in each direction, and the old sidewalks were to be torn out and new 4-ft wide sidewalks installed. A railroad crossing south of the owners' property necessitated raising the original grade of the street and the sidewalk between 1 and 2 ft in front of the owners' property.

After the commission awarded a contract to the construction company for the project, South 10th Street was widened, raised, and curbed, and all trees in the parking area north and south of the owners' property, and on both sides of the highway had been removed. The hackberry trees adjacent to the new curb were still standing. To complete the project, the only work left to be done consisted of removing the hackberry trees, building the new sidewalk, and grading the parking from the new curb line to owners' property line. At this point the owners asked for a temporary injunction to enjoin the city, the commissioner, and the construction company from removing the trees. The injunction was denied and the owners appealed.

The supreme court affirmed the judgment of the lower court. It noted that expert testimony by an engineer for the State had established that future damage to the new curb and gutter would result from the roots of the trees if they were allowed to remain. It also took cognizance of the fact that the owners never, as required by ordinance, asked the city's permission to plant trees.

Concededly, stated the court, an abutting lot owner has an interest and ownership in the shade trees growing in the parking space in front of his lots. However, where the

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44/ Farley v. Graney, 119 S. E. 2d 833, December 1960. See Memorandum 134, September 1961, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 450.

city attempts to widen the street or improve it generally, on ground dedicated for that purpose, an owner's interest in his trees must yield to the greater will of the community.

The court rejected the owners' argument that Paola v. Wentz, 98 P. 775, December 1908, was controlling. In that case, noted the court, the city had not shown the necessity of removing shade trees to construct a new sidewalk. In the instant case a widening of the street was to occur, and testimony had demonstrated that there was a need for removal of the trees.

Turning to the ultimate question of whether the city acted arbitrarily and capriciously in requiring the removal of the trees, the court found no evidence that the decision had been based on an improper exercise of discretion. In the absence of a showing that the city had abused its power, concluded the court, it would not adjudicate a difference of opinion as to the necessity of a public improvement.[45]

PARKING

Only one court decision was noted in which the provision of parking facilities was at issue. In this case, the appellate court upheld the validity of a city ordinance authorizing the issuance of revenue bonds to finance off-street parking facilities.

Florida.—The City of West Palm Beach desired to issue revenue bonds to (a) finance the acquisition and improvement of lands for off-stret parking; (b) provide funds to pay cost of acquiring and installing on-street parking meters; and (c) to pay the cost of other parking facilities. The city showed adequate need for off-street parking facilities. An appeal was taken by the State from a final decree validating the bonds.

There were two main grounds for appeal. The first contested the provision that in the event the operating fund should be insufficient to cover the current expenses of the off-street and on-street parking facilities a deposit into the operating fund could be made from other available funds of the city to cover the insufficiency. In spite of the fact that ad valorem taxes were not to be used to cover the deficiency, the State claimed that this provision violated the part of the State constitution that prohibited the creation of a debt against the city without an approving vote of the freeholders.

The court said that the city could construct and maintain parking facilities and that Florida law is settled that obligations payable from sources other than ad valorem taxes are not debts requiring an election under the portion of the constitution cited by the State.

The second ground of appeal said that the city was not fully authorized under Florida statutes and the city charter to deposit to the operating fund an amount sufficient to make payments to meet the expenses of on-street and off-street parking. The supreme court said this argument has to do with the cost of maintainance, repair, and operation of off-street parking facilities. Florida statutes authorized the municipality to provide parking facilities. The money to operate parking facilities can come from any source provided by the city to exercise its police powers. The court agreed with the city's contention that in exercising its police power the city has implied power to effectuate its exercise and, consequently, a duty to maintain its parking facilities.

The lower court further found that the bonds would not constitute a debt of the city but were to be payable solely from the special fund provided from the revenue of the parking facilities. According to testimony of the city it was inconceivable that the city would need any more funds than those received from the facilities themselves.[46]

45/ Heinzelman v. State Highway Commission, 360 P. 2d 1114, April 1961. See Memorandum 136, November 1961, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 457.

46/ State v. City of West Palm Beach, Fla., 125 So. 2d 568, December 1960. See Memorandum 131, July 1961, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 445.