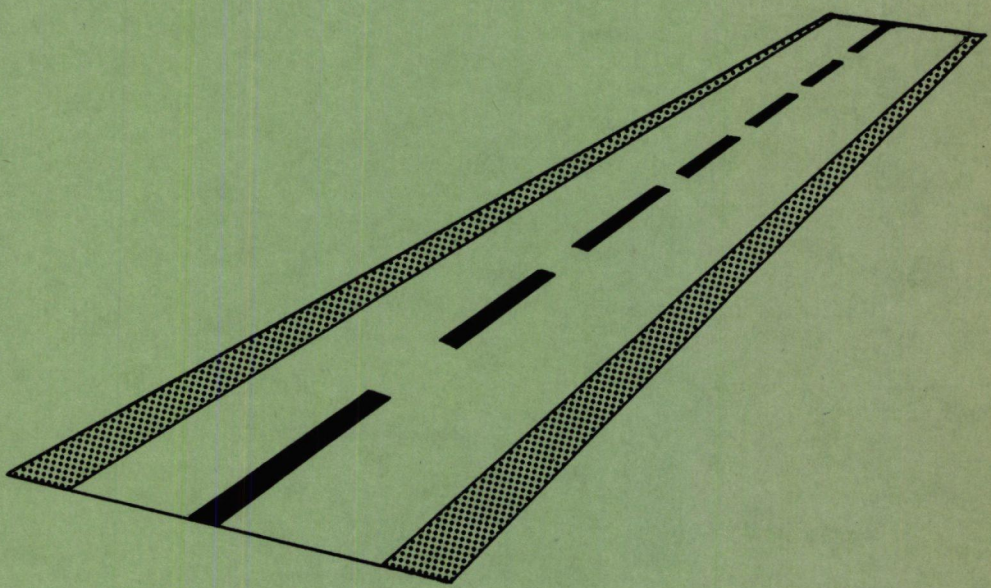
HIGHWAY RESEARCH BOARD

Bulletin 343



Land Acquisition 1962

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Land Acquisition

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1962

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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.
>
> 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

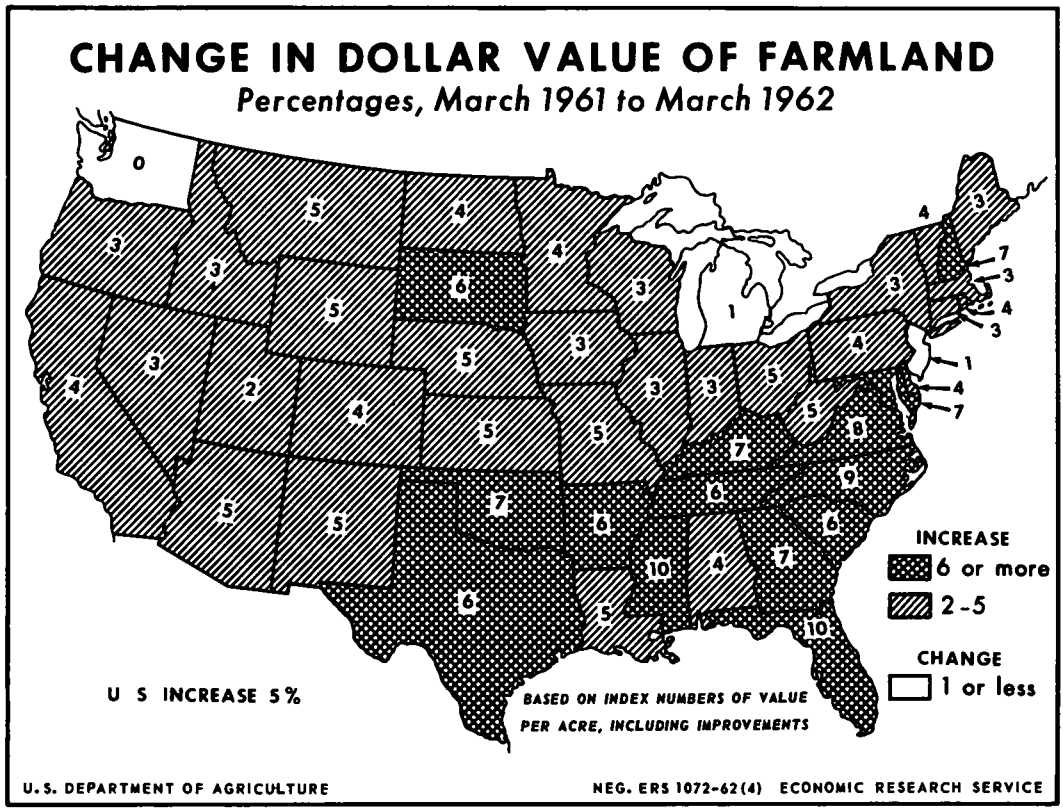


Figure 1.

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.

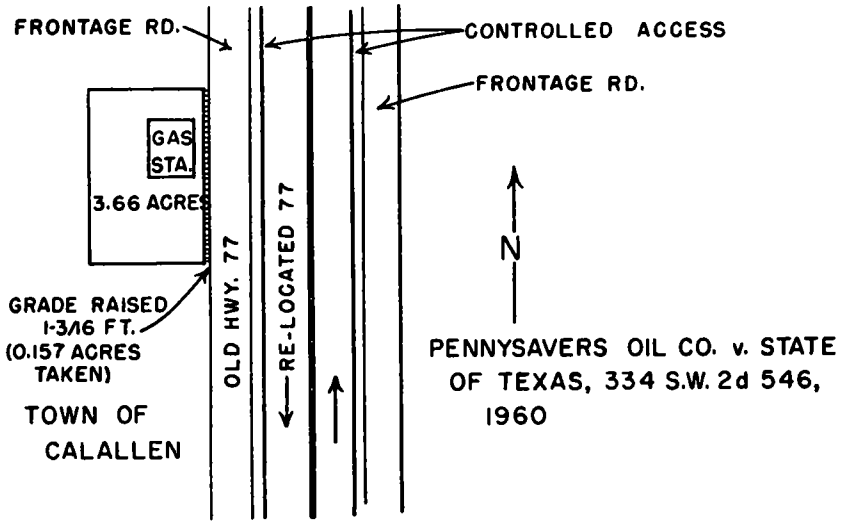


Figure 2.

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]

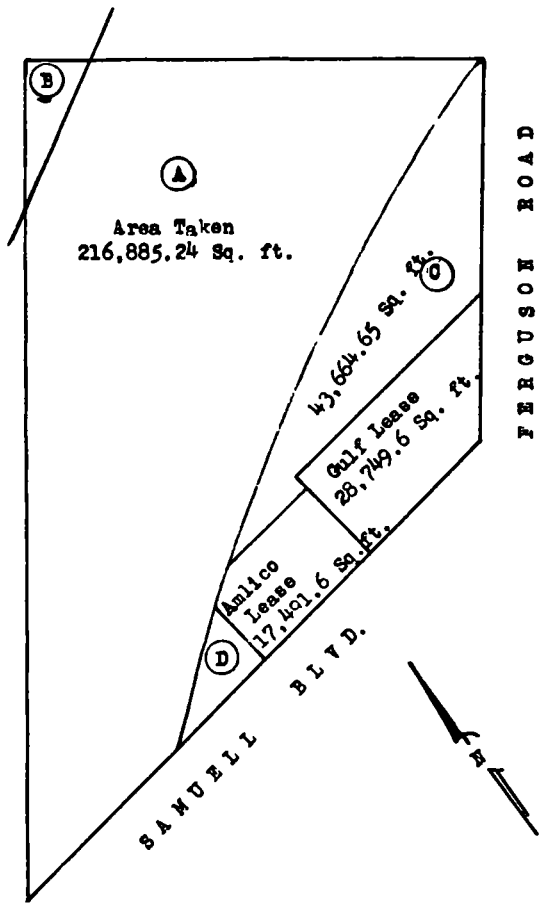
Texas.—Where a landowner previously had full access to a conventional highway, the court of Civil Appeals (Dallas) of Texas recently held that the building of a limited-access highway in such a manner as to deny the landowner access to the old as well as the new highway was a taking of his right of access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

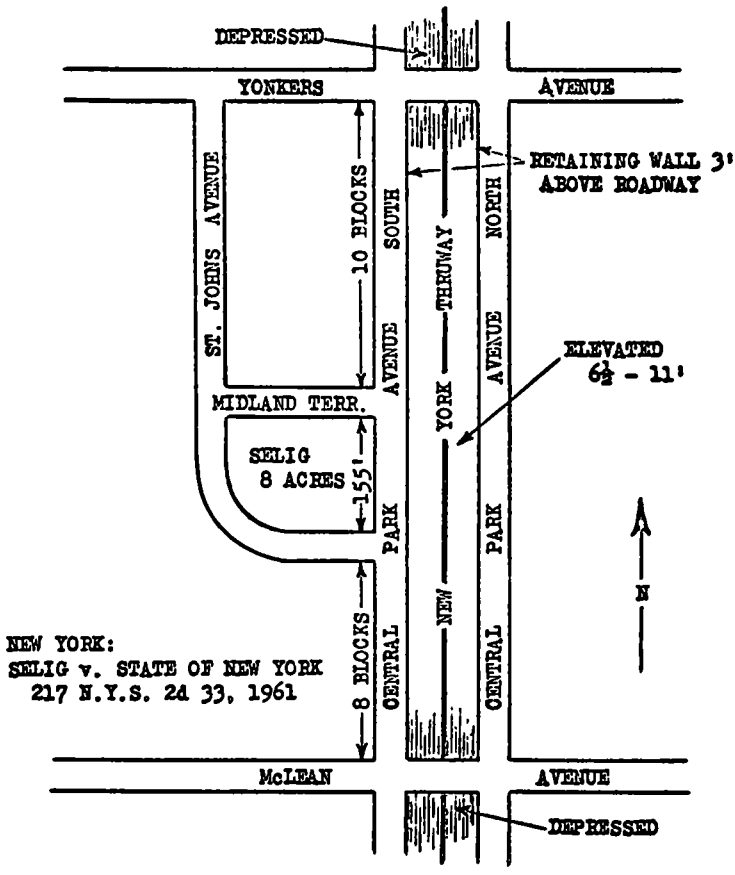


Figure 4.

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.

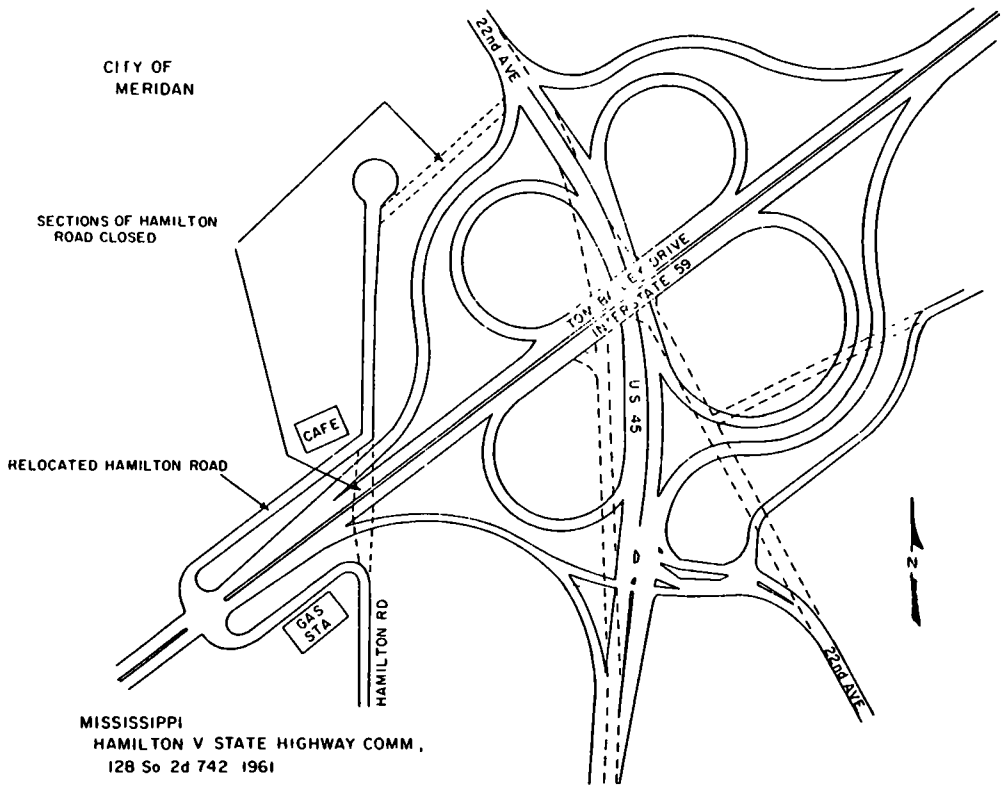


Figure 5.

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]

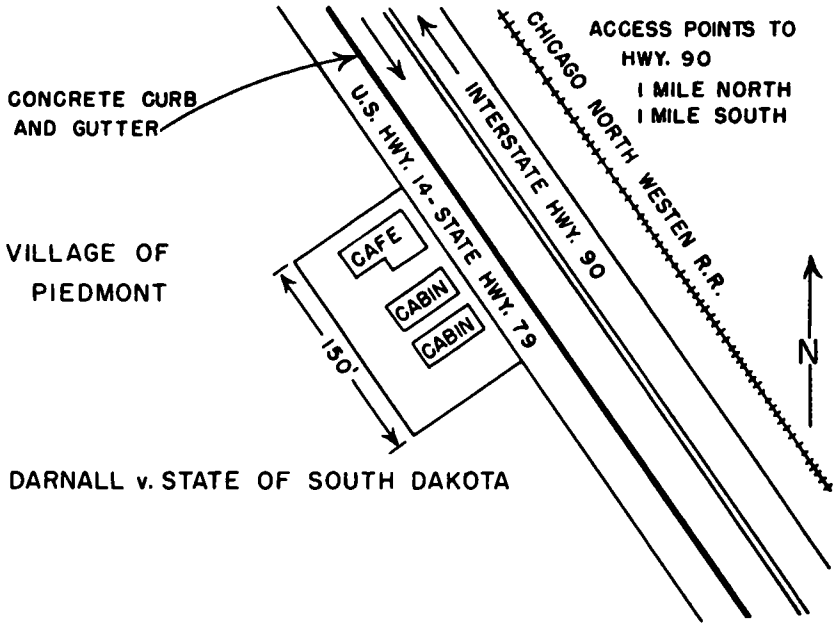


Figure 6.

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.

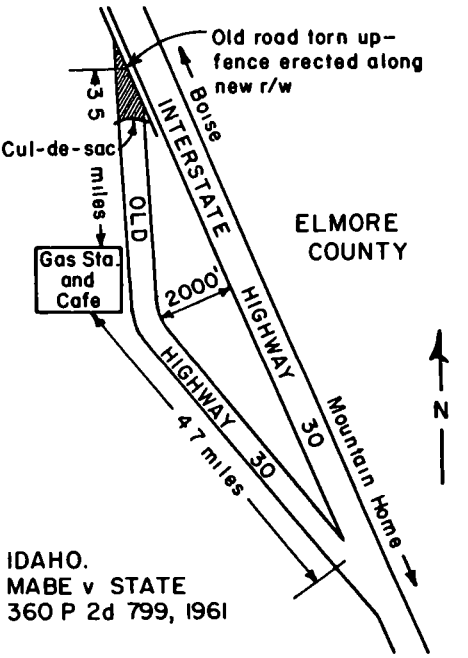


Figure 7.

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]

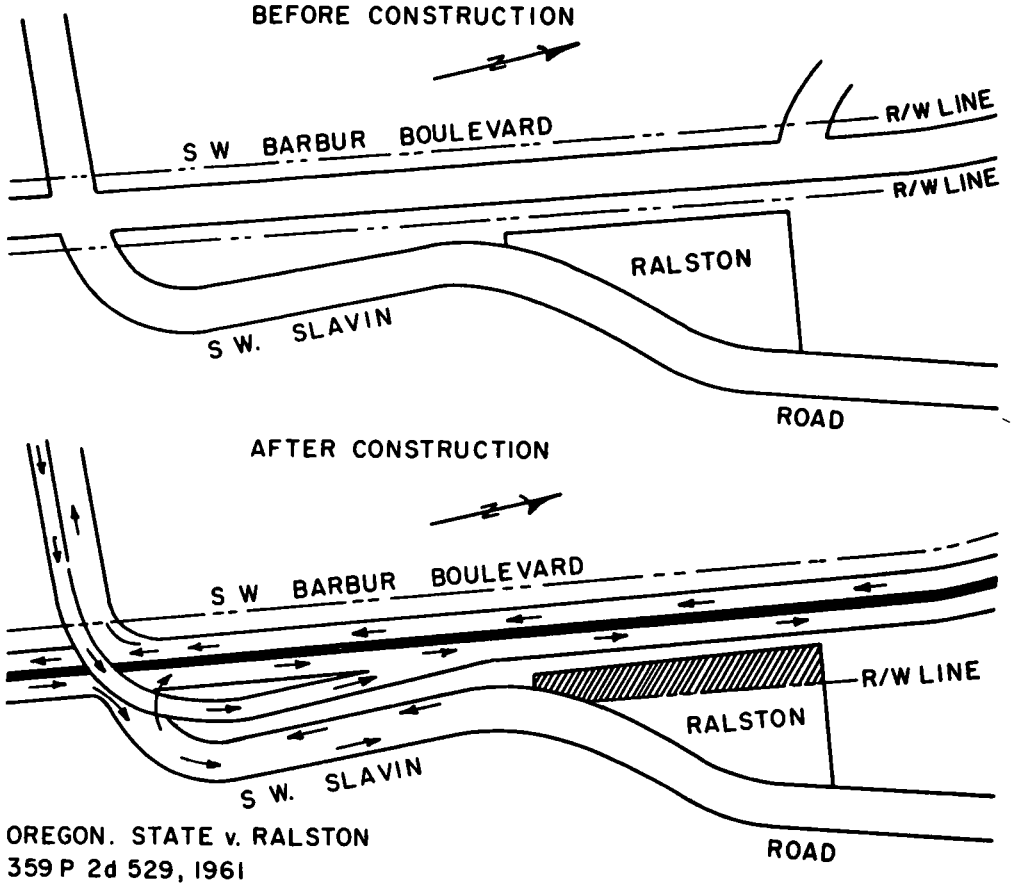


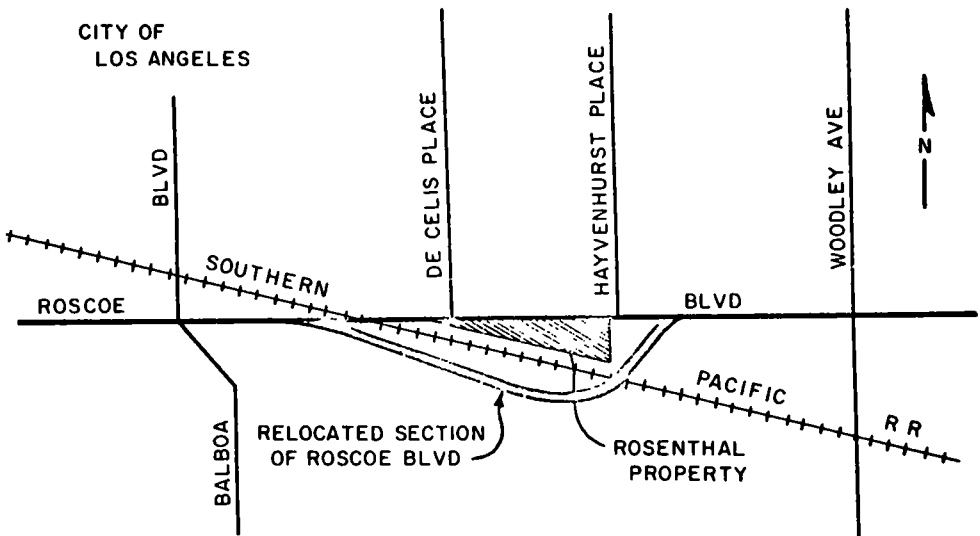
Figure 8.

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.

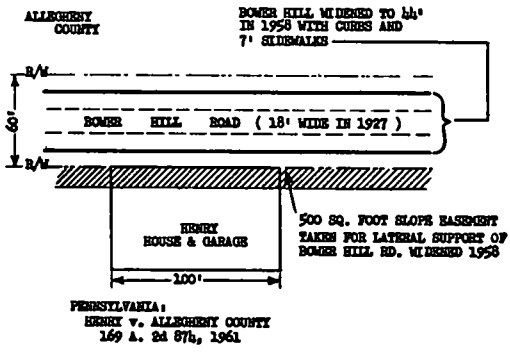


Figure 10.

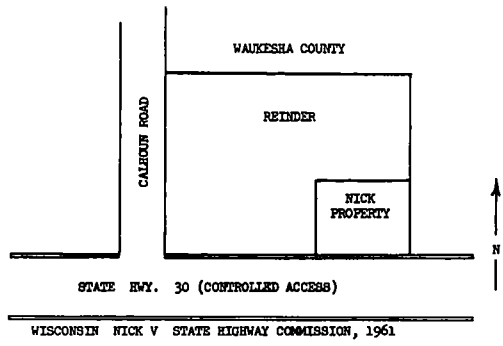


Figure 11.

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

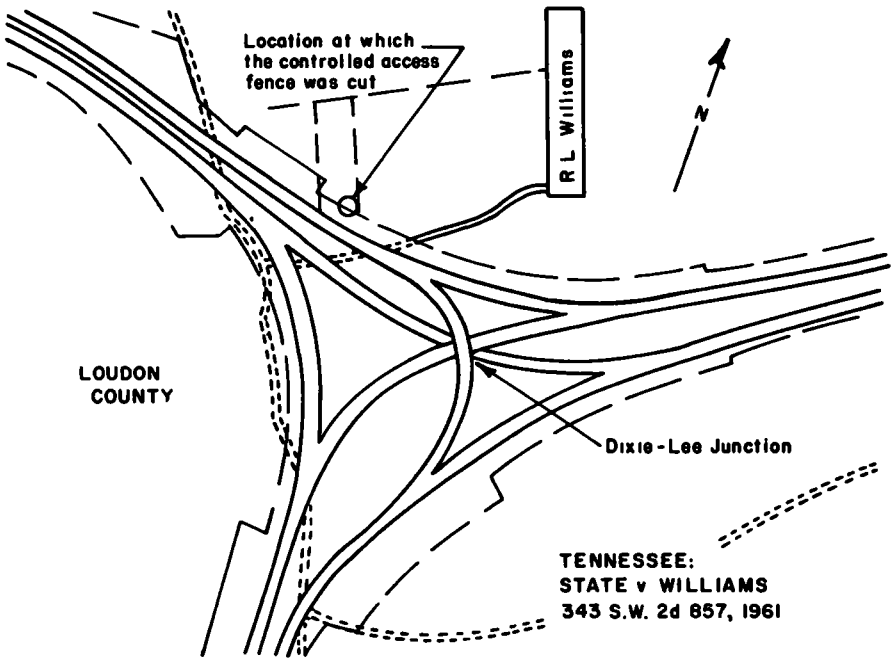


Figure 12.

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.

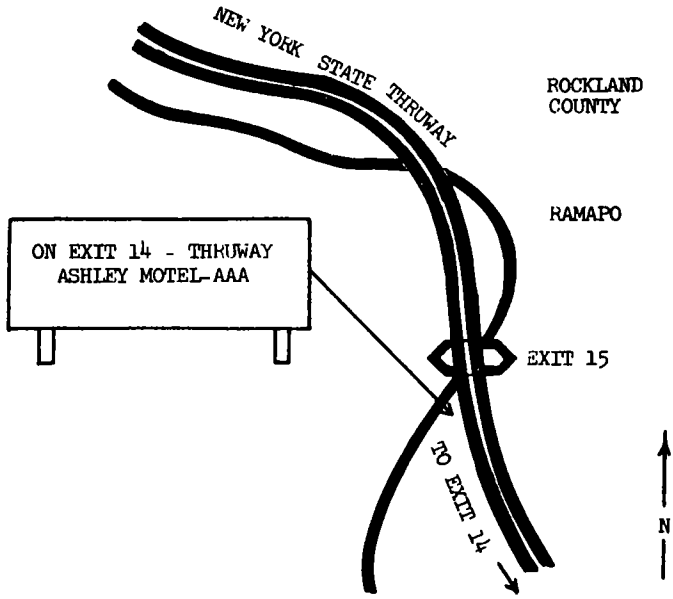
New York.—The Ashley Motor Court erected a sign advertising its location in 1937 on land owned by the Ramapo Land Company. In 1958, at the request of the State Department of Public Works, this sign was relocated on another site that was within 500 ft of the State thruway. The State, acting pursuant to 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.

Economic Evidence in Right-of-Way Litigation

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ECONOMIC DATA IN CONDEMNATION PROCEEDINGS

•THE MERGING of ideas from two fields even under ideal circumstances is a difficult process. In the case of the disciplines of law and economics, however, this process has been going on for many centuries; for instance, present commercial legal practice evolved from the need for rules to implement various institutional relationships in economic affairs. As a consequence, the development of procedural and substantive law involves a recognition of the business climate.

Although the law recognizes various economic arrangements, there are newer means of ascertaining facts today than had heretofore existed. These techniques of factual presentation can greatly aid highway and other public officials in improving their measures of fair compensation for property acquisition. To aid in the refinement of fact-gathering, highway officials across the Nation are engaging in right-of-way and legal research studies to arrive at "true" indicators of value for use in legal proceedings.

It is hoped that from such activities it will be possible to supply the realities behind the "market" and "willing buyer and seller" concepts, abstractions that have been defined fairly specifically in the case law, as described later. It is anticipated substantial savings to the government as well as factual verification and justification of condemnation awards will come from such research.

The occurrence of partial takings of property for highway purposes has made more significant the current law of severance damages and the proof necessary in such cases. Although some 9 of 10 condemnation cases are settled before recourse to judicial procedures, those that find their way to the courts often represent widely varying amounts of valuation for the same parcel of land. The pattern of payments of damages in present as well as future cases in influenced by these interpretations and decisions arrived at in open court. The damages awarded in these cases tend to establish the basis for the level of awards and damages in present appraisal practice because they become part of the jurisprudence kit.

It is in the suggested tools for bridging the gap between current economic practice and the legal tests supplemented by a clear description and analysis of the present evidentiary rules and tests that it is hoped this paper will make some contribution.

Filling in Evidentiary Gaps

Participants in the judicial process in eminent domain proceedings for highway purposes have recognized the need for sharpening factual presentations in condemnation cases. A recognition of this need has been the recent emphasis on pretrial practice[1],

[1] Levin, "Pretrial Practices in Condemnation Cases," Legal Affairs Committee, Annual Meeting, AASHO (December 1960), Naftalin, "Pretrial Practice in State Condemnation Cases for Highway Purposes," HRB Bull. 294, 15-30 (1961), Levin, "Comments on Some Aspects of Eminent Domain Proceedings and Land Use Control in the United States," Comparative Seminar on Land Use Controls (September 1960); Proc. Seminar on Protracted Cases for U. S. Circuit and District Judges, 23 F. R. D. 319 (1958); "Pretrial in Condemnation Cases, A New Approach," J. Am. Jud. Soc., 40: 78 (1956);

on uniform expert appraisal testimony[2], and on severance damage studies[3]. The major emphasis in this paper is on severance damage studies with only brief reference to the other two items.

A major interest in this paper is to fill the gaps in evidentiary practice so that both the court and the jury will be assisted in their decision-making roles. The public and individual property owners will benefit by any reduction of guesswork inherent in courtroom valuation of property. Concerned by the inadequacies of the factual presentations currently admitted in the courtroom, various leaders in the right-of-way, appraisal, and legal fields have indicated a need for devices in dealing with certain types of property[4].

As an example of this concern, a specialist in right-of-way has referred to the valuation of severance damages as

> One of the most difficult phases of appraisal work is the assignment of the proper value of severance damages to properties in highway right-of-way acquisition. [5]

The desire of right-of-way officials to provide for fair and accurate compensation has been stated as follows:

> It is the general intent that owners of parcels that are severed or reduced in size by right-of-way acquisition be compensated as accurately as possible for damage incurred... that payment be no more, no less, than the true value. [6]

Evidence in condemnation cases turns on the question of the value of the property taken, and in partial taking cases, on this as well as damages to the remainder. In accordance with the established valuation procedures, properties are analyzed in terms of before and after the taking. In this connection, it is essential to realize that market value must always be an estimate. Even under the most refined expert appraisal, no two properties can ever be exactly alike in amount, because of the intangibles of location and quality as well as the different background and training of appraisers. Because estimated values are the bases for the determination of fair and just compensation to a property owner, it is worthwhile to ask what can be added to the right-of-way official's technical equipment that will also aid the courts in increasing the accuracy of the estimate of value.

Sutherland, "The Theory and Practice of Pretrial Procedure," Mich. L. Rev. 36: 215, 224-25 (1937); English, "A Year of Pre-Trial Settlement Conferences," Chi. Bar Rec. 50: 343 (1959); Kaufman, "Calendar Decongestion in the Southern District of N. Y.," J Am. Jud. Soc. 40: 70 (1956).

[2] Bonner, "A Uniform Expert Valuation Testimony Act," HRB Bull. 294, 13-14 (1961); Bonner, "A Study of the Persuasion of Juries by Expert Witnesses in Condemnation Cases," Ph. D. Thesis, Ohio State Univ. (1954).

[3] For example, Land Economic Study 4, Michigan State Highway Department (September 1960); Washington State Severance Damage Study 9 and 7 (September 1959); and Gilliland, "Land Economic Studies for Appraisal Service," Joint Bureau-State Right of Way Seminar (November 4, 1959).

[4] Kuehnle, "Expert Testimony," Speech, Annual Convention of American Bar Assoc., Section on Municipal Law (September 1959), Levin, "Highway Right-of-Way Appraisals," Speech, Committee on Right-of-Way, Annual Convention, AASHO (1951).

[5] Murphy, "Partial Taking and Severance Damage Studies," Panel Discussion, Committee on Right-of-Way (1960).

[6] Ibid.

The most usual means of proving value in a court proceeding is, of course, that of expert testimony in which experts or informed individuals on both sides seek to impress the jury with the defensibility of their valuations. The recognition of new legal evidentiary devices has indicated that the law has progressed substantially so that the type of evidence generally used in condemnation proceedings may be improved to meet present fact situations in highway condemnation cases. An analysis of the current status of the law of proof and of the admissibility of economic research evidence (such as statistical surveys, samples, and the hearsay objection to such data) are presented later.

In this section, the particular significance of various types of land economic studies to the highway lawyer and appraiser are discussed.

General Economic Impact

In condemnation law, the courts introduce some legal constructs (namely, market value, highest and best use as the determinant of fair and just compensation) just as in other areas of law (i.e., in torts) the concepts of the prudent man and the reasonable man are used.

Such generalized concepts are needed to furnish standards so that a fair decision may be obtained for all concerned. With the tremendous building programs currently in progress, the Interstate and other Federal-aid highway programs, the State and county highway construction effort, urban renewal, redevelopment, reclamation, flood control, parks, and other programs involving the assignment of compensation, the impact of eminent domain proceedings on the general public has grown.

Despite the technological advances illustrated by all these public works programs, the means of proof has tended to remain within the same paths.[7] Courts, normally however, adapt their present procedures to new problems, for this is how growth obtains in the law to handle growth in the economic system.

When an expert witness is giving his opinion of the value of a parcel taken and damages to the remainder, knowledge of land value trends is an indispensible item to him. He would like to be able to ascertain certain general trends in the area so that he can give due credit to such general inflationary or deflationary movements in arriving at his estimate of value. General land value studies provide him with the expert information that he requires.

It is decidedly difficult and expensive for the individual appraiser to make a thorough study of all land value items in an area. For this reason, the States, Bureau of Public Roads, highway departments, and various universities are making available to the appraisal profession and highway legal counsel through economic impact studies the types of information needed.[8]

It would be well at this point to indicate some of the background of these economic impact studies. The earlier studies of the 1920's were concerned with rural land values. References to the results of these as well as many recent land value studies, perhaps 50 in number, have appeared in the report of the Highway Cost Allocation Study to the U.S. Congress, prepared by the U.S. Bureau of Public Roads.[9] In all, about 100 highway impact studies have been completed and about 40 are presently under way in some 35 States.

The impact studies have utilized various kinds of approaches. In general, the methodology encompassed what has been called a before-and-after technique—an analysis of some period before a highway improvement compared with a period after the completion of the improvement. Wherever possible, geographic areas subject to highway influences were compared with similar areas not subject to the highway influence in order to isolate, to some degree, the impact of the facility. Although the subject matter in

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[7] See section on "Pertinent Laws of Eminent Domain and Evidence."

[8] For a discussion of how such studies are made and their importance, see Garbarino, "The Effect of 'High Lines' on the Market Value of Abutting Properties," Paper, Legal Committee, Edison Electric Inst. (April 1961).

[9] H. R. Rep. No. 72, 87th Cong., 1st Sess. (1961).

these studies varies widely, the concern with right-of-way is seen in these studies because land value analyses are usually a component part of evaluating impact.

The results of the experience gained in these studies have found their way into the courts in some instances, generally through expert presentation. One of the early impact studies that dealt with 2,500 sales in the Houston, Texas, area was used in a Mississippi case as a basis for expert opinion.[10] Other studies provide findings that could be useful in legal disputes, as in the Baltimore Beltway Study[11] where little or no damage was found from highway proximity in a study of subdivision property.

Even when an appraiser does not have access to such economic impact studies, he implicitly uses similar information in his evaluation of a parcel. His experience and education become the basis for his expert opinion. Nevertheless, it is opinion testimony and as such it is subject to all the attacks inherent in the cross-examination of any opinion. Neither side to a legal dispute generally has adequate information to evaluate the trends for the reasons of time and expense. It is this factual gap in case preparation that it is hoped will be filled by the economic impact and similar studies. Watson Bowes, MAI, stated this proposition in the following way:

> Economic studies are not only advantageous in appraising highway right-of-ways but they are absolutely necessary. Every highway department appraiser employs such studies to some extent. Some appraisers relate economic studies to the subject properties by making only mental notes as they are developing their estimates of fair compensation. Such mental notes are difficult to transmit to juries and do not show on any appraisal report so they can be used as a negotiating tool by the negotiator.[12]

An operating official in the highway field of the State of Washington believes these studies serve

> ... to provide data to staff and fee appraisers to assist them in more accurately measuring the just compensation in a partial taking problem. I believe that in all States the right-of-way divisions are finding that the constant improvement in appraisal techniques is resulting in more and more accuracy in the appraisal of a total taking, or in the before value of a property involving a partial taking.[13]

Right-of-way specialists are generally in favor of using such land value studies in appraisals as well as in court proceedings. Balfour and Hess of the California Division of Right-of-Way, Lindas of Oregon, Eichhorn of Michigan, and many other State highway department officials, as well as the Bureau of Public Roads in its "Guide for Highway Impact Studies,"[14] have all indicated their support of such research.

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[10] W. E. Harreld case on Project F-FI-I (52)—IN-55-(2) 75, Hinds County, tried in Chancery Court in 1957, and appealed to the Mississippi Supreme Court in 1958.

[11] Maryland State Roads Commission, July 1960.

[12] Bowes, "The Value of Economic Studies in Right-of-Way Appraising," Speech, Annual Convention, AASHO (1951).

[13] Arnold, "The Economic Study—Its Uses," Speech, Right-of-Way Section Meeting, AASHO Conf. (1960).

[14] For example, Lindas, "Oregon Land Economic Study," Speech, HRB Meeting, (1960); Moser, "Land Economic Studies in Connection with Right-of-Way Acquisition," Speech, Annual Seminar of the Eastern States Regions, American Society of Appraisers (1959); Bureau of Public Roads, "Guide for Highway Impact Studies," (1959).

Land value studies of impact in an area that abuts a highway, compared with one that is not near the highway improvement, would be particularly pertinent in court cases where land value trends are necessary factual background for the jury. It would then be possible for the court and jury to evaluate the work product of the expert appraiser against these data. The California Law Revision Commission[15] has seen fit to recommend the use of appraisal theory in condemnation cases in order to systematize the concepts of valuation and the background of testifiers. It is usually within the court's power to determine the rules of compensation as a means of implementing a legislative decision for the taking of a specific property subject to a public need.

In the main, empirical evidence at the trial consists of the appraiser's opinion of market value, as described in the following statement:

> An appraiser is supposed to reject elements which are remote, fanciful, speculative and uncertain. In judging the situation the appraiser must determine whether the facts establish a diminution in value with reasonable certainty, as distinguished from merely hypothetical or fanciful assertions having no effect upon value.[16]

Yet in a world where statistical data are used to ascertain and provide decision-making tools to management and government, it would appear most proper to prove this of value by empirical or statistical evidence. Since the time of introducing appraisal opinion as expert testimony began, the highway lawyers have avoided the use of much significant information, such as the various land value studies. The implications of these studies to evidentiary presentation is discussed in a later section dealing with the admissibility of research evidence in highway right-of-way litigation.

Interchange Impact

Right-of-way personnel have been especially interested in the subject of the impact of interchanges on land values because experience thus far has shown these interchanges to be the hubs of economic activity. Such impact studies at interchange points tend to provide data that can be utilized to indicate objectively the after value of property at such points. In the State of Washington, a number of case studies at interchange points have been prepared that may be used for such a purpose. In addition to this type of case study, general land value trends at interchange points are being established in the economic impact studies[17] at the University of Washington, Texas A & M, and in the States of Michigan, Minnesota, Ohio, Oklahoma, Pennsylvania, and Washington, and many other States where interchange impact on an area (general influence on land values) and on specific parcels can be delineated.

Severance Damage Studies

A major means of establishing property value is that of the comparable parcel, the standard of value, so that the court and the jury may have the opportunity to approximate true value.

To aid the court in this fact-finding function, right-of-way personnel in State highway departments and private appraisers through such professional organizations as the American Right-of-Way Association and various appraisal societies have interested themselves in establishing various researches in land values. These land value studies attempt to supply the appraiser with knowledge of the economy in which he operates,

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15 California Law Revision Commission, Recommendation and Study Relative to Evidence in Eminent Domain Proceedings, 1960.

16 Luttrell, "Some Applicable Rules in the Trial of a Condemnation Case," 28 Appraisal J 215 (1960).

17 See Appendix E for list of severance damage studies.

for the findings in such studies provide him and other persons involved in right-of-way or eminent domain proceedings with the reaction of land values in situations similar to the one involving the parcel in question. The important contribution made by this research is the aid that may be given in valuing not whole parcels but partial takes. For where whole parcels are acquired by condemnation, the establishment of market value is not as difficult as it is in the case where only part of a parcel is acquired and the damages to the remainder need to be evaluated.

Nature of Severance Damage Studies.—Severance damage studies are intended to facilitate the objective determination of the effect the partial taking of a property has on the value of the remainder parcel. Such information is invaluable if each affected property owner is to be reimbursed for property taken as well as damages to the remainder. To measure the effects of a partial taking of property, most severance damage studies rely on a before-and-after approach—the value of the property before the highway taking compared with the total amount which the owner received from the property; e.g., for property taken, for damages to the remainder, and from the sale of the remainder. Ideally, the adjustment that should be made with a property owner is the difference in the fair market value of the entire tract before the taking and the fair market value of the remaining real property after the taking. Although the appraisal of these before-and-after values is made at the same time, the appraiser must attempt to determine the value for two different times—one in the past before the highway, and the other in the future after the highway influence has been effected. In those situations where the remainder is sold so that a reliable indication of the value of the remainder is provided, the elements for a meaningful comparison are available—the original value (determined by recognized appraising techniques) vs the value realized by the owner (total payments for property taken, for damages, and for remainder parcels). If there is wide discrepancy between these two amounts, either too much or too little is being paid for right-of-way property or damages; the legal limits to these rules are described later.

Similarities Between Severance Damage and Economic Impact Studies

Severance damage or partial taking studies and economic impact studies have several similarities, and either type of study may sometimes be referred to generally as a land economic study. In fact, severance damage studies may be considered as a particular type of economic impact study. For example, a land value study now under way in Colorado is giving special emphasis to the analysis of severance damages related to controlled access highways. In general, severance damage studies and economic impact studies are, of course, alike in that they seek to identify and measure effects that can be traced to highway improvements. This careful attention which both types of studies give to measuring the impact of highways that have been built in the past results from their common objective—developing a factual basis for predicting highway effects.

Some Contrasts Between Severance Damage and Economic Impact Studies

The differences between severance damage and economic impact studies (which, as noted earlier, are generally alike in seeking to measure highway effects) result primarily from the different types of benefits that these studies seek to identify. Both types of studies ordinarily consist of a comparison of the situation before and after the highway to determine the effect of the highway. Economic impact studies are ordinarily concerned with identifying benefits (or disadvantages) that accrue to an entire community or some portion of a community—with general benefits. General benefits or damages can be defined as injuries or benefits that the owner sustains or receives in common with the community generally and that are not peculiar to him.[18] For example, the increment in land values that a community may experience from a bypass route would be termed a general benefit. (The legal basis for these distinctions are described later.)

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[18] Speir, "Appraising for Eminent Domain," Texas Highway Department (May 1956)

Severance damage studies are concerned with highway effects on particular land parcels taken in part for highway property. If the total amount received by a property owner (a) for right-of-way, (b) for damage to the remainder, and (c) from sale of the remainder exceeds the value of the property prior to the highway, a benefit has accrued to the owner. Severance damage studies are often particularly concerned with special benefits—the highway effects that accrue to a particular land parcel taken in part for highway right-of-way—benefits that are peculiar to that property and not shared by other property in the community. In offsetting the damage suffered by remaining land parcels or in paying for property acquired in part, it is more common to look to special benefits than to general benefits, although the distinction between special and general benefits often becomes blurred.

Whether the focus of a study is on general or special benefits affects the method used to identify these benefits. Severance damage studies have commonly employed the case study approach, whereas economic impact studies have been more concerned with the experience of a highway-affected community; e.g., with respect to land value trends, business volumes, or employment.

The different types of control areas used in severance damage studies and in economic impact studies also reflect the different emphasis of these studies. A fundamental type of analysis in economic impact studies, which seeks to detect and measure general benefits, involves comparison of an area influenced by a highway and an area removed from highway influence, the ideal control area being one like the study area except that it has a complete absence of highway effect. The types of controls that have been used in severance damage studies, on the other hand, show some variation, no doubt due primarily to differences in State law as to which benefits can be considered in establishing compensation. In States where both general and special benefits can be applied against the cost of acquiring right-of-way property, a control area removed from the highway influence is desirable. However, in over one-half the States where only special benefits are to be considered in determining adjustments to be made with affected property owners, control areas are needed in the same immediate neighborhood as the study parcel. Appendix D includes a diagram of how severance damage studies seek to measure general and special benefits.

Shortage of Factual Information

One of the major problems in the case of partial takings is the lack of information organized in some systematic fashion. It is hoped that the severance damage program of the Bureau of Public Roads and State highway departments is serving to furnish these facts. An important goal of this program is, of course, to counter extravagant property damage claims with objective analysis.

The difficulty of gauging highway effect without careful reference to the experience in comparable situations has often been illustrated. A severance damage study in Michigan, for example, revealed that a highway-influenced parcel of land that was expected to have a value of only 5 percent of what it was worth before the highway turned out, in fact, to have an after value of 115 percent of its before value.[19] In Ohio, researchers have noted that there has been no instance of an owner having to sell a remainder parcel for as little as 10 percent of its former value, although estimates of 90 percent damages for landlocked property are reported to have become fairly common.[20]

The dearth of factual information about what happens to remainder properties is widely recognized. One account of a typical appraisal states that it contains "solid proof on the before value of the lands and improvements with full documentation" and then the frustrating words, "in my opinion the remainder is damaged 50 percent by reason of proximity."[21]

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19 Land Economic Study 4, Michigan State Highway Department (September 1960)

20 Little, AASHO, Committee on Right-of-Way, Boston (October 15, 1959)

21 Supra note 12

Many appraisers are keenly aware of the fact that large-scale right-of-way appraisal for highway improvements is relatively new, that it poses new problems and intensifies the need for factual information as to how the market reacts to remaining portions in order to make the after estimates "something more than [guesses from a] crystal ball."[22]

Accomplishments of Severance Damage Studies

The goal of severance damage studies—to make it possible to predict at the time of right-of-way taking what effect the highway will have on the remaining parcel—appears to be almost insurmountable. Any two or more properties vary to some degree so that predicitions of what may happen to one piece of property on the basis of the experience with other properties can only be approximate and must be made with considerable caution. The difficult nature of this problem is emphasized by the wide variation in the experience with remainder parcels, the unit value of remainder parcels in one study ranging from ½ to nearly 15 times the former value.[23]

Although exact evaluation of benefits and damages associated with right-of-way taking is desirable, real value can be derived from severance damage studies that are short of such precision. This is evidenced by the usefulness that current studies are having for such purposes as right-of-way acquisition, public relations, highway planning, and administration. In instances where benefits associated with a highway right-of-way taking exceed the value of property taken, it may be sufficient merely to determine that benefits exceed or equal the value of the property taken, inasmuch as benefits cannot ordinarily be offset unless they are matched by the value of right-of-way acquired or by damages as described later. Determining exact amount would appear to be necessary only where the benefit is insufficient to offset costs—in situations where the amount of the award due an owner exceeds any benefits that may be allowed and therefore where the amount of the award payable depends on establishing amounts for benefits or for any damages. Consideration of benefits associated with partial takings without assigning exact benefit amounts can apparently also have some usefulness in those situations where no attention whatsoever is now being paid to this important element of the post-highway situation. In such cases, any recognition of highway benefits whatever should be helpful in establishing more reasonable costs for right-of-way acquisition.

Partial taking studies that merely recognize or estimate benefits in a general way—the benefits approach—have considerable usefulness. However, a number of studies have gone beyond this and have applied a market approach—a measure of effect determined by the market place. These studies have provided comparisons of estimated and actual highway effects on remainder parcels, and some of these estimates have been shown to be fairly accurate. In several instances, estimated and actual damages (generally established by actual sales prices) have been found to be within a few percentage points of one another: for example, estimated damages of 13 percent and actual damages of 7 percent; estimated 37 percent damage and actual damages of 27 percent; and estimated damages of 80 percent compared with actual damages of 70 percent.[24]

Another accomplishment of these studies which should have general usefulness in determining what may happen to remainder properties is the progress made in evaluating the effect of such factors as having more than one potential purchaser for certain types of remainder parcels. As might be expected, the selling price of landlocked

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22 Pryor, "An Adequate Right-of-Way Appraisal," Right-of-Way (December 1959).

23 Land Economics Study Committee Report to Membership, Buckeye Chapter, American Right-of-Way Association, Columbus, Ohio (September 1959).

24 Washington State Severance Damage Study 9 and 7 (September 1959); and Gilliland, "Land Economic Studies for Appraisal Service," Joint Bureau—State Right-of-Way Seminar, Kansas City, Mo (November 4, 1959).

parcels with two or more potential buyers has been found to be significantly higher than that for remainder properties with only one potential buyer; that is, one abutting owner. Certain parcels in Ohio with one abutting owner were found to have a percentage of recovery of 20 percent (that is, the selling price in the after period was 20 percent of the appraised value before the highway), whereas parcels with two or more abutting owners had a recovery rate of about 80 percent.[25] In Michigan, recovery rates for parcels with one potential buyer were found to range from 32 to 57 percent of the former value and from 90 to 113 percent for remainder parcels with two or more possible purchasers.[26]

Research in partial taking studies has also provided assistance in forecasting highway effects by relating experience with remainder parcels to such factors as size of remaining parcel, size of farm unit before the severance, and type of potential purchase. For example, "The degree of damage sustained [by a 160 acre farm] by the loss of 5 to 10 acres...is less.. than [that experienced by] an 80 acre farm." In at least one investigation, small remainder parcels were shown to have a lower rate of recovery than larger parcels, although preliminary findings from another investigation found "no apparent correlation."[27]

These are a few of the accomplishments suggesting the help these studies can afford in providing authoritative proof of just what can be expected to happen to the value of the remainder. Another accomplishment of severance damage studies—a sign that progress is being made in the objective determination of highway effects—is the apparent increase in the expectation that appraisals of after values are to be supported by specific written justification and the occasional rejection by State personnel of inadequately supported appraisals.

Collection of Data on Severed Parcels

To develop a file or "bank" of cases from which comparable sales experience of severed parcels may be obtained, the Bureau of Public Roads and State highway departments are sponsoring the use of a standardized study procedure inclusive of a manual of procedures and suggested techniques. This instructional material will make public results and methods available to highway departments which can be useful in solving controversies on valuation. The necessity for such a bank is that experts, appraisers, and others valuing property generally do so in terms of whole parcels, for that is where real estate valuation experience is most prevalent. Few analyzed data are available for determining the experience with severed parcels or partial takes. This bank will furnish the means for developing comparable sales of severed parcels according to the procedures designated by the manual for obtaining this factual information. The manual also provides suggestions for obtaining maximum usefulness from a uniform severance damage form which has been developed by the cooperative efforts of interested persons in the various States, American Right-of-Way Association, and the Bureau of Public Roads.

The recommended procedures for using the severance damage data include a description of the way in which severance damage data are to be collected and processed, a brief description of the types of analyses feasible for mechanizing the recording and sorting of these data. It is hoped that a central bank of information regarding similar severed parcels will be available at the Bureau of Public Roads for the use of State officials. With the mechanical sorting devices to be used, it will become possible to make comparables available to researchers and appraisers in the field.

The uniform schedule used (BPR 1030) consists of the following parts: general information on parcel location, type of highway, type of access, description of tract,

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[25] "Preliminary Report of Land Economic Studies," Ohio Department of Highways in cooperation with the Bureau of Public Roads (1960).

[26] Supra note 19.

[27] Supra note 24.

parcel taken, remainder tract, relevant data of taking, size and use of parcel, zoning, visibility, elevation, appraisal value, compensation, court awards, and subsequent sales. All of the elements requested on this form are relevant to the establishment of parcel comparability and market value.

Because of the systematic nature of the collection of severance damage cases, it is expected that comparable sales will be made readily available and courtroom presentation will be facilitated. The comparability will still need to be proved and will still be subject to dispute; but standardization of procedure may eventually determine the use of these cases in all States. The details requested on such forms make it possible to narrow down the comparabilities so that the parcels may be comprehensible to fact-finding bodies.

Evidence for Offsets

Another use of these severance damage studies and case histories of individual severed parcels will be to indicate the amount of benefit as offsets to damages and the value of property taken in cases where such offsets are permitted. Where benefits may be offset, there is always difficulty in establishing the amount of general or special benefits.

It is expected that the bank of severance damage cases previously referred to will be available to the States and to the Bureau of Public Roads, and these cases will make it possible for appraisers in the first instance to estimate the amount of benefits that have historically been associated with similar cases.

Despite the case histories that would be made available from these studies, the usual objection is that the amount of offset to damages (if any) found in such studies does not apply to a parcel under consideration because it represents a property that is different in nature, type, location, etc., from the property under litigation. In the case of the severed parcels, it is hoped that the histories of land parcels of similar types as valued through market sales will be indicative of the value of the parcel in question.

The utilization of land value studies in court work will generally run into objections on the grounds that they are averages (they represent a dispersion of properties), they deal with hearsay, and they do not represent the property involved. In the next two sections of this paper, the current status of the law of proof and the possibilities of meeting the hearsay and other objections are discussed. These discussions point the way toward more effective utilization of such economic studies in the courts and also point out the limitations to their use.

PERTINENT LAWS OF EMINENT DOMAIN AND EVIDENCE

The possible uses of economic evidence in highway condemnation litigation must be considered in light of the pertinent laws of eminent domain and evidence, and in light of the problems involved in applying these laws. With this objective, this section examines (a) the nature of the condemning authority's duty to compensate those whose property it takes, (b) the rules and criteria of value whereby this compensation is measured, particularly where only part of a tract of real estate is taken for highway purposes, and (c) the types of permissible evidence currently used to prove the property value, damages, and benefits designated by these rules and criteria of value as components of the property owner's just compensation.

In this examination of the current law, it is observed how the types of economic evidence heretofore discussed would meet existing inadequacies and thereby facilitate a more accurate measurement of the property owner's just compensation. It is further observed how these types of economic evidence would comply with the rules of evidence. In a later section, the potential challenges raised by the rules of evidence to the admissibility of this economic evidence are discussed.

Constitutional Sources of Duty to Make Just Compensation

Fundamental to the law of eminent domain in the United States and in the several

States are the Federal constitutional provisions[28] that require that just compensation be paid to owners of private property taken pursuant to the power of eminent domain. These Federal provisions and a majority of the State constitutions[29] only require that such compensation be made to the owner of property taken by eminent domain; but some State constitutions[30] extend the right of just compensation to owners of property damaged by the exercise of eminent domain. Taking, in the constitutional sense, entails either actually entering on the land or depriving the owner of substantially all beneficial use of the property.[31] Damaging, in the constitutional sense, occurs when non-condemned land has either sustained an injury actionable at common law or has been injured more than the general public by the physical disturbance of one of the owner's rights therein.[32] Compensation for taking is measured by the property's value at the time of taking as defined[33]; compensation for damaging is measured by the value depreciation of the damaged property.[34] Thus, the exercise of the eminent domain power requires ascertaining in every instance the value of the property taken and in some instances both the value of the property taken and the value depreciation of property not taken.

Value Criteria for Measuring Just Compensation

It is the judiciary, whose exclusive function is to determine the exact amount of compensation in each case, which has largely formulated the rules and criteria of evaluation in eminent domain cases. Courts have generally held the just compensation constitutionally required for the taking of property to be the property's value at the time of the taking.[35] This value has been further defined in most cases as the property's

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28 U S. Const. amend. V, which provides "nor shall private property be taken for public use without just compensation," binds the Federal government. The "due process" clause of U. S Const. amend. XIV, as construed in Chicago, B. & Q. R. R. v. Chicago, 166 U. S. 226 (1897) imposes substantially the same requirement on the States.

29 See Appendix A, Column A

30 See Appendix A, Column B

31 United States v. Causby, 328 U. S. 256 (1946); Portsmouth Harbor Land & Hotel Co. v United States, 260 U. S 327 (1922); Friendship Cemetery v. City of Baltimore, 197 Md. 610, 81 A. 2d 57 (1951); Penn v. Carolina Va. Corp., 231 N C. 481, 57 S. E. 2d 817 (1950); Cochran Coal Co. v. Municipal Management Co., 380 Pa. 397, 110 A 2d 345 (1955) This traditional concept of taking has been broadened to render compensable the substantial interference with any of the rights of property ownership in some States. For example, In re Forrstrom, 44 Ariz. 472, 38 P 2d 878 (1934); Liddick v. City of Council Bluffs, 232 Iowa 197, 5 N. W. 2d 361 (1942); State ex rel. McKay v. Kauer, 156 Ohio St. 347, 102 N. E. 2d 703 (1951).

32 Chicago v. Taylor, 125 U. S. 161 (1888); Jarnagin v Louisiana Highway Comm'n, 5 So 2d 660 (La. App. 1942); Wolfrom v. State, 246 Minn. 264, 74 N. W. 2d 510 (1956); State Highway Comm'n v. Bloom, 77 S. D. 452, 93 N. W. 2d 572 (1958).

33 Danforth v. United States, 308 U S. 271 (1939); see cases cited infra note 35.

34 Rose v. State, 19 Cal. 2d 713, 737-40, 123 P 2d 505, 519-21 (1942); State Highway Bd. v Coleman, 78 Ga. App. 54, 50 S. E. 2d 262 (1948); Harrison v. Louisiana Highway Comm'n, 191 La. 839, 186 So. 354 (1939); Tennessee Gas Transmission Co. v. Maze, 45 N. J. Super. 496, 133 A. 2d 28 (App. Div. 1957)

35 De Bruhl v. State Highway & Public Works Comm'n, 247 N. C. 671, 102 S. E. 2d 229 (1958); In re Appropriation for Highway Purposes, 167 Ohio St. 463, 150 N. E. 2d 30 (1958); White v. State Highway Comm'r, 201 Va. 885, 114 S. E. 2d 614 (1960). But this uniformly designated valuation date varies according to the different acts that constitute a taking as illustrated by these same cases: De Bruhl (an administrative order); In re Appropriation (entry on the premises); White (initation of legal proceedings).

market value,[36] but where market value has not been reasonably ascertainable, courts have had recourse to what they term the actual or intrinsic value of the property.[37]

The concept of market value,[38] especially as applied to real estate, does not readily admit of concise and practical definition. The practical application of this concept in condemnation proceedings has led to the generally accepted definition of market value; namely,

> the amount of money which a purchaser willing but not obliged to buy the property would pay to an owner willing but not obliged to sell it, taking into consideration all uses to which the land was adapted and might in reason be applied.[39]

The constitutional requirement of just compensation for taking, from which stems the market value criterion, implies full indemnity to the owner.[40] However, this indemnification extends only to the value of the property taken and does not guarantee that the owner will receive a return for his investment in the land.[41] For purposes of establishing market value, the land is looked upon merely as so much land apart from its sentimental value to the owner of his willingness or unwillingness to sell it.[42]

Under the market value criterion for establishing just compensation, all the elements of value that contribute to the saleable character of the land are relevant; that is, all facts that an owner would naturally and properly press upon a prospective buyer's attention and that would naturally influence an ordinarily prudent person desiring to purchase.[43] Thus, the owner of condemned land is entitled to have it evaluated in light of the highest and best use to which the land can reasonably be adapted, irrespective of its current use or the owner's immediate plans for its use[44]; however, only such highest and best uses as are legally permissible, are not remote or speculative, and would affect the present market value of the land may be considered.[45]

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[36] Olson v. United States 292 U S. 246 (1934), Housing Authority v. Lustig, 139 Conn. 73, 90 A. 2d 169 (1952); Hoy v. Kansas Turnpike Authority, 184 Kan. 70, 334 P. 2d 315 (1959); State Dept. of Highways v. Tolmas, 238 La. 1, 113 So. 2d 288 (1959); State Highway Comm'n v. Superbilt Mfg Co., 204 Ore. 393, 281 P. 2d 707 (1955).

[37] Newton Girl Scout Council v. Massachusetts Turnpike Authority, 335 Mass. 189, 138 N.E 2d 769 (1956); Assembly of God Church v. Vallone, 150 A. 2d 11 (R.I. 1959).

[38] The market value concept seems to be synonymous with fair market value and cash market value insofar as they are adapted to eminent domain law. Orgel, Valuation under Eminent Domain §17 (1953).

[39] Assembly of God Church v. Vallone, 150 A. 2d 11, 15 (R.I. 1959). See cases cited supra note 36.

[40] United States v. Miller, 317 U.S 369 (1943); State ex rel Dep't of Highways v. Barrow, 238 La. 887, 116 So. 2d 703 (1959); Schlotman v. Wharton County, 253 S W 2d 325 (Tex. Civ. App. 1953); Pruner v State Highway Comm'r, 173 Va. 307, 4 S.E. 2d 393 (1939).

[41] United States ex rel. T.V.A. v. Powelson, 319 U.S. 266 (1943); see cases cited infra notes 52 and 56.

[42] Wilmington Housing Authority v. Harris, 47 Del. 469, 93 A. 2d 518 (Super. Ct. 1952); City of St. Louis v. Paramount Mfg. Co., 247 Mo. App. 200, 168 S.W. 2d 149 (1943), Syracuse University v. State, 7 Misc. 2d 349, 166 N.Y.S. 2d 402 (Sup. Ct. 1957)

[43] Housing Authority v. Lustig, 139 Conn. 73, 90 A. 2d 169 (1952); see Olson v. United States, 292 U.S. 246 (1934).

[44] Department of Public Works & Buildings v. Lambert, 411 Ill. 183, 103 N.E. 2d 356 (1952); Hoy v. Kansas Turnpike Authority, 184 Kan. 70, 334 P. 2d 315 (1959).

[45] Olson v. United States, 292 U.S. 246 (1934); State Highway Comm'n v. Brown, 176 Miss. 23, 168 So. 277 (1936); State Highway Comm'n v. Arnold, 218 Ore. 43, 341 P. 2d 1089 (1959); City of Austin v. Canizzo, 153 Tex. 324, 267 S.W. 2d 808 (1954).

The market value criterion has been bypassed in certain types of cases. The condemned land may have been improved and adapted for such a special usage as not to be readily saleable at anything near its real value,[46] or other circumstances may preclude the ascertainment of market value.[47] The landowner's constitutional right to full indemnity for the loss has led courts under these circumstances to adopt the intrinsic value or value to the owner criterion.[48] Under this criterion, the objective value of the property to the owner, or anyone else, for any special use to which it has been adapted is considered.[49] It is frequently arrived at by calculating the replacement cost of the improvements on the land less depreciation plus the value of the land.[50]

Only the value of the property taken is to be indemnified under the just compensation for taking provisions of the Federal and State constitutions. Thus, the value of the buildings and fixtures thereon are properly compensable.[51] However, any business operated on such property, including any good will appurtenant thereto and any anticipated profits therefrom, is not considered a property right within the meaning of these constitutional provisions.[52] The courts have reasoned that the business is severable and distinct from the land; only where the business is taken over by the condemning authority will the owner be compensated for the value of the business.[53] The impact of this rule has been alleviated in many States; in some, special legislation authorizes compensation for the taking or damaging of a business by eminent domain[54]; in others, the courts have admitted the profits of a going business concern on condemned property as evidence of its value for its highest and best use.[55] The restricted scope of this indemnification also precludes compensation for the frustration of contracts related to the condemned property,[56] and for the inconvenience and expense incident to being dispossessed of the property.[57]

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46 Newton Girl Scout Council v. Massachusetts Turnpike Authority, 335 Mass. 189, 138 N.E 2d 769 (1956) (summer camp); Assembly of God Church v. Vallone, 150 A. 2d 11 (R.I 1959) (church).

47 State ex rel Dep't of Highways v. Barrow, 238 La. 887, 116 So. 2d 703 (1959) (by stipulation); Tigar v. Mystic River Bridge Authority, 329 Mass. 514, 109 N.E. 2d 148 (1952) (partially built refrigeration plant).

48 See cases cited supra notes 46 and 47.

49 See cases cited supra note 46.

50 See Assembly of God Church v. Vallone, 150 A. 2d 11 (R.I 1959).

51 Jackson v. State, 213 N.Y. 34, 106 N.E. 758 (1914); State Highway Comm'n v Superbilt Mfg. Co., 204 Ore. 393, 281 P. 2d 707 (1955).

52 Department of Public Works & Buildings v. Lambert, 411 Ill. 483, 103 N.E. 2d 356 (1952); In re Smith St. Bridge, 234 App. Div 583, 255 N.Y.S. 801 (1932); Williams v. State Highway Comm'n, 252 N.C. 141, 113 S E. 2d 263 (1960), State Highway Comm'n v Vella, 213 Ore. 386, 323 P. 2d 941 (1958); Ryan v. Davis, 201 Va. 79, 109 S.E. 2d 409 (1959)

53 For example, Kimball Laundry Co. v. United States, 338 U.S. 1 (1949).

54 Fla. Stats. Ann. 1957, Sec. 73.10(4) as construed in Hooper v. State Road Dep't., 105 So. 2d 515 (Fla App. 1958); Administrative Code, City of New York, Sec. K 41-44.0 as construed in Application of Huie, 11 App. Div. 2d 837, 202 N Y.S. 2d 954 (1960); Vt. Stats. Ann., tit. 19, Sec. 221(2) as construed in Record v. Vermont Highway Bd., 121 Vt. 230, 154 A. 2d 475 (1959).

55 See Housing Authority v. Lustig, 139 Conn 73, 90 A. 2d 169 (1952); State ex rel State Highway Comm'r v. Williams, 65 N.J. Super. 518, 168 A. 2d 233 (App. Div. 1961).

56 New Jersey Turnpike Authority v. Bowley, 27 N.J. 549, 143 A. 2d 558 (1958); Ohio Valley Advertising Corp. v. Linzell, 168 Ohio St. 259, 153 N.E. 2d 773 (1958).

57 In re Smith St. Bridge, 234 App. Div. 583, 255 N.Y.S. 801 (1932), Williams v. State Highway Comm'n, 252 N.C. 141, 113 S.E. 2d 263 (1960).

Modifications in Partial Taking Cases

Severance Damages. —Computing just compensation for the condemnation of only a part of a tract of land raises a new series of valuation problems. Even under a mere taking provision, the owner of a tract of land is not confined to recovery of the value of the land taken. Besides any increased value that may inhere in the land taken because it is part of a larger tract,[58] the owner of such a partially condemned tract is further entitled to recover any severance damage to the remainder not taken.[59] These severance damages include the correlative loss of any value that may have inhered in the remainder as part of the larger tract.[60] They further include any present or prospective depreciation in the remainder's market value that naturally and proximately results from the proposed use of the condemned part. Any aspect of the proposed use that may detrimentally influence a prospective purchaser of the remainder is properly considered in ascertaining these damages.[61] Severance damage studies, insofar as they trace the subsequent market value history of land severed for highway construction, are especially designed to assist in the computation of severance damages.

Setoff of Benefits. —Integrated with the assessment of severance damages are the various rules governing the setoff of benefits accruing to the remainder parcel from the prospective use for which the land has been condemned. The benefits that frequently accrue from a public improvement to neighboring lands are often the subject of a special assessment on the neighboring land thereby benefited.[62] Such assessments as serve to defray or cover the cost of the public improvement are a proper exercise of the power of taxation.[63] In most jurisdictions and with various limitations discussed later, the same type of benefits are considered in computing the compensation due a landowner for land partially taken by eminent domain. Accordingly, prospective benefits enhancing the market value of land from which condemned land has been severed and attributable to the particular public improvement for which the condemnation has been made[64] have been set off against the compensation to which the landowner would otherwise be entitled.

Benefits have been classified as either special or general. Special benefits accrue in a peculiar way to a particular tract because of its direct relation to the public improvement. Conversely, general benefits accrue to the general public of the community as well as to directly related lands. In highway condemnation cases, courts have usually distinguished between these two types of benefits on the basis of whether they accrue

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58 People ex rel Dep't of Public Works v. Loop, 127 Cal. App. 2d 786, 274 P. 2d 885 (1954); State Highway Bd. v. Bridges, 60 Ga. App. 240, 3 S. E. 2d 907 (1939); Department of Public Works & Buildings v. Griffin, 305 Ill. 585, 137 N. E. 523 (1922).

59 MacArthur v. State Highway Dep't, 85 Ga. App. 500, 69 S. E. 2d 781 (1952); Case v. State Highway Comm'n, 156 Kan. 163, 131 P. 2d 696 (1943); In re Appropriation for Highway Purposes, 108 Ohio App. 1, 160 N. E. 2d 383 (1959); State v. Meyers, 292 S. W. 2d 933 (Tex. Civ. App. 1956).

60 People ex rel Dep't. of Public Works v. Loop, 127 Cal. App. 2d 786, 274 P. 2d 885 (1954); Little v. Burleigh County, 82 N. W. 2d 603 (N. D. 1957); In re Appropriation of Easement for Highway Purposes, 93 Ohio App. 179, 112 N. E. 2d 411 (1952).

61 State Highway Bd. v. Coleman, 78 Ga. App. 54, 50 S. E. 2d 262 (1948); State ex rel. State Highway Comm'n v. Bruening, 326 S. W. 2d 305 (Mo. 1959); State Highway Comm'r v. National Fireproofing Corp., 127 N. J. L. 346, 22 A. 2d 268 (E. & A. 1941).

62 See Economic Research Agency, "Special Assessments in Theory and Practice," Bureau of Public Roads Report (1960).

63 Roberts v. Richland Irrigation Dist., 289 U. S. 71 (1933); see generally Economic Research Agency, op. cit. supra note 62, at 21-37.

64 People v. McReynolds, 31 Cal. App. 2d 219, 87 P. 2d 734 (1939); Denver Joint Stock Land Bank v. Board of County Comm'rs, 105 Colo. 366, 98 P. 2d 283 (1940); Gilmore v. State, 208 Misc. 427, 143 N. Y. S. 2d 873 (Ct. Cl. 1955).

only to lands abutting the highway or to nonabutting lands as well.[65] Thus, benefits that accrue to nearby lands that do not abut the highway are regarded as general benefits[66]; however, benefits that accrue to both those abutting lands, no part of which has been taken for the highway, and those that have been partially condemned are regarded as special benefits.[67] Severance damage studies, which analyze the market value development of highway severed remainder parcels, are designed to assist in the determination and measurement of special and general benefits; with respect to general benefits, however, a similar service may be provided by other economic impact studies which analyze the market value development of highway-affected communities.

Both general and special benefits may be set off in some States,[68] but only special benefits are deductible in a majority of States.[69] Setoff of both types has been held perfectly consistent with the property owner's right of full indemnification, and, accordingly, has been constitutionally sanctioned.[70] Historically, set off has been justified as an exercise of the power of taxation.[71] Setoff of general benefits has been disallowed primarily for two reasons. Such setoff has been regarded as an unjustly exacted payment from the owner of partially condemned property for benefits equally enjoyed by his neighbors without charge.[72] Such benefits have also been regarded as too speculative to be assessable as compensation.[73]

The rules of setoff further differ as to the elements of compensation from which benefits may be deducted. Except in two States, benefits are everywhere set off against severance damages to the remainder.[74] Under this rule, benefits are regarded as one of the elements enhancing the property's market value, only the depreciation of which is compensable.[75] On the other hand, several States prohibit the setoff of benefits against the value of the property taken.[76] It is primarily the requirement of many of these State constitutions that just compensation be made in money which precludes setoff against the value of the land taken.[77] Conversely, where setoff against the full compensation is

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65 Koelsch v. Arkansas State Highway Comm'n, 223 Ark. 529, 267 S. W. 2d 4 (1954); Louisiana Highway Comm'n v. Grey, 197 La. 942, 2 So. 2d 654 (1941); State ex rel. State Highway Comm'n v. Young, 324 Mo. 277, 23 S. W 2d 130 (1929); State Highway Comm'n v Bailey, 212 Ore. 261, 319 P. 2d 906 (1957). See also McRea v. Marion County, 222 Ala. 511, 133 So. 278 (1931); Board of Comm'rs v. Gardner, 57 N.M. 478, 260 P. 2d 682 (1953).

66 Louisiana Highway Comm'n v. Grey, 197 La. 942, 2 So. 2d 654 (1941).

67 State v. Smith, 237 Ind. 72, 143 N.E. 2d 666 (1957); State ex rel. State Highway Comm'n v. Young, 324 Mo. 277, 23 S. W. 2d 130 (1929).

68 See Appendix B, Columns A and C.

69 See Appendix B, Columns B and D.

70 McCoy v. Union Elevated R. R., 247 U. S 354, 365-66 (1918); Board of County Comm'rs v. Gardner, 57 N.M. 478, 260 Pac. 2d 682 (1953); Long v. Shirley, 177 Va. 401, 14 S.E. 2d 375 (1941).

71 Newby v. Platte County, 25 Mo. 258 (1857).

72 Louisiana Highway Comm'n v. Grey, 197 La. 942, 2 So. 2d 654 (1941); Petition of Reeder, 110 Ore. 484, 222 P. 724 (1924); Demers v. City of Montpelier, 120 Vt. 380, 141 A. 2d 676 (1958).

73 State v. Hudson County Bd. of Chosen Freeholders, 55 N. J. L. 88, 25 Atl. 322 (1892); Hempstead v. Salt Lake City, 32 Utah 261, 90 Pac. 397 (1907).

74 See Appendix B, Columns A, B, C and D.

75 Department of Public Works & Buildings v. Barton, 371 Ill. 11, 19 N.E. 2d 935 (1939). See Appendix B, Columns A, B, C, and D.

76 See Appendix B, Columns C, D, and E.

77 Kane v. City of Chicago, 392 Ill. 172, 64 N.E. 2d 506 (1946); In re Fourth Ave., 125 Misc. 133, 210 N.Y.S. 184 (Sup. Ct. 1925), rev'd on other grounds, 221 App. Div. 458, 223 N.Y.S. 525 (1927); Wray v. Knoxville, L.F. & J. R.R., 113 Tenn. 544, 82 S.W. 471 (1904). See Appendix B, Columns C and D.

allowed, it is regarded as the only just allocation of cost between the public treasury and the private property owner.[78]

Thus, in cases where part of a tract of land is taken by eminent domain, determination of the landowner's just compensation will be affected by the rules of setoff in any one of five different ways depending on the local law: (a) general and special benefits may be set off against both the value of the land taken and the severance damages to the remainder,[79] (b) general and special benefits may be set off only against the severance damages,[80] (c) only special benefits may be set off against the value of the land taken and the severance damages,[81] (d) only special benefits may be set off against the severance damages,[82] or (e) no benefits of any kind may be set off.[83] The cost of highway right-of-way acquisition, which necessarily involves much partial taking, is substantially affected by whichever setoff rule applies. This is illustrated by the varying amounts payable in the following hypothetical situation:

Original value	$200,000
Value of land acquired	80,000
Severance damage	20,000
Special benefit	40,000
General benefit	50,000

Prevailing Rule	Compensation Due Owner ($)
1. In some States, the amount payable to a landowner for land taken or damages to the remainder can be offset by any special and general benefits ($80,000 + $20,000 - $40,000 - $50,000 = $10,000)	10,000
2. In a number of States special benefits may be used to offset damages to the remainder only ($80,000 + 0 [$20,000 - $40,000] = $80,000)	80,000
3. In some States, special benefits may be applied against the cost of land acquired and damages to to the remainder ($80,000 + $20,000 - $40,000 = $60,000)	60,000
4. In some States, both special and general benefits may be deducted but only from any damage to the remainder ($80,000 + 0 [$20,000 - $40,000 - $50,000] = $80,000)	80,000
5. In two States no offset of benefits is permitted ($80,000 + $20,000 - 0 = $100,000)	100,000

Formulas for Computing Just Compensation

The several considerations incident to ascertaining the condemnee's just compensation in partial taking cases have resulted in two judicially created rules. Under the before-and-after method, the condemnation tribunal always appraises, according to

78 See Bauman v. Ross, 167 U. S. 548, 574-84 (1897). See Appendix B, Columns A and B.
79 See Appendix B, Column A.
80 See Appendix B, Column C.
81 See Appendix B, Column B.
82 See Appendix B, Column D.
83 See Appendix B, Column E.

the same principles previously discussed, the value of the entire tract of land before the partial taking.[84] Then, if no benefits are to be set off, it appraises the remainder without regard to any expected benefits.[85] However, if any benefits can be considered, the remainder is appraised in light of those anticipated benefits that can properly be set off.[86] The inherent shortcoming of this formula lies in its inability to segregate the value of the part taken from severance damages to the remainder. For this reason, it would seem inadequate where benefits are to be set off only against severance damages. Although the before value may be shown by comparable sales of similar property, the very nature of the severed remainder which abuts the highway after the taking may severely limit the available comparable sales evidence of the after value. However, severance damage studies, through their classification and compilation of the sales of similarly severed parcels, would provide such badly needed comparable sales evidence.

As an alternative, the value plus damages formula provides a much more complex but theoretically precise method of computing the condemnee's award in partial taking cases. Under this formula, the value of the part taken is separately appraised[87]; then the severance damages to the remainder are determined either as a separate sum[88] or in light of the benefits properly set off.[89] Where the damages have been separately computed, any permissible setoff benefits are assessed.[90] Then, the final award is computed by subtracting from the sum of the value of the land taken and the severance damages, or only from the latter as determined by local law, all properly set off and separately assessed benefits.[91] Severance damage studies, by focusing on the subsequent history of severed parcels, are especially geared to provide reliable indexes of both the damage and benefits resulting to the severed remainder from highway takings.

In a comparative appraisal, each of these formulas appears to have its own distinctive merits. Only the value-plus-damages rule recognizes and theoretically complies with the condemnee's constitutional and statutory rights to be compensated in money for land taken. However, the artificial and complex dichotomies of this formula make it inherently difficult to apply. Under it the same element of damage may be assessed in duplicate under different theoretical guises.[92] On the other hand, the before-and-after rule stands out for its simplicity of application and its inherent capacity to reflect in appropriate proportions the value of the land taken and the severance damages. Its main drawback is its inability to segregate the value of land taken from severance damages to assure compensation in money for the former.

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84 Hamer v. Iowa State Highway Comm'n, 250 Iowa 1228, 98 N. W. 2d 746 (1959); Barnes v. North Carolina State Highway Comm'n, 250 N. C. 378, 109 S. E. 2d 219 (1959); Johnson's Petition, 344 Pa. 5, 23 A. 2d 880 (1942).

85 Hamer v. Iowa State Highway Comm'n, 250 Iowa 1228, 98 N. W. 2d 746 (1959).

86 State v. Stoner, 271 Ala. 3, 122 So. 2d 115 (1960); Gabriel v. Cox, 130 Conn. 165, 32 A. 2d 649 (1943); Barnes v North Carolina State Highway Comm'n, 250 N C. 378, 109 S. E. 2d 219 (1959); Johnson's Petition, 344 Pa. 5, 23 A. 2d 880 (1942).

87 See People ex rel Dep't of Public Works v. Loop, 127 Cal. App. 2d 786, 274 P. 2d 885 (1954); State Highway Bd. v. Bridges, 60 Ga. App. 240, 3 S. E. 2d 907 (1939); Department of Public Works & Buildings v. Griffin, 305 Ill. 585, 137 N. E. 523 (1922).

88 See People ex rel Dep't of Public Works v. Schultz Co., 123 Cal. App. 2d 925, 268 P. 2d 117 (1954); State Highway Bd. v. Bridges, 60 Ga. App. 240, 3 S. E. 2d 907 (1939); State ex rel. State Highway Comm'n v. White, 254 S. W. 2d 668 (Mo. App. 1953); D' Angelo v. Director of Public Works, 152 A. 2d 211 (R. I. 1959).

89 See Department of Public Works v. Barton, 371 Ill. 11, 19 N. E. 2d 935 (1939); In re Appropriation for Highway Purposes, 93 Ohio App. 179, 112 N. E. 2d 411 (1952); State Highway Comm'n v Bailey, 212 Ore 261, 319 P. 2d 906 (1957).

90 See cases cited supra note 88.

91 See cases cited supra notes 88 and 89.

92 Sorensen v. Cox, 132 Conn. 583, 568-87, 46 A. 2d 125, 126 (1946).

Proof of Value

Applicability of the Rules of Evidence. —The concepts of value relating to just compensation and the formulas integrating them can be effectuated only insofar as the rules of evidence permit. Each time the power of eminent domain is exercised to take private property, the quantum of the owner's just compensation must be determined by an arbiter of the facts. State constitutions and statutes variously provide for this function to be performed by either a board of commissioners[93] or a common law jury.[94] The board of commissioners chosen for its peculiar skill and knowledge in property valuation is generally not bound by the rules of evidence.[95] Rather, its members are simply charged to appraise impartially and to the best of their skill and knowledge according to the substantive rules of valuation.[96] In contrast, the common law jury, not chosen for any special knowledge or skill, is for the most part bound by these rules.[97] Hence, in proof of the condemned property's value, the rules of evidence exclude from the jury's consideration any evidence that is not both competent in itself and material and relevant to this issue.[98] Severance damage studies by the very nature of their subject matter ought to be found both material and relevant to the issue of market value in partial taking cases; the evidentiary status of these studies might be challenged on the basis of competency. However, as discussed later, severence damage studies when properly conducted ought to be found sufficiently competent to be admitted as an exception to the hearsay rule.[99]

The Objective of Market Value Evidence. —Within the scope of these rules, certain types of evidence are commonly used and very strategic in proving the market value of condemned property. Market value is not simply an inherent quality of the property. It is largely a reflection of the state of mind of the public with respect to that property.[100] This state of mind is commonly proven by the opinions of qualified witnesses who testify what value they estimate the public would attach to the particular property taken or damaged by eminent domain. This state of mind is also frequently proven by deduction from the prices paid in recent sales of the same or similar property which are admitted as evidence of the market value. By virtue of the index of this state of the public mind which the severance damage studies are designed to provide, these studies ought to implement opinion testimony on the market value issue and provide a broader scope of sales evidence.

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93 For example, Alabama: Ala. Code Ann., tit. 19, §§4, 10-16 (1940) (with right to appeal to common law jury in trial de novo); Georgia: Ga. Code Ann., §36-401-36-403 (1933)(with right to appeal to common law jury in trial de novo); Missouri: Mo. Rev. Stat., §523.040 (1959) (with right to appeal to common law jury in trial de novo), Virginia: Va. Code, §33-63 (1950) (without right to appeal to common law jury in trial de novo).

94 For example, Arizona: Ariz. Const. art. 2, §23; Ariz. Rev. Stat Ann., §§1146-47 (1956); Florida: Fla. Const. art. 16, §29; Fla. Stat., §73.10 (1957); Illinois: Ill. Const. art. II, §13 (not applicable to the State); Ill. Rev Stat., c. 47, §1 (Supp. 1960) (applicable to the State); Massachusetts· Mass. Gen. Laws Ann., c. 79, §22, c. 80A, §9 (1958).

95 See Shoemaker v. United States, 147 U.S. 282, 303-06 (1893); In re Bronx Parkway Comm'n, 206 App. Div. 526, 202 N.Y.S. 249 (1923). But cf. Pruner v. State Highway Comm'r, 173 Va. 307, 4 S.E. 2d 393 (1939).

96 Shoemaker v. United States, 147 U.S. 282, 303-06 (1893).

97 City of Chicago v. Harbecke, 409 Ill. 425, 100 N.E. 2d 616 (1951).

98 Hance v. State Roads Comm'n, 221 Md. 164, 171, 156 A. 2d 644, 647 (1959).

99 See page 80.

100 Epstein v. Boston Housing Authority, 317 Mass. 297, 299, 58 N.E. 2d 135, 137 (1944).

Evidence of Other Sales

Actual sales of the condemned property not too remote from the valuation date and voluntarily bargained in good faith are admissible evidence of the property's market value.[101] This type of evidence is most strategic. Any prospective purchaser of land is bound to be influenced by the price recently paid for it in a voluntary and bona fide sale. The jury seeking to indemnify a property owner for his loss is naturally influenced by any price recently paid by him for the property. The mere fact that it is the identically same property precludes many of the distracting collateral issues which would otherwise arise.[102] Nevertheless, such evidence is not conclusive of the property's value at the time of taking.[103]

In contrast to evidence of recent sales of the condemned property, evidence of recent sales of property similar to the condemned land is usually much more available, but much less readily admissible. Although evidence of such sales is universally admissible to cross-examine opinion testimony,[104] a minority of four States prohibit its use as direct evidence of market value.[105] However, the law of the great majority favors the soundness of admitting such sales as direct evidence of market value. Thirty States expressly allow such sales as independent evidence of market value[106]; those of the remaining States, whose courts have considered this kind of evidence, all tend to give it some affirmative probative value[107] and there has been a noticeable change-over recently in which a number of former minority States have adopted the majority rule.[108]

Cogent reasons support the admissibility of such sales either as independent evidence of market value or in support of opinion testimony. Market value, the criterion of just compensation, is the price at which property sells in the open market. Such sales, when made under normal and fair conditions, are by their very nature, a more valid indication of market value than the speculative opinions of witnesses.[109] Thus, when offered in support of such testimony, sales evidence necessarily enhances the testimony, and when offered as independent evidence, provides a firm basis for any condemnation award that may ignore other kinds of evidence. Severance damage studies, insofar as they are based on comparable sales of severed parcels, ought to be accorded equally strong probative value.

The inherent drawback of evidence of recent sales of similar property is the multitude of collateral issues that each such sale raises. For each such sale proffered in evidence, the court often decides as preliminary questions of fact the numerous issues of comparability, proximity, and voluntariness discussed later. Furthermore, for each such sale

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101 Epstein v. City & County of Denver, 133 Colo. 104, 293 P 2d 308 (1956); Mississippi State Highway Comm'n v. Taylor, 237 Miss. 847, 116 So. 2d 757 (1960); In re Ohio Turnpike Comm'n, 164 Ohio St. 377, 131 N E. 2d 397 (1955) Cert. denied, 352 U. S. 806 (1957), B & K, Inc v. Commonwealth, 398 Pa. 518, 159 A. 2d 206 (1960).

102 Mississippi State Highway Comm'n v. Taylor, 237 Miss. 847, 853, 116 So. 2d 757, 760 (1960); cf. Eames v. Southern N. H. Hydro-Elect. Corp., 85 N. H. 379, 381-82, 159 Atl. 128, 129 (1932); State v. Peek, 1 Utah 2d 263, 271, 265 P. 2d 630, 636 (1953).

103 Epstein v. City & County of Denver, 133 Colo. 104, 108-09, 293 P 2d 308, 310 (1956).

104 State v. Peek, 1 Utah 2d 263, 273, 265 P. 2d 630, 637 (1953); e. g., Templeton v. State Highway Comm'n, 254 N. C. 337, 118 S. E 2d 918 (1961); Pittsburgh Terminal Warehouse & Transfer Co. v. Pittsburgh, 330 Pa. 72, 198 Atl. 632 (1938).

105 See Appendix C, Column D

106 See Appendix C, Column A

107 See Appendix C, Columns B and C.

108 For example, County of Los Angeles v. Faus, 48 Cal. 2d 672, 312 P. 2d 680 (1957); Redfield v. Iowa State Highway Comm'n, 251 Iowa 332, 99 N. W 2d 413 (1959); Village of Lawrence v. Greenwood, 300 N. Y. 231, 90 N. E. 2d 53 (1949).

109 Stewart v. Commonwealth, 337 S. W. 2d 880, 884 (1960); State v. Peek, 1 Utah 2d 263, 272, 265 P. 2d 630, 636 (1953).

admitted in evidence, the jury must decide wherein and to what extent the recently sold parcel differs from the condemned parcel, and make allowance for such difference in arriving at the latter's value.[110] The multitude of these collateral issues, especially when multiplied by the number of comparable sales introduced, may substantially impede the valuation procedure by their digressive effect. For this reason, the number of comparable sales admissible in any one case may be regulated by the court[111] and in four States such sales are not admissible in direct evidence at all.[112] As discussed previously, the admission of statistical surveys would require the court to determine, as a preliminary question of fact, whether the proper methodology had been followed in conducting the survey to establish its reliability as evidence. However, once this collateral issue is resolved, a much broader scope of comparable sales evidence is available to the jury.

Certain requirements of similarity and proximity restrict the admission of all such sales of similar property. The property sold must be sufficiently similar in character and geographically proximate to the condemned property to be useful in reflecting the latter's market value.[113] The exact degree of each qualification required in each case is largely determinable by the trial court within its discretionary power.[114] However, certain elements of similarity are almost universally demanded by the courts. Where nearness to schools, churches, transportation, and shopping centers substantially influences the value of property, only sales of property located a similar distance from these public facilities may be admissible as comparable.[115] Where the highest and best use of a tract of land is for agricultural purposes, sales of more distant property with soil of a similar character may be deemed sufficiently similar to be admissible.[116]

Where the condemned property has been adaptable for such a special highest and best use that sales of similarly adaptable property in the same community were not available, the requirement of geographical proximity has been largely abrogated.[117] For the same reasons, the market value of severed lands with a special highest and best use due to their adjacency and access to a major highway ought to be provable by the sales price of a comparable remainder in another community. Similarity in the topographical features, size, and shape of the two parcels is also considered.[118] If the individual sales compiled in severance damage studies were to be introduced in evidence, each such sale would be subjected to these same tests of comparability. However, if a survey of such sales made in a severance damage study were to be admitted in aggregate form, the comparability of the sales there included would be shown by an examination of those who conducted the survey on their methodology and criteria.

Furthermore, sales of similar land, to be admissible, must be so proximate in time to the date when the condemned property was taken as to furnish an indication of value at

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110 Forest Preserve Dist. v. Kean, 298 Ill. 37, 131 N. E. 117 (1921).

111 Stewart v. Commonwealth, 337 S. W. 2d 880, 883 (1960); State v. Peek, 1 Utah 2d 263, 273, 265 P. 2d 630, 637 (1953).

112 See Appendix C, Column D.

113 County of Los Angeles v. Faus, 48 Cal. 2d 672, 312 P. 2d 680 (1957); Department of Public Works & Buildings v. Drabnick, 14 Ill. 2d 28, 150 N. E. 2d 593 (1958); Application of Port of New York Authority, 28 N. J. Super. 575, 101 A 2d 365 (App. Div. 1953); State v. Peek, 1 Utah 2d 263, 265 P 2d 630 (1953).

114 Cases cited supra note 113.

115 See State ex rel Dep't of Highways v. Barber, 238 La. 587, 115 So. 2d 864 (1959).

116 See Gardner v. Brookline, 127 Mass. 358 (1879).

117 See Knollman v. United States, 214 F. 2d 106 (6th Cir. 1954) (suitable for industrial development).

118 Vann v. State Highway Dep't, 95 Ga. App. 243, 97 S. E. 2d 550 (1957); Stewart v. Commonwealth, 337 S. W. 2d 880 (Ky. 1960).

the latter date.[119] The permissible interval depends partly on the stability of market conditions and the availability of more recent sales, but is ultimately in each case determinable by the court within its broad discretionary power.[120] The timeliness of sales included in severance damage study surveys could easily be shown by the survey director's testimony.

Both recent sales of the condemned property and recent sales of similar property, to be admissible, must have been voluntary and bargained in good faith.[121] The requirement of voluntariness precludes evidence of sales wherein either party acted under any coercion. Thus, where the threat of condemnation or the need to sell out or purchase with undue haste has induced either party to consummate a sale, such a sale is not admissible evidence.[122] On this basis, a majority of the States exclude all sales to a condemnor or purchaser with the power of eminent domain.[123] To assure that such sales evidence reflects market value, only such sales as were bargained in good faith by both parties are admissible.[124] Thus, only sales made by parties capable and desirous of protecting their own interests are admissible. The voluntary and good faith nature of sales included in severance damage studies is one of the facts ascertained by those who conduct such studies. Thus, the exact degree of voluntariness and good faith common to all such sales included in any survey introduced in evidence could be ascertained by examining those who conducted the survey.

When a sale of similar property has been ruled admissible, it is merely deemed sufficiently similar to be helpful in evaluating the condemned property. Both parties are then entitled to introduce evidence of the differences between the two properties to show wherein and to what extent the condemned property's value is greater or lesser.[125] A severance damage study survey, when ruled admissible, might also on examination of the study director be shown to be based partly on dissimilar sales. Thus, the admission in evidence of such a survey would not preclude either party from showing wherein the condemned property's value should not be governed by the survey. However, severance damage studies by the breadth of their scope would weigh heavily against any speculative valuation of the condemned property.

When such sales are admitted as independent evidence of value, the sales price must be proven with as much formality as other material facts. Thus, only those who were parties or brokers to such sales, or who in some other manner knew of the price paid of their own knowledge, are competent to testify to the prices paid in such sales.[126] Accordingly, the mere recital of consideration in a deed and other hearsay sources of price information are not admissible.[127] However, the Federal revenue stamps affixed to real estate deeds have been admitted as evidence of the amount of consideration.[128]

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119 County of Los Angeles v. Faus, 48 Cal. 2d 672, 312 P. 2d 680 (1957); Application of Port of New York Authority, 28 N. J. Super. 575, 101 A. 2d 365 (App. Div. 1953)

120 Cases cited supra note 119

121 Epstein v. Boston Housing Authority, 317 Mass 297, 58 N.E 2d 135 (1944) (similar property); State ex rel. State Highway Comm'n v. Rauscher, 291 S. W. 2d 89 (Mo. 1956) (same property); Application of Port of New York Authority, 28 N. J. Super. 575, 101 A. 2d 365 (App. Div. 1953) (similar property); Thompson v. State, 319 S. W. 2d 368 (Tex. Civ. App. 1958) (same property).

122 Congregation of the Mission of St. Vincent de Paul v. Commonwealth, 336 Mass. 357, 145 N. E. 2d 681 (1957); Phelps v. State, 157 S. W. 2d 955 (Tex. Civ. App. 1942)

123 For example, Stewart v. Commonwealth, 337 S W. 2d 880 (Ky. 1960); Robards v. State, 285 S. W. 2d 247 (Tex. Civ. App. 1955). Contra, County of Los Angeles v Faus, 48 Cal. 2d 672, 312 P 2d 680 (1957).

124 Cases cited supra note 121.

125 Forest Preserve Dist. v. Kean, 298 Ill. 37, 131 N. E. 117 (1921)

126 United States v Katz, 213 F. 2d 799 (1st Cir.) Cert. denied, 348 U. S. 857 (1954); City & County of Denver v. Quick, 108 Colo. 111, 113 P. 2d 999 (1941)

127 Phelps v. State, 157 S. W. 2d 955 (Tex. Civ. App. 1942).

128 Redfield v. Iowa State Highway Comm'n, 251 Iowa 332, 99 N. W. 2d 413 (1959); cf. In re Ohio Turnpike Comm'n, 164 Ohio St. 377, 131 N. E. 2d 397 (1955). Contra, City & County of Denver v. Quick, 108 Colo. 111, 113 P. 2d 999 (1941).

Thus, the sales price information collected in severance damage studies would be reliable and, therefore, competent evidence so long as, in the conduct of the study, this information be taken from either interviews with parties to the transactions or, in some States, from the Federal revenue stamps on the deeds.

Opinion Evidence.—Historically, market value has been regarded by the courts as merely a matter of opinion.[129] To assist the condemnation jury in forming its opinion of the market value of property taken or damaged by the exercise of eminent domain, the opinion testimony of those with special knowledge relating to the property's value is admissible evidence.[130] Such opinion evidence, however, is merely advisory and, accordingly, not binding on the jury.[131]

Consistent with the rationale for the admissibility of all opinion testimony, such opinions may be given only by those possessed of some special knowledge or skill deemed valuable to the jury in forming its conclusion.[132] In condemnation proceedings, real estate experts are everywhere competent to give opinion testimony on the property's market value,[133] and in some States neighboring residents and businessmen are also competent to so testify.[134] Moreover, in addition to their respective special knowledge or skills, all condemnation value opinion witnesses must possess certain factual knowledge. They must all be both personally acquainted with the condemned property and personally familiar with the state of the market in that area.[135]

Those who have bought and sold, valued or managed real estate in the community are deemed to have acquired therefrom such skill in appraisal and such knowledge of property values as to be real estate experts competent to give opinion testimony.[136] Such experts must also have a personal knowledge of the condemned property and market conditions in the area. Accordingly, they must base their testimony on characteristics and conditions they have actually observed rather than on hypothetical conditions.[137] Only in the absence of a market value are specialized experts competent to give opinion testimony regarding the property's intrinsic value.[138] Real estate expert testimony has been regarded as the most practical medium of presenting to the jury the appraisal hypotheses on which either party seeks to have the condemnation award based.[139]

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129 See Montana Ry. v. Warren, 137 U. S. 349 (1890).

130 People v. Al. G. Smith Co., 86 Cal. App. 2d 308, 194 P. 2d 750 (1948); State v. Peterson, 134 Mont. 52, 323 P. 2d 617 (1958); Application of Port of New York Authority, 28 N. J Super. 575, 101 A. 2d 365 (App. Div. 1953).

131 State ex rel Dep't of Highways v. Hub Realty Co., 239 La 154, 118 So. 2d 364 (1960); Port of New York Authority v. Howell, 59 N J. Super. 343, 157 A. 2d 731 (Law Div. 1960).

132 Blount County v. Campbell, 268 Ala. 548, 109 So. 2d 678 (1959); State ex rel. State Highway Comm'n v. Devenyns, 179 S. W. 2d 740 (Mo. App. 1944).

133 For example, Shelby County v. Baker, 269 Ala. 111, 110 So. 2d 896 (1959); Department of Public Works & Buildings v. Pellini, 7 Ill. 2d 367, 131 N. E. 2d 55 (1955); Muzi v. Commonwealth, 335 Mass. 101, 138 N. E. 2d 578 (1956).

134 For example, State v. McDonald, 88 Ariz. 1, 352 P 2d 343 (1960); Southwick v. Massachusetts Turnpike Authority, 339 Mass. 666, 162 N. E 2d 271 (1959); Taney County v. Addington, 304 S. W. 2d 842 (Mo. 1957); South Carolina State Highway Dep't v. Hines, 234 S. C. 254, 107 S. E. 2d 643 (1959).

135 Shelby County v. Baker, 269 Ala 111, 110 So. 2d 896 (1959); Lazenby v. Arkansas State Highway Comm'n, 231 Ark. 601, 331 S. W. 2d 705 (1960), Forest Preserve Dist. v. Krol, 12 Ill. 2d 139, 145 N. E. 2d 599 (1957); State ex rel. State Highway Comm'n v. Devenyns, 179 S. W. 2d 740 (Mo. App. 1944)

136 See cases cited supra note 133

137 Chicago & W. I. R. R. v. Heidenreich, 254 Ill. 231, 239-40, 98 N. E. 567, 571 (1912).

138 See Eisenring v. Kansas Turnpike Authority, 183 Kan. 774, 332 P. 2d 539 (1958); Newton Girl Scout Council v. Massachusetts Turnpike Authority, 335 Mass, 189, 138 N. E. 2d 769 (1956)

139 Application of Port of New York Authority, 28 N. J. Super. 575, 579, 101 A 2d 365, 367 (App. Div. 1953).

Both severance damage studies and other economic impact studies would provide a means of testing such a witness's expertise in appraising highway-affected property.

In a majority of jurisdictions, neighboring residents and businessmen are deemed competent to give opinion testimony.[140] This competence is premised on the special familiarity with local real estate values which they are presumed to have acquired by their long-standing activity and interest in the area.[141] Such lay witnesses are not deemed to possess any special appraisal skill; rather, it is their special familiarity with local values that qualifies them to give value opinion testimony.[142]

The speculative nature of such testimony is perhaps best illustrated by a recent Missouri highway condemnation case[143] in which the only opinion witnesses on value were two neighboring farmers. An award of $400 was determined by commissioners. Both parties appealed to the Circuit Court for a jury trial. On the before-and-after basis, one farmer's testimony would have warranted a $4,725 award, and the other's testimony, a $2,500 award. Apparently influenced by these lay witnesses, the jury awarded $2,000. Where there are no available real estate experts familiar with the condemned property and values in its surrounding area, such lay witnesses may be the only available means of proving value. In such a situation, severance damage studies ought to provide both a ready selection of sales of comparably severed parcels and a more reliable index of the remainder's value through survey evidence. Furthermore, any economic impact studies relating to the area of the condemned property might be used to cross-examine the lay witness on his knowledge of local real estate values.

The owner of the condemned property is deemed competent to give his opinion of the property's value by virtue of the knowledge of it which he is presumed to have as owner.[144] Although this type of testimony is competent as a matter of law, the condemnee's natural bias has been said to derogate from the weight a jury would otherwise accord to it. For this reason, it has been suggested that such testimony serves little more than to enable the owner to present his claim personally to the jury.[145] Cross-examination on the basis of severance damage studies ought to both substantiate any reasonable claims expressed in testimony by such an owner and delineate the true nature of any speculative claims proffered by him.

All opinion testimony on the condemned property's value must be based on the substantive rules of valuation previously discussed.[146] In support of his opinion, the condemnation value witness should on direct examination give the facts on which it is

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140 E.g., Shelby County v. Baker, 269 Ala. 111, 110 So. 2d 896 (1959); State v. McDonald, 88 Ariz 1, 352 P. 2d 343 (1960); Taney County v. Addington, 304 S.W. 2d 842 (Mo. 1957); South Carolina State Highway Dept. v. Hines, 234 S.C. 254, 107 S.E. 2d 643 (1959).

141 State v. McDonald, 88 Ariz. 1, 352 P. 2d 343 (1960).

142 Shelby County v. Baker, 269 Ala. 111, 110 So. 2d 896 (1959); South Carolina State Highway Dept. v. Hines, 234 S.C. 254, 107 S.E. 2d 643 (1959).

143 Taney County v. Addington, 304 S.W. 2d 842 (Mo. 1957).

144 E.g., Arkansas State Highway Comm'n v. Covert, 338 S.W. 2d 196 (Ark. 1960); Randle v. Kansas Turnpike Authority, 181 Kan. 416, 312, P. 2d 235 (1957); Southwick v. Massachusetts Turnpike Authority, 339 Mass. 666, 162 N.E. 2d 271 (1959). Contra Green v. State Bd. of Pub. Rds. 50 R.I 489, 149 Atl. 596 (1930).

145 Besen v. State, 17 Misc. 2d 119, 130, 185 N.Y.S. 2d 495, 504 (Ct. Cl. 1959).

146 Indianapolis & Cincinnati Traction Co. v. Wiles, 174 Ind. 236, 91 N.E. 161 (1910); see Mississippi State Highway Comm'n v. Hillman, 189 Miss. 850, 198 So. 565 (1940); City of Houston v. Fisher, 322 S.W. 2d 297 (Tex. Civ. App. 1959).

based.[147] These facts indicate the extent of the witness's familiarity with the condemned property. This familiarity naturally affects the weight the jury will accord to the testimony. Such supporting evidence has been held indispensable to sustain the opinion.[148] The reasons or general principles on which the opinion is based may also be given on direct examination,[149] even though they are frequently left to be extracted on cross-examination. Severance damage study surveys and other economic impact studies help to provide facts on which the expert opinion witness can rely.

The supporting data to which the opinion witness testifies must be relevant and competent.[150] Thus, the opinion witness, with few exceptions,[151] can testify on direct examination only to such data as would be admissible as independent evidence. However, the hearsay rule has been somewhat relaxed in its application to the supporting data offered by expert opinion witnesses.[152] The Oregon Supreme Court seems to have fashioned another exception to the hearsay rule. They have held that a real estate appraiser may properly introduce as supporting evidence for his expert opinion reports made by other investigators which he deems reliable.[153] Other courts have indicated a similar inclination.[154] Severance damage studies and other economic impact studies would seem to qualify under such a hearsay exception. The need for a hearsay exception to allow the use of these studies as evidence is discussed in the next section of this report.

ANALOGIES TO OTHER FIELDS OF LAW

The need to improve the means for ascertaining measures for fair compensation has already been described. The conventional rules governing the admissibility of evidence in such cases have not responded as rapidly as the changes in evidentiary practice in other fields of law. Graphic illustrations of avoidance of the use of many types of economic facts in the courtroom in highway condemnation proceedings are apparent when the court is confronted with making decisions pertaining to compensation for remainders in partial takings, evaluation of benefits or damages resulting therefrom, predictions of possibilities and probabilities of the effects of partial takings on remainders. Ways and means of ascertaining the answers for the problems posed, and related problems, have not been available because of the exclusionary rules of evidence preventing the use of certain kinds of research evidence in highway cases. The difficulties engendered in obtaining the admission of such evidence has probably resulted from a lack or shortage of economic factual data needed to make and support land valuations. What is needed is a simplification and liberalization of the exclusionary rules so as to permit the accessibility to research evidence, thereby allowing more extensive reference to and reliance

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147 Johnson's Petition, 344 Pa. 5, 23 A. 2d 880 (1942); L'Etoile v. Director of Public Works, 153 A. 2d 173 (R. I. 1959).

148 State Highway Comm'n v. Byars, 221 Ark. 845, 256 S. W. 2d 738 (1953).

149 People v. Al. G. Smith Co., 86 Cal. App. 2d 308, 194 P. 2d 750 (1948); Hance v. State Roads Comm'n, 221 Md. 164, 156 A. 2d 644 (1959); Fox-Wisconsin Theatres, Inc. v. City of Waukesha, 253 Wis. 452, 34 N. W. 2d 783 (1948).

150 City & County of Denver v. Quick, 108 Colo. 111, 113 P. 2d 999 (1941); State ex rel. State Highway Comm'n v. Dockery, 300 S. W. 2d 444 (Mo. 1957).

151 In some jurisdictions (see Appendix C, Column B) comparable sales are admissible in support of opinion testimony on market value, even though not admissible as independent evidence.

152 See Covina Union High School Dist. v. Jobe, 174 Cal. App. 2d 340, 345 P. 2d 78 (1959); Newton Girl Scout Council v. Massachusetts Turnpike Authority, 335 Mass. 189, 138 N. E. 2d 769 (1956); Tennessee Gas Transmission Co. v. Maze, 45 N. J. Super. 496, 133 A. 2d 28 (App. Div. 1957); State Highway Comm'n v. Arnold, 218 Ore. 43, 341 P. 2d 1089 (1959); City of Houston v. Huber, 311 S. W. 2d 488 (Tex. Civ. App. 1958).

153 State Highway Comm'n v. Arnold, 218 Ore. 43, 341 P. 2d 1089 (1959).

154 See Stewart v. Commonwealth, 337 S. W. 2d 880, 885 (Ky. 1960); Tennessee Gas Transmission Co. v. Maze, 45 N. J. Super. 496, 504, 133 A. 2d 28, 32 (App. Div. 1957).

on data obtained by land economic studies, statistical surveys, samples, and opinion polls as aids to courts in ascertaining the economic facts relevant to the determination of land valuations.

Despite the frequent exclusion of research evidence as a device for evaluating land in condemnation proceedings, judicial recognition and acceptance of certain types of research evidence have occurred in various areas of litigation which may be applicable to eminent domain cases. Statistical data, summarized in census and other reports, mortality and annuity tables, are judicially noticed and have been admitted into evidence at times without a showing of the trustworthiness of the report or table. Various fields of commercial law, both private and public, have resorted to the findings of economic research. Market reports and price lists are admitted as evidence determining the value of personal property. Authoritative works of scholarship, traffic surveys, and socioeconomic data are admitted into the courts as independent evidence.

The intention of this section of the report is to point the way toward the admission of similar research evidence in condemnation proceedings. "Law is a progressive thing. It is an expansive thing, adapting itself to new relations and interests of men. They are constantly springing up in the progress of society. But this progress must be by analogy to what is already settled."[155] Analogy, then, is the keystone of this section, for if economic data can be admitted in the form of census reports and statistical tables and used as a yardstick for determining the value of personal property, it is suggested here that these data are usable as independent evidence, and as circumstantial evidence where necessary, on which the expert can rely in determining land valuations.

The emphasis of this section, therefore, is to present the state of the law and practice in the admission and use of research evidence in various types of cases and to advocate its use in condemnation proceedings. In an earlier section of this report, the applicability of various kinds of evidence in condemnation proceedings was discussed. Parallel to a study of this nature are (a) a consideration of the best methods of preparation and presentation of research evidence, (b) a formulation of standards to guide lawyers and courts in the presentation of economic research findings of various kinds, (c) an analysis of widely differing situations where economic research is germane, and their classifications, (d) and the limits of economic research in courts of law. These topics will be touched on only indirectly because they are not the principal subject of this study.

The doctrines of evidence, their applications, and the decisions stating them are as the sands of the sea. It is for this reason that the treatment in this section on the admissibility of research evidence in the courtroom is highly selective and demonstrative, with no pretensions to completeness. The objective is to furnish the appraiser and the lawyer with a starting point in improving measures of determining land values, so that the landowner whose property is taken or damaged will receive fair compensation. The admission of the results of economic research is one direction in which improvement may be made; hence, a study of its use in the areas of law where it is accepted, and an understanding of its application is indispensable to recommending its use in condemnation proceedings.

Admissibility and Use of Research Evidence

Fact finding is the pillar on which all judicial applications of law depend.[156] Ascertaining facts is not always limited to the determination of facts and circumstances within the knowledge of a relatively small group; namely, the parties to the action and their supporting witnesses. Frequently, complex issues in dispute compel recourse to an almost boundless group from which information is collected, analyzed, and summarized in order to make generalizations that are reflected in statistical tables or series. Whether this type of factual statistical data is hearsay,[157] and if so, whether necessity or prac-

155 Seminar on Protracted Cases, 23 F. R. D. 319, 449 (1959).

156 See Note, Geo. Wash. L. Rev., 20:211 (1951).

157 "Hearsay evidence is testimony in court or written evidence of a statement made out of court, such testimony being offered as an assertion to show the truth of matters asserted therein; and, thus, resting for its value upon the credibility of the out of court asserter." McCormick, Evidence §225 (1954).

tical convenience provides sufficient justification for excepting it to the tenets of the hearsay rule is a matter begging judicial decision.

Admission or refusal of such hearsay data, or the accepting of some hearsay evidence while rejecting other, is based on judicial recognition that hearsay is not all more or less alike, or amenable to being dealt with in a simple or uniform manner. There are many types of hearsay evidence[158]; they are as numerous and as variegated as the types of communication, ranging from third-stage rumors to sworn affidavits of credible observers.[159] Correspondingly, its trustworthiness scales from utter worthlessness to the highest reliability, depending on the human frailties of perception, memory, and veracity. Such recognizance concedes that evidence is not taboo merely because of its hearsay nature but is contingent for its admission on the court's determination of its reliability.

Only two types of statistical or survey data are unquestionably admitted as independent evidence for the truth of the matter asserted therein.[160] These two surveys are the United States Census reports based on samples as well as complete enumerations,[161] and mortality tables[162] used in computing annuities, life insurance sums, dower, and damages for loss of life. In addition to their admission into evidence, they may also be, and frequently are, judicially noticed by the court,[163] thereby dispensing with all

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158 Id. at 301.

159 Id. at 224.

160 Zeisel, "The Uniqueness of Survey Evidence," Cornell L. Q., 45: 322 (1959); McCormick, op. cit. supra note 157, §296.

161 13 U. S. C. 195 (1958).

162 Turcotte v. DeWitt, 332 Mass. 160, 124 N. E. 2d 241 (1955). Trauttoff v. Dannen Mills, Inc., 316 S. W. 2d 866 (Mo App. 1958); Continental Oil Co. v. Elias, 307 P. 2d 849 (Okla. 1956).

163 State census reports are also judicially noticed in the States of their origin, but reference here will only be made to the United States census reports.

Alabama: Pickens County v Jordan, 239 Ala. 589, 196 So. 121 (1940)

Arizona: Hernandez v. Frohmiller, 68 Ariz. 242, 204 P. 2d 854 (1949).

California: People ex rel. Stoddard v. Williams, 64 Cal. 87, 27 Pac. 939 (1883).

Colorado: In re Constitutionality of Senate Bill No. 293, 21 Colo. 38, 39 Pac. 522 (1895).

Florida: Budget Comm'n v. Blocker, 60 So. 2d 193 (Fla. 1952).

Georgia: Tift v. Bush, 209 Ga. 769, 75 S. E. 2d 805 (1953).

Idaho: City of Turh Falls ex rel. Cannon v. Koehler, 63 Idaho 562, 123 P. 2d 715 (1942).

Illinois: Coal Creek Drainage Levee Dist. v. Sanitary Dist., 336 Ill. 11, 167 N. E. 807 (1929).

Indiana: Goves v. Board of Comm'rs, 199 N. E. 137 (Ind. 1936).

Iowa: State v. Braskamp, 87 Iowa 588, 54 N. W. 532 (1893).

Kansas: Sparks v. Sparks, 301 Ky. 576, 1922 S. W. 2d 724 (1946).

Mississippi: Ross v. Morrimac Veneer Co., 129 Miss. 693, 92 So. 823 (1922).

Missouri: State v. Public Serv. Comm'rs, 334 Mo. 985, 70 S. W. 2d 52 (1934).

Montana: Hill v. Rae, 52 Mont. 348, 158 Pac. 826 (1916).

Nebraska: Kokes v. State, 55 Neb. 691, 76 N. W. 467 (1898).

New Jersey: Michaels v. Johnson, 33 N. J Super. 77, 109 A. 2d 452 (1954).

New York: Taylor v. City of White Plains, 206 Misc. 946, 135 N. Y. S. 2d 773 (Sup. Ct. 1954)

North Carolina: Clark v. City of Greenville, 221 N. C. 255, 20 S. E. 2d 56 (1942).

Oklahoma: Jones v. Freeman, 193 Okla. 554, 146 P. 2d 564 (1943), appeal dismissed, 322 U S. 717 (1944).

Oregon: Smith v. Jefferson, 75 Ore. 179, 146 Pac. 809 (1915).

Pennsylvania: Commonwealth v. Walter, 274 Pa. 553, 118 Atl. 510 (1922).

South Carolina: Richards v. City of Columbia, 227 S. C. 538, 88 S. E. 2d 683 (1955).

evidence to prove those facts contained therein. Even if admitted into evidence, it is usually not necessary for the party proffering them to make a preliminary showing as to their source, methods of compilation, authenticity, or reliability.[164]

Census reports have been explained by the courts to hold such status of admissibility, withheld from others, because of the confidence commanded from the disinterested character of its operation, the trustworthiness and reliability in its expertness, and the impossibility of verifying information obtained by interviewers because of such information being privileged.[165]

Texas: L. E. Whitman & Co. v. Allen, 64 S. W 2d 1024 (Tex. Civ. App. 1933).
Virginia: Shelton v. Sydnor, 126 Va. 625, 102 S. E. 83 (1920).
Washington: State v. Smith, 149 Wash. 173, 270 Pac. 306 (1928), judgment adhered to on rehearing, 155 Wash. 173, 284 Pac. 796 (1930).
Wisconsin: Grimm v. Bayfield County, 174 Wis. 43, 182 N. W. 466 (1921).

Mortality tables:

Alabama: Great So. Ry. v. Norrell, 225 Ala. 503, 143 So. 904 (1932).
California: Froeming v. Stockton Elec. Ry., 171 Cal. 401, 153 Pac. 712 (1915).
Connecticut: Strakosch v. Connecticut Trust & Safe Deposit Co., 96 Conn. 471, 114 Atl. 660 (1921).
Florida: Harvey v. Rhea, 152 Fla. 817, 12 So. 2d 302 (1943).
Illinois: Muhlke v. Tiedemann, 280 Ill. 534, 177 N. E. 708 (1917).
Indiana: Dallas & Mavis Forwarding Co. v. Hiddell, 126 Ind. App. 113, 126 N. E. 2d 18 (1955).
Kansas: Knoche v. Meyer Sanitary Milk Co., 177 Kan. 423, 280 P. 2d 605 (1955).
Kentucky: Morris v. Morris, 293 S. W. 2d 243, 245 (Ky. 1956): "We think that we may fairly judicially note the Federal Government's preoccupation with a collection of statistics concerning all vital matters, not only mortality, but also pertaining to such subjects as agriculture, mining, cost of living, etc., and we also recognize the general acceptance by all people of the thorough and workmanlike job which has been done over a long period of years by various federal agencies to such an extent that many wage contracts have geared the rise and fall of wages and salaries to the rise and fall of the cost of living indices. We know of no more accurate measurement."
Michigan: Tandy v. Knox, 313 Mich. 147, 20 N W. 2d 844 (1945).
Missouri: Selle v. Selle, 337 Mo. 1234, 88 S. W. 2d 877 (1935).
Montana: Stephens v. Elliott, 36 Mont. 92, 92 Pac. 45 (1907).
New Jersey: Berry v. President & Directors of the Bank of Manhattan Co., 133 N. J. Eq. 164 (1943).
North Dakota: Guer v. Ryaden, 74 N. W. 2d 361 (N. D 1955).
Oregon: Shelton v. Lowell, 196 Ore., 430, 249 P. 2d 958 (1952).
Washington: McTerran v. Heroux, 77 Wash. 2d 631, 269 P. 2d 815 (1954).
West Virginia: Drake v. Clay Hardware & Supply Co., 157 S. E. 35 (W. Va. 1931).

[164] Keast v. Santa Ysabel G. M. Co., 136 Cal. 256, 259, 68 Pac. 771, 772 (1902): "The court may or may not require such preliminary proof of standard acceptance according to its judgment of the need therefor."; Valente v. Sierra Ry., 151 Cal. 534, 91 Pac. 481, 484 (1907): "In some courts it is said that such tables are admissible after proper preliminary proof of their authenticity and standard quality. Such proof in this case was not made, but the general weight of authority is to the contrary, and permits the introduction of such tables as are satisfactory to the court. Such a ruling is founded upon the theory that the court may take judicial notice of standard tables."; Hann v. Brooks, 331 Ill. App. 535, 549, 73 N. E. 2d 624, 630 (1947): "A showing that the tables are used by reputable life insurance companies is sufficient to establish their status as standard authorities." But see Banks v. Braman, 195 Mass. 97, 80 N. E. 799 (1907).

[165] Zeisel, op. cit. supra note 160, at 325.

Mortality tables have been admitted on the general principle that they are founded on "certain and constant" data, and deal with "exact sciences."[166] Such a reason seems to imply that every collection of figures that savors of the exact sciences is sufficient to be admitted, but present day practices discredit such a notion. The more plausible reason for their admission to the exclusion of others is that the admission of this collection of data is demanded by custom and practical convenience, and is relied on by those members of the general public who are interested in such data.[167] Consequently, the judicial mind relented to its use in the absence of a better yardstick for its problem-solving tasks.[168]

The admissibility of standard tables or reports of scientific calculations of all sorts as discovered in severance damage studies, economic impact studies, and other research results may in some circumstances be argued for on the analogy of this exception for U.S. Census reports and mortality tables.[169] It is doubtful, however, whether such a general rule can be regarded as established on the basis of the admission of such data, but there are some decisions that seem to suggest that trend.[170]

Recognition as being within an exception to the hearsay rule is also given to certain commercial and professional lists and reports; namely, market reports, price lists, and quotations contained in newspapers and trade journals.[171]

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166 6 Wigmore Evidence §1698 (3d ed. 1940).

167 Ibid.

168 See cases cited in note 163.

169 See 6 Wigmore Evidence §1698 (3d ed. 1940).

170 See e.g., Hultberg v. Phillippi, 169 Kan. 610, 220 P. 2d 208 (1950) (motor vehicle speed chart admitted); Whalen v. Town Plan & Zoning Comm, 146 Conn. 321, 150 A. 2d 312 (1959) (traffic reports showing the heaviest traffic in an area admitted without comment as to its admissibility); Bruner v. McCarthy, 105 Utah 399, 142 P. 2d 649 (1943), in which exhibit containing a compilation of figures prepared by expert, based on mortality annuity tables for purpose of showing what amount of money it would be necessary to invest at various interest rates to pay an individual specified amounts per year for 35 years, admitted. But see Sloan v Carolina Power & Light Co., 248 N. C. 125, 102 S.E. 2d 822 (1958) (table of Nat'l Elec. Safety Code issued by U. S. Dept. of Commerce, Bureau of Standards, excluded).

For a discussion of the admissibility of commercial and professional lists, see discussion below; for a discussion of the admissibility of interest tables, etc., see 6 Wigmore Evidences §1642 (3d ed. 1940). See United States v. Mortimer, 118 F. 2d 266 (2d Cir.), cert. den., 314 U.S. 616 (1941), in which the court upheld, in a prosecution for using and conspiring to use the mails to defraud, the admission of a number of charts purporting to show defaults in the payment of taxes on a high proportion of certain mortgaged properties which had been prepared by a prosecution witness, an experienced public accountant, and the reliability of which was not questioned, even though the tax records were not themselves in evidence and all those who participated in their preparation did not testify; San Francisco v. Superior Court of San Francisco, 38 Cal. 2d 156, 238 P. 2d 581 (1951), in which the court issued a writ of prohibition to restrain enforcement of an order for the inspection of documents and data claimed to be the records of official proceedings conducted by the Civil Service Commission of San Francisco, which included a wage rate survey in which the commission solicited information from private employers on the written promise and agreement with each that the source of all information supplied would be held in confidence and that the wage scales and other data would not be identified except by a code known only to the commission, such survey being made necessary by the municipal employees in accord with the generally prevailing wages for like service conditions in private employment.

171 See generally, 6 Wigmore Evidence §1702, 1704 (3d ed. 1940); McCormick, Evidence § 296 (1954); Comment, 45 Mich. L. Rev. 748 (1947); Note, 39 Harv. L. Rev. 885 (1926)

Alabama: Farm Industries Div. of Quaker Oats Co. v. Howell, 39 Ala. App. 131, 95 So. 2d 808 (1957).

> These documents may be described as privately printed documents published for the use of the trade or profession, or public generally, containing statements of contemporaneous facts which are accepted as reliable and acted upon by persons to whom they are furnished, and attaining currency solely because of the accuracy of their statements.[172]

Their admission in some cases is based on judicial principles[173]; in others, statutory mandates[174] that, in most instances, have carried out hints originally given by the courts.

Arizona: Atlantic Nat'l Bank v. Korrick, 29 Ariz. 486, 242 Pac. 1009 (1926).
Arkansas: St. Louis & S. F. R. R. v. Pearce, 82 Ark. 353, 101 S. W. 760 (1907).
Colorado: Estes v. Denver & R. G. R. R., 49 Colo. 378, 113 Pac, 1005 (1910).
Connecticut: State v. Pambianchi, 139 Conn. 543, 95 A. 2d 695 (1953).
Georgia: Columbian Peanut Co. v. Pope, 69 Ga. App. 26, 24 S. E. 2d 710 (1943).
Idaho: State v. Jensen, 47 Idaho 785, 280 Pac. 1039 (1929).
Illinois: Nash v. Classen, 163 Ill. 409, 45 N. E. 276 (1828).
Kansas: Webbler v. Umback, 125 Kan. 117, 263 Pac. 786 (1928).
Louisiana: Freedman Iron & Supply Co. v. J. B. Beaird Co., 222 La. 627, 63 So. 2d 144 (1952)
Maine: Washington Ice Co. v. Webster, 68 Me. 463 (1878).
Maryland: Jones v. Ortet, 114 Md. 205, 78 Atl. 1030 (1910).
Michigan: Sisson v. Cleveland & T. R. R., 14 Mich. 489 (1866).
Mississippi: Dearborn Motors Credit Corp. v. Henton, 221 Miss. 643, 74 So. 2d 739 (1954).
Missouri: Bailey v. St. Louis & S. F. Ry., 209 S. W. 630 (Mo. App. 1927).
Nebraska: Allender v. Chicago & N. W. Ry., 119 Neb. 559, 230 N. W. 102 (1930).
New Jersey: State v. Carrano, 27 N. J. Super. 382, 99 A. 2d 426 (1953) (criminal case recognizing the rule).
New Mexico: Johnson v. Nichols, 66 N. M. 181, 344 P. 2d 697 (1959).
New York: Whelan v. Lynch, 60 N. Y. 469 (1875); Watts v. Phillips-Jones Corp., 211 App. Div. 523, 207 N. Y. S. 493 (1925), FF'd, 242 N. Y. 557, 152 N. E. 425 (1926).
North Carolina: Commander v. Smith, 192 N. C. 159, 134 S. E. 412 (1926).
North Dakota: Schnitz Bros. v. Bolles & Rogers Co., 48 N. D. 673, 186 N. W. 96 (1922).
Pennsylvania: Bounomo v. United Distiller's Co., 77 Pa. Super. 113 (1921).
Rhode Island: National Cash Register Co. v. Underwood, 56 R. I. 379, 185 Atl. 909 (1936), which recognized the rule but held that price list prepared and extended by company for exclusive reference by its salesmen, and not in any way to be used as a price quotation to the public for actual sale, was not probative evidence of value of that commodity in an open competitive market.
South Carolina: Kirkpatrick v. Hardeman, 123 S. C. 21, 115 S. E. 905 (1923).
Texas: Houston Packing Co. v. Spivey, 333 S. W. 2d 423 (Tex. 1960); Allen v. Payne, 334 S. W. 2d 607 (Tex. Civ. App. 1960).
Utah: Baglin v. Earl-Eagle Mining Co., 54 Utah 572, 184 Pac. 190 (1919).
Washington: Cron & Dehn, Inc., v. Chelan Packing Co., 258 Wash. 167, 290 Pac. 999 (1930).
Wyoming: Atlantic Nat'l Bank v. Korrick, 29 Wyo. 468, 242 Pac. 1009 (1926).
Contra, Massachusetts: Doherty v. Harris, 230 Mass. 341, 119 N. E. 863 (1918).

[172] Note, 39 Harv. L. Rev. 885 (1926).

[173] See cases cited supra note 171; see generally, 6 Wigmore Evidence §1702 (3d ed. 1940).

[174] Code of Ala. ch. 7, 385 (1958); Ky. Rev. Stat. ch. 355, §2-724 (1960); Mass. Gen. Laws Ann. ch. 106, §2-724 (1958) (but see Code Comment at the end of section; 6 Wigmore, Evidence, §1704 (3d ed. 1940). For a statement of Massachusetts law see Doherty v. Harris, 230 Mass. 341, 119 N. E. 863 (1918); N. D. Century Code ch. 32, §25-04 (1960); Pa. Stat. ch. 12 A, s2-724 (1954).

Such data are deemed to be competent evidence of the state of the market and sufficient for informing courts of justice as to market value, because they are based on a general survey of the whole market and are constantly received and acted on by persons who transact commercial operations on the faith of them.[175] Their trustworthiness is found in the fact that these commercial lists are prepared for use by the trade or profession, and are, therefore, habitually made with meticulous care and accuracy to make them reliable for business and commercial purposes. Trustworthiness is also found in the considerations that the composers and writers of these reports and lists know beforehand that their work will have no commercial or professional market value unless they are found to have their customary accuracy, and that their inaccuracies will more than likely be discovered. Moreover, there are no motives to deceive its users. The constant use of such reports and lists also test the accuracy of such works and sanction their reliability.[176]

Unlike census reports and mortality tables, market reports and price lists have not enjoyed the status of being universally admitted as an exception to the hearsay rule without attached qualifications.

An appreciable number of States follow the Michigan rule[177] requiring some evidence to show either how the trade journal or newspaper obtains its information or that those dealing in the trade or profession rely on such newspaper or journal for information as to market value. A few courts have yet to depart from the application of the strict New York rule,[178] later modified,[179] requiring a prior showing of source and method of compilation. Such a requirement calling for a preliminary showing of source can present almost insuperable problems of proof in cases where the market value at a distant point is in issue, and it becomes necessary to use documents that originated at that point, or when the market report covers a large region or even the whole country.[180] Finally, several jurisdictions have consistently admitted documentary evidence as to market value without a decision as to the necessity of a prior showing of trustworthiness; many of these decisions are accompanied by language that raises the question whether any such foundation was laid or was required to be laid.[181]

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175 See e.g., Sisson v. Cleveland & T R.R., 14 Mich. 489 (1866).

176 See generally 6 Wigmore Evidence §§1702, 1704 (3d ed 1940).

177 For a statement of the rule, see Sisson, supra note 21, at 496 This approach was formulated best in Mount Vernon Brewing Co. v. Teschner, 108 Md 158, 69 Atl. 502 (1908), accord, Fairley v. Smith, 87 N C. 367 (1882). Instead of giving an option as permitted by the Michigan rule, some courts require a showing that the document is relied on by the trade dealing in the particular article or commodity in question. See e.g., Johnson v. Nichols, 66 N.M. 881, 344 P. 2d 697 (1959). See generally 45 Mich. L. Rev. 748 (1947), 6 Wigmore, op. cit. supra note 176.

178 The New York rule originated in Whelan v Lynch, 60 N.Y. 469, 474 (1875) It is followed in Fishel v F M. Ball & Co., 83 Cal. App. 128, 256 Pac. 493 (1927); Willard v. Mellor, 19 Colo 534, 36 Pac 148 (1894); Fountain v. Wabash Ry., 114 Mo. App. 676, 90 S.W.393 (1905). Schnitz Bros. v. Bolles & Rogers Co., 48 N D. 673, 186 N W. 96 (1921); Baglin v. Earl-Eagle Mining Co., 54 Utah 572, 184 Pac. 190 (1919)

179 In Burns Mfg. Co. v. Clinchfield Products Corp., 189 App. Div. 569, 178 N.Y.S. 483 (1919), the court adopted a test of general reliance without commenting on Whelan. In Watts v. Phillips-Jones Corp., 211 App. Div. 523, 207 N Y.S 493 (1925), the court also applied the test of general reliance, and modified Whelan by stating that a showing of source and method of compilation was not the only basis for qualifying a document. In von Rectzenstein v. Tomlinson, 249 N Y. 60, 162 N E. 584 (1928), the court expressed a preference for the test of general reliance.

180 See e.g., Chicago, B & Q. Ry. v Todd, 74 Neb. 712, 105 N W. 83 (1905); Mount Vernon Brewing Co. v. Teschner, 108 Md. 158, 69 A. 502 (1908); Marden, Orth & Hastings Corp. v. Trans-Pacific Corp., 109 Wash. 296, 186 Pac. 844 (1920)

181 Webbler v. Umback, 125 Kan. 117, 263 Pac. 786 (1928); Jordan v Miller, 232 Mich. 8, 204 N W 708 (1925).

No question is raised here as to whether a prior showing of trustworthiness or some substitute is a proper rule for admitting such documentary evidence. It is doubtful, though, that the methods of qualifying documents have been or should be limited to a preliminary showing of source or general reliance. Rare indeed is the case where failure to require such a prerequisite to the introduction of a document would amount to reversible error. In many cases, such a preliminary showing consisted only of testimony by the party offering the document.[182] It is questionable whether such showing constituted any greater guarantee of trustworthiness than the document itself. If the opposing party has equal access to price information and market data and equal opportunity to introduce evidence on point, he should not, under the adversary theory of procedure, be allowed to win the point without more than to stand up and object. Some cases have ignored the time and money involved in the trial of a law suit and have limited recovery on an admittedly good cause of action to nominal damages for failure of such a showing.[183]

As a corollary to the admission of commercial documents, it would seem that oral testimony based on such documents would be admissible. Such an inference has not been substantiated by case law. Although most States permit an expert to base his testimony on such documents,[184] it has been held by a small minority that such oral testimony was incompetent when based solely on documentary sources on the startlingly incompatible ground that the documents themselves would not be admissible because they were not the best evidence.[185] Seemingly, such decisions leave ample room for the use of documentary sources by experts, but prohibit the mere parroting of documents by the unqualified and place attention on the credibility of the writing itself.[186]

An overwhelming majority of decisions on the proof of market value by the use of documentary sources have involved the use of the documents themselves as evidence and not as sources for oral testimony. Such a practice leads to the conclusion that, in practice at least, commercial and professional circles have adopted the better alternative.

The disinterestedness and reliability of market reports and lists of current prices in journals and newspapers used by the trade, as well as census reports, mortality tables, or authoritative works in any field of scholarship would seem equally to warrant their use in the courtroom as evidence of the facts contained therein.[187] The legislators in a few States have tried to establish this tenor by enacting statutes authorizing the use of such works to evidence "facts of general notoriety and interest."[188] Rule 63 (31) of the

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182 See e.g., St. Louis I.M. & S. R.R. v. Laser, 120 Ark. 119, 179 S.W. 189 (1915).

183 Kentucky Refining Co. v. Conner, 145 Ala. 664, 39 So. 728 (1905); Schnitz Bros. v. Bolles & Rogers Co., 48 N.D. 637, 186 N.W. 96 (1922).

184 See e.g., Howell v. Hines, 298 Mo. 282, 249 S.W. 924 (1923), Fountain v. Wabash Ry., 114 Mo. App. 676, 90 S W 393 (1905).

185 Doherty v. Harris, 230 Mass. 341, 119 N.E 863 (1918)· National Bank of Commerce v. New Bedford, 175 Mass. 257, 56 N.E 288 (1900).

186 45 Mich. L. Rev. 748, 752 (1947).

187 See 6 Wigmore, Evidence §§1690-92 (3d ed. 1940); Note, 19 St. Louis L. Rev. 353 (1934).

188 California was the first State to enact such a statute: "Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties are prima facie evidence of facts of general notoriety and interest." Cal. Code Civil Proced. §1936. Other States have enacted statutes similar to the California statute: Ala. Code Ann. ch. 7, §413 (1958); Idaho Code §9-402 (1948); Iowa Code Ann. 622.23 (1958); Mont. Rev. Code Ann. §93-1101-8 (1947); Neb. Rev. Stat. §25-1218 (1956); Ore Rev. Stat. §41.670 (Supp. 1959); Utah Code Ann. §78-25-6 (1953).

Uniform Rules also echoes this principle.[189] The courts have generally declined to sanction a broad exception to the hearsay rule for such works.[190]

Still amazingly limited has been the court's admission into evidence of statistical surveys, samples, and research opinion evidence.[191] Although the admission of census sampling and the averages and probabilities of mortality tables would seem to sanction the admission of other survey data, the courts have not so reasoned. Though the substance of samples, opinion research, and other collections of data possess

> . . . at least equal inductive value being made with equal or greater thoroughness, sifted, arranged, and stated by trained observers, [they are] by the same discriminative authority relegated to the limbo of hearsay and other judicial abominations. The error lies not in looking too leniently upon [census samples and] mortality tables, but in a misconception of the true qualities of other scientific work.[192]

Statistics is a science, the study and application of which require expert knowledge and method; it is the process by which decisions are made, based on incomplete knowledge. It is a process of generalizing from a part to the whole; it attempts to solve a group of problems treated in philosophy by inductive logic. Statistical inferences are inductive by reason that they assign certain traits to large accumulations of objects from knowledge of these same characteristics for only a few of these objects.[193] Like mortality tables, such statistical data also have their foundation in the theory of probability, and permit measurement of the magnitude of possible error in the result, and a definite probability statement about the uncertainty of the inference.[194]

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189 The Uniform Rules of Evidence, Rule 63 (31), adapted from the Model Code of Evidence, Rule 529.

190 Alabama is the only jurisdiction that has construed such a statute permitting the direct admission of medical books, extracts, and treatise, without qualification as to purpose or case. The other States having such statutes have uniformly construed these statutes as not to allow direct admission of medical works. See e.g., City of Dothan v. Hardy, 237 Ala. 603, 188 So. 264 (1934), admitting such works, and the following which deny such admission: Brown v. L. A Transit Lines, 282 P. 2d 1032 (Cal. App. 1955); Wilcox v. Crumpton, 219 Iowa 389, 258 N. W. 704 (1935), recognizing the rule; Osborn v. Gray, 28 Idaho 89, 152 Pac. 473 (1915). States not having such statutes follow the common-law rule prohibiting the use of medical works as direct evidence in the courtroom, except in certain specified cases authorized by statutes. See e.g., S. C Code §26-142 (1952); Mass. Gen. Laws Ann. ch. 233 § 79C (1958); and Nev. Rev. Stat. §51.040 (1960).

191 See generally Zeisel, op. cit. supra note 6; Sprowls, "The Admission of Sample Data into a Court of Law: A Case History," U. C. L. A. L. Rev., 4: 222 (1957); McCoid, "The Admission of Sample Data into a Court of Law: Some Further Thoughts," U. C. L A. L. Rev., 4:233 (1957); Note, "Public Opinion Surveys As Evidence," Harv. L. Rev. 66: 498 (1953); Note, "Admissibility of Public Opinion Polls," Minn. L Rev., 37:385 (1953).

192 6 Wigmore Evidence §1698 (3d ed. 1940).

193 McCoid, op. cit. supra note 37, at 223-24. Interested readers are referred to the following publications for detailed studies on survey and poll methodology: Parten, "Surveys, Polls and Public Opinion" (1949); Cantril, "Gauging Public Opinion" (1947); Blankenship, "Consumer and Opinion Research" (1934); see the reference guide of Smith, Laswell, and Casey, "Propaganda, Communication and Public Opinion" (1946). For a discussion of the courts' attitude towards the methodology of the taking of surveys or public opinion polls, see Annot., 76 A. L. R. 2d 619, 633-40 (1961).

194 McCoid, op. cit. supra note 191.

Presently, statistical surveys, samples, and opinion polls have been used sparingly in judicial problem solving, being limited to admission as an exception to the general rule, not for the truth of the matter asserted, but for the fact that it was made.[195] Additional limitations have subjected such data to use only in certain litigable areas. These areas comprise commercial law, both public and private, patent and trademark infringement, unfair competition, deceptive advertising, misbranding, and related areas[196] where consumer reaction is important. To a limited extent, antitrust cases have given some credence to surveys and opinion polls.[197]

The most common problem for which sampling is used explicitly in litigation is for survey of opinion.[198] Such a limitation bespeaks a need for raising the level of economic and statistical literacy among the officers of the court.[199] Courts need the assistance of those engaged in statistical research. In numerous areas, survey and opinion polls may be crucial to the disposition of a case. Possibilities of statistical research have been indicated in commercial litigations where the value of surveys have appeared in boldest outline and where the stakes have been high. But there are other litigable areas where surveys and polls would be extremely useful; for instance, in valuation law.[200] Documentation in other fields of law such

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195 United States v. 88 Cases, 187 F. 2d 967 (3d Cir.), cert. den. 342 U. S. 861 (1951); Hermann v. Newark Morning Ledger Co., 48 N. J. Super. 420, 138 A. 2d 61 (1958). See Zeisel's discussion, op. cit. supra note 6; 66 Harv. L. Rev. op. cit. supra note 191.

196 Gulf Oil Corp. v. F. T. C., 150 F. 2d 106 (5th Cir. 1945); Sorensen and Sorenson, "Responding to Objections Against the Use of Opinion-Survey Findings in the Courts," J. Marketing 2: 133-134 (1955); see generally Barksdale, "Use of Survey Research Findings as Legal Evidence" (1957); Caughey, "The Use of Public Polls, Surveys and Sampling as Evidence in Litigation and Particularly Trademark and Unfair Competition Cases," Calif. L. Rev. 44: 539 (1956); Hall, "Evidence—Hearsay—Admissibility of Public Opinion Polls," Mich. L. Rev. 52: 916 (1954); Howes, "The Role of Public Surveys in Unfair Competition Cases," Trademark Rep. 46: 154 (1956); Kecker, "Admission in Courts of Law of Economic Data Based on Samples," J. Bus. 28: 118 (1955); Note, Geo. Wash. L. Rev. 20: 211 (1951); Note, Harv. L. Rev. 66: 498 (1953); Annot., 76 A. L. R. 2d 619 (1961).

197 United States v. United Shoe Mach. Corp., 93 F. Supp. 190 (D. Mass. 1950); United States v. J. I. Case Co., 101 F. Supp. 856 (D. Minn. 1951); but see United States v. E. I. Dupont de Nemours & Co., 177 F. Supp. 1 (D. Ill. 1959).

198 RKO Radio Pictures v. Jarrico, 128 Cal. App. 2d 172, 274 P. 2d 928, cert.denied, 349 U. S. 928 (1954); Las Vegas Sun, Inc. v. Franklin, 74 Nev. 282, 329 P. 2d 867 (1958); Great Atlantic & Pacific Tea Co. v. A. & P. Trucking Corp., 51 N J. Super. 412, 144 A. 2d 172 (1958), modified on other grounds, 29 N. J. 455, 149 A. 2d 595 (1959). Dean, "Sampling to Produce Evidence on Which the Courts Will Rely," Current Bus. Studies 19, at 6 (1954).

199 Id. at 11.

200 "Value is nothing more than the price for which property may be sold and the value of other like property is highly probative as to the value of the property in question.... In the commercial field there is no more commonly accepted method for ascertaining property values than by comparison with other property and the prices at which it is sold." City of Los Angeles v. Cole, 28 Cal. 2d 509, 521, 170 P. 2d 928, 934 (1946) (Dissenting opinion). See 2 Wigmore, Evidence §463 (3d ed. 1940). Since comparison of similar property is necessary for valuation, survey methods could be used in accumulating and presenting in aggregate form data of comparable sales.

as immigration, naturalization, and deportation cases,[201] cases involving change of venue,[202] legislative and quasi-legislative proceedings,[203] lend support to the use of such information in highway condemnation cases.

Sampling results have been limited in judicial proceedings because of technical objections to its being hearsay evidence, relying on out-of-court statements as to the characteristics of basic data or sample data; the objection that the conclusion of the statistician is merely opinion as to matters that do not fall within the range of admissible opinion evidence; and the objection that statistical data and its inferences are not the best evidence available of the characteristics of basic data.[204] Sampling and polling evidence have also been subjected to the proper suspicions and reluctance of judges who realize the ease with which overzealous lawyers seeking to advance the cause of their clients could be tempted to bias such data, and the difficulty of detecting such bias.[205] Reputable research organizations, however, enjoy the same confidential relationship to their clients as do reputable members of the bar.

> They will not countenance perjured testimony in their behalf. Their system of analysis, design of experiment and the full results of their efforts are all open to judicial review, the court willing The legitimate opinion research organization wants its findings to be considered public property in the sense that they cannot be perverted in support of any single "side" and that the full implications, involving qualifications where they exist, be revealed.[206]

Another factor militating against the use of sampling and polling is the offer by adverse parties of polls purporting to prove inconsistent propositions of fact.[207] In such instances, however, it would seem that conflicting testimony as to reliability shown by each opposing party should be considered in connection with the credibility of the evidence and not its admissibility.

To minimize the bases for objection to the admission of statistical data as evidence, the following could be helpful: (a) the use of pretrial conferences, where feasible, for having the parties start with the same set of instructions and the same basic facts[208];

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201 In Repouille v United States, 165 F. 2d 152, 153 (2d Cir. 1947), Judge Learned Hand stated that the courts have no Gallup poll to aid them in discovering the meaning of the "good moral character" required of any applicant for naturalization; a poll is a possible method for verifying a position as to moral justiciability of an act performed by an applicant for naturalization.

202 Survey methods may be used to discover whether there is sufficient local prejudice to justify a change of venue in criminal cases. See Note, 54 Harv. L. Rev. 679, 684 (1941), Sorensen, "The Role of Public Sentiment and Personal Prejudice in Jury Trials of Criminal Cases," Ch. X (unpublished dissertation, Univ. of Chicago).

203 Woodward, "A Scientific Attempt to Provide Evidence for a Decision on Change of Venue," Am. Sociol. Rev. 17: 447 (1952).

204 McCoid, op. cit. supra note 191, at 235.

205 United States v. 88 Cases, 187 F. 2d 967 (3d Cir.), cert. denied, 342 U S. 861 (1951); Dean, op. cit. supra note 198, at 5.

206 Sorensen and Sorensen, op. cit. supra note 196, at 137.

207 See e.g., Quaker Oats Co. v. General Mills, Inc , 134 F. 2d 429 (7th Cir. 1943); Oneida, Ltd. v. National Silver Co., 25 N Y S. 2d 271 (Sup. Ct. 1940); cf. Alexander Young Distilling Co. v. National Distillers Prod. Corp., 40 F Supp. 748 (E. D. Pa. 1941).

208 See Naftalin, "Pretrial Practice in State Condemnation Cases for Highway Purposes," HRB Bull. 294, 15-30 (1961) for a bibliography of articles on pretrial procedure, see Report of Comm. on Condemnation and Condemnation Procedure, Munici-

(b) the service on the adversary, in advance of trial, of a copy of the statistical report he plans to use, along with a statement of the underlying materials, their location, and availability for inspection[209]; (c) the qualifying of the official who conducted the research by the party offering the document[210]; and (d) the testimony of the official as an authenticating witness if the adverse party requests it and shows cause.[211]

If the hearsay objection is thought to be too serious to overcome in getting evidence of the poll or sample into the record for consideration by the trier of facts, there remains another basis for bringing the results to the attention of the court. Courts are often concerned with public opinion and various trends. In the absence of any evidence of what public opinion and reaction or what various trends are respecting particular matters, courts in their frequent attempts to make such determinations, assume the prerogative of knowing the issue in dispute by taking judicial notice.[212] Statistical research findings deserve consideration as an alternative to the judge's impressions and opinions substituted for public opinion in matters where the former are assumed to stand for the latter. They can be a great aid to the court when taking judicial notice; then, too, such data thus submitted need not conform to the technical rules of evidence.

Reasons for Use of Research Evidence in Condemnation Proceedings

The uses, objectives, and extent of research evidence in condemnation proceedings have already been described. It would be worthwhile here to present some summary conclusions as to why research evidence whose use in the courts has already been studied should be used in determining the value of land in condemnation proceedings. Economic research would be an additional step in the evolutionary process of obtaining adequate and accurate ways and means of estimating the value of land. Already in the evolutionary process comparable sales of particular parcels are admissible in some States as direct evidence if the foundation for each parcel is separately and individually made.[213] As was pointed out, a means of obtaining suitable comparable sales and relevant facts associated with such sales is now available.[214] The next step of admitting the same type of sale information, but in aggregate or statistical form, should be taken. Assuming one issue in a condemnation proceeding is what a land price trend for a particular community has been over a period of years, the only way to determine precisely what prices have been is to tabulate records of sales which may run into tens or hundreds or thousands. In such a case, survey evidence is essential; it will save time and money while keeping the record clear of the various underlying source materials.

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pal Law Section, A B. A., 1960, at 153. In a condemnation proceeding, a number of economic facts may be stipulated; for instance, the severance damage case studies or the economic impact study findings could be stipulated as factual materials to which there would be no objection. Thus, a struggle over the adequacy or inadequacy of the data may be avoided. In this fashion, solid, factual materials may be admitted on stipulation, thereby narrowing wide disparities in land estimates through the mutual agreement in use of research materials

209 Submitting such a report to opposing counsel does not include the "work product" of the proponent of the report. It is discoverable by the other side only if there are special circumstances which make it essential to the preparation of his case and in the interest of justice that the statements be produced for his inspection or copying. See Hickman v. Taylor, 329 U. S. 495 (1947); Walsh v Reynolds Metals Co., 15 F. R. D. 376 (D. N. J. 1954); see generally Luttrell, "Some Applicable Rules in the Trial of a Condemnation Case," Appraisal J 28: 213, 216 (1960).

210 Kennedy, "Law and the Courts," The Polls and Public Opinion,at 92, 101 (1949); Comment, 30 Tex. L Rev. 112, 118 (1951).

211 Ibid.

212 Kennedy, op. cit. supra note at 101; Sorensen and Sorensen, op. cit. supra note 196, at 134 et seq.

213 See supra, "Pertinent Laws of Eminent Domain and Evidence."

214 See supra, "Economic Data in Condemnation Proceedings."

"To preserve the vitality of its functions, the law, as it relates to the market place, must keep pace with evolutions in the market place."[215] Research evidence is the keystone of all contemporary problem-solving methods. Its use has been pinpointed in the courtroom as well as in commercial and professional circles.

Analytically, the general types of land economic studies and land value surveys discussed may be designated as hearsay because they are based on valuations of property and persons not represented in these proceedings. But, the principles that have supported the admission of census reports, mortality tables, market reports, and price lists will and should allow the use of such economic data to be given as evidence in condemnation proceedings. From this brief specified study of the role of research evidence and the hearsay rule in judicial proceedings, it is apparent that there are two main hurdles that economic research evidence (namely, land economic studies and surveys) must get over in order to be admitted as an exception to the hearsay rule. The first hurdle is necessity. From what has been discussed it is clear that what is urgently needed by public officials, fee appraisers, lawyers, and juries are facts on which land estimates can be substantiated and supported. The courts are sufficiently aware of this need, for in 1960 alone, 16 appeals cases were handed down during the year in which the only issue on appeal was whether the verdict was supported by the evidence.[216] In four cases the lower courts made awards that so shocked the conscience of the respective appellate courts that they were reversed.[217] In addition, three cases were reversed on the finding that the awards were not within the range of the evidence.[218] The results of a scientifically designed sample of sales prices of properties within an area, a properly prepared and conducted opinion survey designed to determine various influences on land values, an impact study, a severance damage study, or other economic data hold the promise of furnishing such material to meet this shortage of factual data.

The second consideration necessary for making an exception to the hearsay rule is the trustworthiness of the document. The guarantee that such economic studies and statistics would be trustworthy and reliable is to be found in the conditions and procedures with respect to their preparation. In addition, the State highway departments or the universities associated with them in these endeavors would be unlikely to stake their reputations on ill-conceived studies. The motive, in other words, is precisely the same in character and is more certain in its influence than that accepted as sufficient in some of the other hearsay exceptions previously discussed; it is, namely, the unwelcome probability of a detection and exposure of errors.

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215 Barksdale, Use of Survey Research Findings as Legal Evidence, at xiii (1957).

216 United States v. Magyar, 273 F. 2d 421 (2d Cir. 1959); State v. Hunter, 270 Ala. 57, 116 So. 2d 383 (1959); Arkansas State Highway Comm'n v. Addy, 329 S. W. 2d 535 (Ark. 1959); Arkansas State Highway Comm'n v. Huges, 328 S. W. 2d 391 (Ark. 1959); Skinner v. Polk County, 250 Iowa 1264, 98 N. W. 2d 749 (1959); Stortenbecker v. Iowa Power & Light Co., 250 Iowa 1073, 96 N. W. 2d 468 (1959); Luecke v. State Highway Comm'n, 186 Kan. 584, 352 P. 2d 454 (1960); United Fuel Gas Co. v. Mauk, 325 S. W. 2d 339 (Ky. 1959); Mississippi State Highway Comm'n v. Peterson, 117 So. 2d 452 (Miss. 1960); Mississippi State Highway Comm'n v. Pittman, 238 Miss. 402, 117 So. 2d 197 (1960); Mississippi State Highway Comm'n v. Ellzey, 237 Miss. 345, 114 So. 2d 769 (1959); Mississippi State Highway Comm'n v. Taylor, 237 Miss. 847, 116 So. 2d 757 (1959); Clark County School Dist. v. Mueller, 348 P. 2d 164 (Nev. 1960); Allbro v. Vallone, 158 P. 2d 571 (R. I. 1960); State v. Coffield, 328 S. W. 2d 916 (Tex. 1959); Utech v. City of Milwaukee, 9 Wis. 2d 352, 101 N. W. 2d 57 (1960).

217 Arkansas State Highway Comm'n v. Addy, 329 S. W. 2d 535 (Ark. 1959); United Fuel Gas Co. v. Mauk, 325 S. W. 2d 339 (Ky. 1959); Mississippi State Highway Comm'n v. Taylor, 237 Miss. 847, 116 So. 2d 757 (Miss. 1959)

218 Clark County School Dist. v. Mueller, 348 P. 2d 164 (Nev. 1960); Allbro v. Vallone, 158 A. 2d 571 (R. I. 1960); Utech v. City of Milwaukee, 9 Wis. 2d 352, 101 N. W. 2d 57 (1960).

In addition to their admission as an exception to the hearsay rule, there seem to be good reasons why land economic studies and surveys should come into evidence through judicial notice. Such admission would of necessity be based on their undisputed authenticity, thereby obviating testimony by a witness vouching for such.

The public document rule also seems another vehicle for admitting these land studies. Their admission under such an exception would depend on whether they had been prepared by governmental agencies within the scope of duty imposed on them by law, or whether it was the usual course of business for highway departments to do certain land value studies in connection with condemnation. The important point is that the law of evidence is changing; it is moving in the direction of factual data derived from studies, surveys, and applications of statistical techniques in many fields of law.

CONCLUSION

The materials presented in this paper on the economic orientation of condemnation cases, and the suggestions for the utilization of various types of evidentiary materials in such cases indicate a belief that economic fact should serve the court in establishing legal fact.

Existing legal practices with respect to the admission and use of research evidence in courts of law have indicated that such results and techniques have made definite contributions to the judicial fact-finding and decision-making processes. Such findings have almost invariably been confined to areas of commercial litigations, excepting, however, certain scientific tables and calculations said to be admissible and competent because of the demands of custom and practical convenience making them generally, if not universally acceptable.

This study of the experience of such research findings where judicially acceptable along with the indicated needs emerging from condemnation proceedings for factual data which can best be obtained by such research methods sanction their admission and use in land valuation cases. Such sanctions, if adhered to, demand a reshaping of the rules of evidence which prohibit their entrance in condemnation proceedings as independent evidence. Such change in evidentiary procedure only summons the next step in the evolutionary process set in motion by the admission of comparable sales of particular parcels. As previously mentioned, if evidence of sales of comparable parcels can be introduced in piecemeal form through the prolonged procedure of separately and individually establishing the collateral issue of comparability followed by evidence of the sales prices, the essence of time, and the keeping of good unclouded records, if nothing else, would welcome better procedural methods of introducing evidence pertaining to land values. Land economic studies, severance damage studies, economic statistics, and other research data can provide these needs while also meeting the shortage of land valuation data essential in determining just compensation. The goal of condemnation proceedings is to award such just compensation. Because such an award depends on property value, damages, and frequently benefits assigned to the land in question, it follows that these may be more accurately determined by objective research methods. The products of these methods could serve both as a means for substantiating or cross-examining expert testimony and as independent evidence, expecially on issues such as (a) after value where the before-and-after formula is applied; (b) severance damages; (c) special benefits; and (d) general benefits.

The various hurdles over which some of the evidentiary matter may have to go in order to make it fully acceptable have been described. Some of the means of countering judicial objection have also been enumerated. It is believed by the authors that better valuations of damages to property, and especially to remainder parcels will proceed through the means suggested.

Inasmuch as partial takings of property on a wholesale basis is relatively a new item in condemnation law, the research sponsored in highway economic impact, severance damages, and highway law is essential for providing court appraisers and an informed public with the basic decision-making materials. For the governmental entities involved, savings may also be engendered even through the use of out-of-State evidence.

What is required of courts and of legal counsel is a desire to utilize economic data

currently available within their States, and obtained under systematic procedures. Through such use, what may be considered experimental only because of nonusage may become traditional through usage.

Appendix A

STATES WHOSE CONSTITUTIONS REQUIRE COMPENSATION

For Taking Property by Eminent Domain	For Taking or Damaging Property by Eminent Domain
(A)	(B)
Alabama[1]	Alabama[2]
Connecticut	Alaska
Delaware	Arizona
Florida	Arkansas
Hawaii	California
Idaho	Colorado
Indiana	Georgia
Iowa	Illinois
Kansas[3]	Kentucky[2]
Kentucky[1]	Louisiana
Maine	Minnesota
Maryland	Mississippi
Massachusetts	Missouri
Michigan	Montana
Nevada	Nebraska
New Hampshire[4]	New Mexico
New Jersey	North Dakota
New York	Oklahoma
Ohio	Pennsylvania[2]
Oregon	South Dakota
Pennsylvania[1]	Texas
Rhode Island	Utah
South Carolina	Virginia
Tennessee	Washington
Vermont	West Virginia
Wisconsin	Wyoming

[1]Taking provisions applicable to all types of condemnation.
[2]Taking or damaging provisions applicable to exercise of eminent domain by municipal or other corporation.
[3]No compensation provision applicable to exercise of eminent domain by State or public corporation.
[4]Compensation requirement merely been deemed to be implied by consent provision.

NOTES

Column A

Alabama: Ala. Const. art. I, §23.
Connecticut: Conn. Const. art. I, §11.
Delaware: Dela. Const. art. I, §8.
Florida: Fla. Const., Declar. of Rts., §12.

Hawaii: Hawaii Const. art. I, §18.
Idaho: Idaho Const. art. I, §14.
Indiana: Ind. Const. art. I, §21.
Iowa: Iowa Const. art. I, §18.
Kansas: Kan. Const. art. 12, §4. (Not applicable to the State or public corporations)
Kentucky: Ky. Const. §13.
Maine: Me. Const. art. I, §21.
Massachusetts: Mass. Const. Pt 1, art. 10.
Maryland: Md. Const. art. III, §40
Michigan: Mich. Const. art. XIII, §1.
Nevada: Nev. Const. art. I, §8.
New Hampshire: N.H. Const. Pt 1, art. 12 (by implication as construed, Great Falls Mfg. Co. v. Vernald, 47 N.H. 444, 455 (1867)).
New Jersey: N.J. Const. art. 1, Pt 20.
New York: N.Y. Const. art. I, §7.
Ohio: Ohio Const. art. 1, §19.
Oregon: Ore. Const. art. 1, §18.
Pennsylvania: Pa. Const. art.1, §10.
Rhode Island: R.I. Const. art. I, §16.
South Carolina: S.C. Const. art. 1, §17.
Tennessee: Tenn. Const. art. 1, §21.
Vermont: Vt. Const. ch. I, art. 2.
Wisconsin: Wis. Const. art. 1, §13.

Column B

Alabama (where a municipal or other corporation is condemning): Ala. Const. art. 12, §235.
Alaska: Alaska Const. art. I, §18.
Arizona: Ariz. Const. art. 2, §17.
Arkansas: Ark. Const. art. 2, §22.
California: Cal. Const. art. I, §14.
Colorado: Colo. Const. art. II, §15.
Georgia: Ga. Const. art. I, §3, par. 1.
Illinois: Ill. Const. art. II, §13.
Kentucky (where a municipal or other corporation is condemning): Ky. Const. §242.
Louisiana: La. Const. art. 1, §2.
Minnesota: Minn. Const. art. 1, §13.
Mississippi: Miss. Const. art. 3, §17.
Missouri: Mo. Const. art. I, §25.
Montana: Mont. Const. art. III, §14.
Nebraska: Neb. Const. art. I, §21.
New Mexico: N.M. Const. art. II, §20.
North Dakota: N.D. Const. art. I, §14.
Oklahoma: Okla. Const. art. 2, §24.
Pennsylvania (where a municipal or other corporation is condemning): Pa. Const. art. XVI, §8.
South Dakota: S.D. Const. art. VI, §13; S.D. Const. art. XVII, §18 (applicable to municipal and other corporations).
Texas: Tex. Const. art. 1, §17.
Utah: Utah Const. art. 1, §22.
Virginia: Va. Const. §58.
Washington: Wash. Const. art. I, §8.
West Virginia: W.Va. Const. art. III, §9.
Wyoming: Wyo. Const. art. I, §33.

SETOFF RULES WHEN A STATE OR LOCAL GOVERNMENT TAKES PROPERTY FOR HIGHWAY CONSTRUCTION OR IMPROVEMENT

General and Special Benefits Against Value of Land Taken and Severance Damages	Special Benefits Only Against Value of Land Taken and Severance Damages	General and Special Benefits Against Severance Damages Only	Special Benefits Against Severance Damages Only	Setoff Prohibited
(A)	(B)	(C)	(D)	(E)
Alabama[1]	Alabama[2]	New York	Alaska[3]	Iowa
New Mexico	Arkansas	Virginia	Arizona[3]	Oklahoma
North Carolina	Connecticut	West Virginia	California	
South Carolina[1]	Delaware[4]		Colorado	
	Florida		Georgia	
	Hawaii[5]		Hawaii[6]	
	Kansas		Idaho	
	Maine		Illinois	
	Massachusetts		Indiana	
	Michigan[4]		Kentucky	
	New Hampshire		Louisiana	
	New Jersey		Maryland	
	Pennsylvania[7]		Mississippi	
	Rhode Island		Missouri	
	South Carolina[2]		Montana	
	South Dakota[4]		Nebraska	
	Vermont[7]		Nevada[3]	
	Washington		North Dakota	
			Ohio	
			Oregon	
			Tennessee	
			Texas	
			Utah	
			Wisconsin	
			Wyoming[4]	

[1]In certain cases, only special benefits may be set off (see Column B).
[2]See Column A for general rule.
[3]Although not yet so construed, these statutes identical to California provision which is limited to special benefits.
[4]Setoff statutes seem to contain sufficiently broad language to authorize general benefit setoff, if and when they should be construed on this point.
[5]In certain cases, setoff allowed only against severance damages (see Column D).
[6]See Column B.
[7]Setoff against full value implied from use of before-and-after formula in these jurisdictions.

NOTES

Column A

Alabama: Ala. Const. art. I, §23, as construed in McRea v. Marion County, 222 Ala. 511, 133 So. 278 (1931); Ala. Code Ann., tit. 19, §14 (1940), but see Column B; New Mexico: Board of Comm'rs v. Gardner, 57 N.M. 478, 260 P. 2d 682 (1953); North Carolina: N.C. Gen. Stat., §136-19 (1958), as construed in Barnes v. North Carolina State Highway Comm'n, 250 N.C. 378, 109 S.E. 219 (1959); South Carolina: S.C. Code, 33-127, 33-136 (1952), as amended by §25-165 (Supp. 1960); see Smith v. City of Greenville, 229 S.C. 252, 92 S.E. 2d 639 (1956).

Column B

Alabama (highway improvements by local governments): Ala. Const. art. 12, §223, as distinguished in McRea v. Marion County, 222 Ala. 511, 133 So. 278 (1931); Arkansas: Ark. Stat. Ann., §76-521 (1947); Ball v. Independence County, 214 Ark. 694, 217 S.W. 2d 913 (1949); Connecticut: Conn. Gen. Stat., §13-145 (1958); Sorensen v. Cox, 132 Conn. 583, 46 A. 2d 125 (1946); Schwartz v. City of New London, 20 Conn. Supp. 21, 120 A. 2d 84 (1955); Delaware: State ex rel. State Highway Dep't v. Morris, 47 Del. 477, 93 A. 2d 523 (Super. Ct. 1952); Florida: Fla. Stat., §73.10(3) (1957); Hawaii: Hawaii Rev. Laws, § 8-21 (1955) (except in road widening or realignment cases): but see Column D; Kansas: Kan. Gen. Stat., §§26-209, 68-706 (1949), as amended; Trasper v. Board of Comm'rs, 27 Kan. 391 (1882); Maine: Boober v. Towne, 127 Me. 332, 143 Atl. 176 (1928); In re Penley, 89 Me. 313, 36 Atl. 397 (1896); Massachusetts: Mass. Gen. Laws Ann., ch. 79, §12 (1958); Michigan: Mich. Stat. Ann., c. 64, §8.189 (1958); New Hampshire: Whitcher v. Benton, 50 N.H. 25 (1870); New Jersey: State v. Hudson County Bd. of Chosen Freeholders, 55 N.J.L. 88, 25 Atl. 322 (1892); Minnesota: Chicago, R.I. & P. Ry. v. City of Minneapolis, 164 Minn. 226, 205 N.W. 640 (1925); Pennsylvania: Johnson's Petition, 344 Pa. 5, 23 A. 2d 880 (1942); Rhode Island: D'Angelo v. Director of Public Works, 152 A. 2d 211 (R.I. 1959); South Carolina (condemnation by county government): S.C. Code, §33-840 (1952), as distinguished in Smith v. City of Greenville, 229 S.C. 252, 92 S.E. 2d 639 (1956); South Dakota: S.D. Code, §§28.13 A09, 37.4010 (Supp. 1960); Vermont: Vt. Stat. Ann., tit. 19, §221 (1959); Washington: Wash. Rev. Code, §§8.04.080, 8.08.040, 8.12.190 (1961).

Column C

New York: Hartman v. State, 5 Misc. 2d 636, 161 N.Y.S. 2d 748 (Ct. Cl. 1957); New York, W & B Ry. v. Siebrecht, 73 Misc. 219, 130 N.Y.S. 1005 (Sup. Ct. 1919); Virginia: Va. Code Ann., §33-73 (1950), as construed in Long v. Shirley, 117 Va. 401, 14 S.E. 2d 375 (1951); West Virginia: W. Va. Code, §5380 (1955), as construed in Strouds Creek & M. R.R. v. Herald, 131 W. Va. 45, 45 S.E. 2d 513 (1947).

Column D

Alaska: Alaska Comp. Laws Ann., §57-7-13 (1949); Arizona: Ariz. Rev. Stat. Ann., §12-1122 (1956), as construed in Pima County v. De Concini, 79 Ariz. 154, 285 P. 2d 609 (1955); California: Cal. Civ. Proc. Code, §1248, as construed in People v. Schultz Co., 123 Cal. App. 2d 925, 268 P. 2d 117 (1954); Colorado: Colo. Rev. Stat., §50-1-17 (1953); Denver Joint Stock Land Bank v. Board of County Comm'rs, 105 Colo. 366, 98 P. 2d 283 (1940); Georgia: Ga. Code Ann., §36-504 (1933), as construed in State Highway Bd. v. Bridges, 60 Ga. App. 240, 3 S.E. 2d 907 (1939); Idaho: Idaho Code, §7-711 (1947); Hawaii: Hawaii Rev. Laws, §8-21 (1955) (in road widening or realignment cases only); Illinois: Ill. Const. art. II, §13, as construed in Kane v. City of Chicago, 392 Ill. 172, 64 N.E. 2d 506 (1945); Department of Public Works & Buildings v. Barton, 371 Ill. 11, 19 N.E. 2d 935 (1939); Indiana: Burns Ind. Stat. Ann., §3-1706 (1946), as construed in State v. Smith, 237 Ind. 72, 143 N.E. 2d 666 (1957); Kentucky: Ky. Rev. Stat. §§177.083, 416.100-416.120, 416.230-416.240 (1960); Freuel v.

Commonwealth, 331 S.W. 2d 710 (1959); Louisiana: Louisiana Highway Comm'n v. Grey, 197 La. 942, 2 So. 2d 654 (1941); Maryland: Md. Ann. Code, art. 33A, §25 (1957); Pumphrey v. State Rds. Comm'n, 175 Md. 498, 2 A. 2d 668 (1937); Mississippi: Mississippi State Highway Comm'n v. Hillman, 189 Miss. 859, 198 So. 565 (1940); Missouri: Mo. Rev. Stat., §227.120 (1959); Montana: Mont. Rev. Code, §99-9912 (1949), as amended; Nebraska: Crawford v. Central Neb. Public Power & Irr. Dist., 154 Neb. 832, 49 N.W. 2d 682 (1951); Nevada: Nev. Rev. Stat., §37.110 (1960); North Dakota: N.D. Cent. Code, §35-15-22 (1960), as construed in Lineburg v. Sandoen, 74 N.D. 364, 21 N.W. 2d 808 (1946); Ohio: Ohio Const. art. I, §19; In re Abraham, 121 N.E. 2d 695 (Ohio C. P. 1953); Oregon: State Highway Comm'n v. Bailey, 212 Ore. 261, 319 P. 2d 906 (1957); Tennessee: Tenn. Code Ann., §23-1414 (1955); Texas: Tex. Civ. Stat., art. 3265 (1952), as construed in State v. Carpenter, 126 Tex. 604, 89 S.W. 2d 194 (1936); Utah: Utah Code Ann., §104-61-11 (1943); Wisconsin: Wis. Stat. Ann., §32.09 (Supp. 1961); Wyoming: Wyo. Stat., §1-775 (1957).

Column E

Iowa: Iowa Const. art. 1, §18; Oklahoma: Okla. Const. art. 2, §24.

Appendix C

ADMISSIBILITY OF COMPARABLE SALES AS EVIDENCE OF MARKET VALUE IN CONDEMNATION PROCEEDINGS

Independently Admissible As Evidence of Market Value	Admissible in Support Of Opinion Testimony	Judicial Indication It Would Be Independently Admissible, Though Never So Held	Admissible Only To Impeach Opinion Testimony	No Cases On Point
(A)	(B)	(C)	(D)	(E)
Alabama	District of Columbia	Nevada	Michigan	Alaska
Arizona		Oklahoma	Minnesota	Hawaii
Arkansas		Rhode Island	North Carolina	Idaho
California	Mississippi	South Carolina	Pennsylvania	Maine
Colorado		West Virginia		Montana
Connecticut	Ohio			New Mexico
Delaware				North Dakota
Florida				South Dakota
Georgia				Vermont
Illinois				
Indiana				
Iowa				
Kansas				
Kentucky				
Louisiana				
Maryland				
Massachusetts				
Missouri				
Nebraska				
New Hampshire				
New Jersey				
New York				
Oregon				
Tennessee				
Texas				
Utah				
Virginia				
Washington				
Wisconsin				
Wyoming				

NOTES

Column A

Alabama: Southern Elec. Generating Co. v. Leibacher, 269 Ala. 9, 110 So. 2d 308 (1959); Arizona: Town of Williams v. Perrin, 70 Ariz. 157, 217 P. 2d 918 (1950); Arkansas: Sewer & Water Works Improvement Dist. No. 1 v. McClendon, 187 Ark. 510, 60 S.W. 2d 920 (1933); California: County of Los Angeles v. Faus, 48 Cal. 2d 672, 312 P. 2d 680 (1957); Colorado: Kistler v. Northern Colo. Water Conservancy Dist., 126 Colo. 11, 246 P. 2d 616 (1952); Connecticut: Campbell v. City of New Haven, 101 Conn. 173, 125 Atl. 650 (1924); Delaware: Wilmington Housing Authority v. Harris, 47 Del. 469, 93 A. 2d 518 (Super. Ct. 1952); Florida: City of Tampa v. Texas Co., 107 S. 2d 216 (Fla. App. 1958); Georgia: Flemister v. Central Ga. Power Co., 140 Ga. 511, 79 S.E. 148 (1913); Fulton County v. Cox, 109 S.E. 2d 849 (Ga. App. 1959); Illinois: City of Chicago v. Blanton, 15 Ill. 2d 198, 154 N.E. 2d 242 (1958); Indiana: Northern Ind. Pub. Serv. Co. v. Darling, 239 Ind. 237, 154 N.E. 2d 881 (1958); Iowa: Redfield v. Iowa State Highway Comm'n, 251 Iowa 337, 99 N.W. 2d 413 (1959); Kansas: Wood v. Syracuse School Dist., 108 Kan. 1, 193 P. 1049 (1920); Kentucky: Stewart v. Commonwealth, 337 S.W. 2d 880 (Ky. 1960); Louisiana: State v. Havard, 239 La. 133, 118 So. 2d 131 (1960); Maryland: Patterson v. Mayor & City Council of Baltimore, 127 Md. 233, 96 Atl. 458 (1915); Massachusetts: Epstein v. Boston Housing Authority, 317 Mass. 297, 58 N.E. 2d 135 (1944); Missouri: State v. Bruening, 326 S.W. 2d 305 (Mo. 1959); Nebraska: Langdon v. Loup River Pub. Power Dist., 142 Neb. 859, 8 N.W. 2d 201 (1943); New Hampshire: Eames v. Southern N.H. Hydro-Elect. Corp., 85 N.H. 379, 159 Atl. 128 (1932); New Jersey: Curley v. Mayor & Aldermen of Jersey City, 83 N.J.L. 760, 85 Atl. 197 (E. & A. 1912); State v. Williams, 65 N.J. Super. 518, 168 A. 2d 233 (App. Div. 1961); New York: Village of Lawrence v. Greenwood, 300 N.Y. 231, 90 N.E. 2d 53 (1949); Oregon: State v. Parker, 357 P. 2d 548 (Ore. 1960); Tennessee: Union Ry v. Hunton, 114 Tenn. 609, 88 S.W. 182 (1905); Texas: City of Austin v. Canizzo, 153 Tex. 324, 267 S.W. 2d 808 (1954); Utah: State v. Peek, 1 Utah 2d 263, 265 P. 2d 630 (1953); Virginia: May v. Dewey, 201 Va. 621, 112 S.E. 2d 838 (1960); Washington: Seattle & M. Ry. v. Gilchrist, 4 Wash. 509, 30 Pac. 738 (1892); Wisconsin: Blick v. Ozawkee County, 180 Wis. 45, 192 N.W. 380 (1923); Wyoming: Morrison v. Cottonwood Dev. Co., 38 Wyo. 190, 266 P. 117 (1928).

Column B

District of Columbia: District of Columbia Redev. Land Agency v. 61 Parcels of Land, 98 U.S. App. D.C. 367, 235 F. 2d 864 (1956) (admissible to support appraiser's expert testimony but subject to the court's discretion); Mississippi: Mississippi State Highway Comm'n v. Rogers, 236 Miss. 800, 112 So. 2d 250 (1959); Ohio: In re Ohio Turnpike Comm'n, 164 Ohio St. 377, 131 N.E. 2d 397 (1955). Cert. denied, 352 U.S. 806 (1951).

Column C

Nevada: Clark County School Dist. v. Mueller, 76 Nev. 11, 348 P. 2d 164 (1960) (dictum for such evidence); Oklahoma: Durell v. Public Serv. Co., 174 Okla. 549, 51 P. 2d 517 (1935) (rule stated as dictum); Rhode Island: Hervey v. City of Providence, 47 R.I. 378, 133 A. 618 (1926) (issue of remoteness held properly decided by judge to exclude evidence; Massachusetts rule assumed to be determinative); South Carolina: Wateree Power Co. v. Rion, 113 S.C. 303, 102 S.E. 331 (1920) (seems to assume Mass. rule in holding that sales to condemnor, where only sales of comparable land available, were admissible); South Carolina Highway Dept. v. Hines, 234 S.C. 254, 107 S.E. 2d 643 (1959) (Gen. Rule recognized without indication whether it was S.C. law; evidence excluded because as a mere offer not accepted, it was not within the rule); West Virginia: (No cases dealing with evidence of comparable sales to noncondemnor); Cf. United Fuel Gas Co. v. Allen, 137 W. Va. 897, 75 S.E. 2d 88

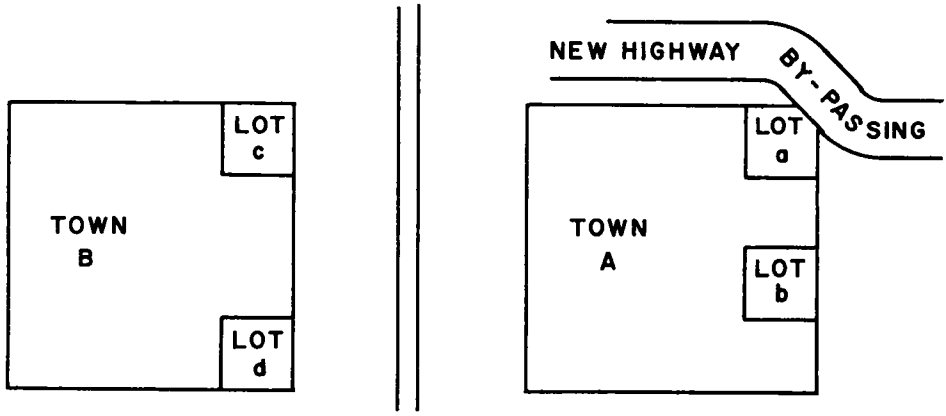
(1953) (sale to condemnor "voluntarily" made is good where severance damages are not involved).

Column D

Michigan: Lockeman v. Dillman, 255 Mich. 152, 237 N.W. 552 (1931); Minnesota: Minneapolis-St. Paul Sanitary Dist. v. Fitzpatrick, 201 Minn. 442, 277 N.W. 394 (1937); North Carolina: Templeton v. State Highway Comm'n, 118 S.E. 2d 918 (N.C. 1961); Pennsylvania: Serals v. West Chester Borough School Dist., 292 Pa. 134, 140 Atl. 632 (1928).

Appendix D

AN EXAMPLE OF THE DETERMINATION OF GENERAL AND SPECIAL BENEFITS



Benefits Accruing From Highway Improvement

Value of residential lots a,b,c, and d before the bypass--$1,000 each
Value of residential lots c and d after the bypass--$1,000 each
Value of residential lot a after the bypass $1,400
Value of residential lot b after the bypass--$1,200
Special benefit accruing to lot a--$200 ($1,400 minus $1,200)
General benefit accruing to lots a and b--$200 each ($1,200 minus $1,000)

This example shows the hypothetical benefits associated with a highway improvement bypassing Town A. Property values in the affected community (Town A) increased about $200 per lot following the opening of the bypass route. Average residential lot values in a comparable community unaffected by the highway (Town B) remained unchanged. Comparing what happened in the study area (Town A) with what happened in the control area (Town B) indicates that residential lots in Town A realized a value increase of about $200 each. This is a general benefit.

Within Town A, lot a, which was partially taken for highway right-of-way was affected by the highway to a greater extent than lot b, a comparable lot within the same community. Following the opening of the highway, lot a sold for $1,400 and lot b for $1,200. This indicates that a special benefit of $200 accrued to lot a—the difference between the value of lot a ($1,400) and the value of a comparable lot nearby ($1,200).

For the purpose of determining the special benefit accruing to lot a, lot b is the control. For determining general and special benefits experienced by lot a, lot c or d is the control.

STATUS OF SEVERANCE DAMAGE STUDIES[1] (As of June 1, 1961)

State	Research Agency	Nature of Study in Progress	Studies Completed
Alabama[2]	Alabama State Highway Department	Case studies of severance damages	
Arizona[2]	Arizona Highway Department	Analysis of cost data in connection with the acquisition of right-of-way for highway improvements	
Arkansas[2]			
California	California Division of Highways	Continuing case studies of severance damages to remainder properties after partial takings for right-of-way	"Land Economic Studies, Remainder Parcel Analysis" No. 1—summarizes 10 remainder parcel sales in Vallejo, California "Land Economic Studies"—summarizes 20 remainder parcel cases "California Land Economic Studies—Techniques" "Remainder Parcels", a report of the Land Economics Study Section
Colorado	Colorado Department of Highways	Severance damages, right-of-way acquisition, and partial takings, including case studies of same	"Case Studies of Damage Payments," Nos. 1 through 21
Connecticut			
Florida[2]			
Georgia[2]	Georgia State Highway Department	Analysis of factual evidence with respect to values fixed, payments made, disposition of remainder properties, and use of remainder properties	
Hawaii			
Idaho	Idaho Department of Highways	Analysis of actual damage as compared with damage awards in connection with right-of-way takings	
Illinois	University of Illinois	Case studies of land values and severance damages to remainder properties after partial takings for right-of-way	"Land Economic Studies," Nos. 1-5
Indiana	Indiana State Highway Department	Evaluation of right-of-way appraisal values and determination of a series of basic uniform rules and guides to be used in land appraisals	
Iowa	Iowa State Highway Commission	Effects of farm unit severance resulting from right-of-way purchase	
Kansas	State Highway Commission of Kansas	Severance damage studies as part of larger economic impact study	
Kentucky[2]	Kentucky Department of Highways	Investigation and evaluation of damage effects in terms of market value of highway building program on remainders of partial takings in urban and rural areas	
Louisiana[2]			
Maine	Maine State Highway Commission	Case study of partial taking and severance damage	
Maryland	Maryland State Roads Commission	Case studies of remainder properties after purchase for right-of-way	
Michigan	Michigan State Highway Department	Guide for right-of-way appraisers in estimating costs for property acquired for highway right-of-way	"Land Economic Studies," Nos. 1-7
Minnesota	University of Minnesota	Relationships between compensation payments and extent of property taken plus damages as direct consequence of highway	"How Farmers Adjusted to an Interstate Highway in Minnesota"
	Minnesota Department of Highways	Analysis of severance damages as part of economic impact study being made on segment of I-094-3(15) in St. Paul	
Mississippi	University of Mississippi	Analysis of effects on land use, land value, and fragmentation	
		Case studies of partial takings of rural	

		properties	
Missouri	Missouri State Highway Commission	Severance damage studies being conducted as part of larger economic impact study	
Montana[2]			
Nebraska[2]			
New Jersey	New Jersey State Highway Department	Develop data to provide more reliable basis for estimating severance and consequential damage	"Severance Study Manual"
New Mexico	New Mexico State Highway Commission	Severance damage studies	
New York	New York Department of Public Works	Severance damage studies being conducted as part of Northway economic impact study	
North Carolina[2]			
North Dakota[2]	North Dakota State Highway Department	Case studies of several sections of highway	
Ohio	Ohio Department of Highways	Studies of land values and relationship of subsequent sales prices of remainder parcels to "before" value, by type of remainder parcels	
Oklahoma	Oklahoma State Highway Department	Collection and interpretation of sales data on severed parcels of land previously acquired. These data expected to provide a basis for right-of-way appraisers to substantiate after values in the before-and-after appraisals for highway right-of-way	
Oregon	Oregon State Highway Commission	Case studies of land values and severance damages to remainder properties after partial takings for right-of-way	"Land Economic Studies Properties Abutting Baldock Freeway" "Oregon Land Economic Studies," Nos 30-35
South Carolina[2]	University of South Carolina	Severance damage studies being conducted as part of larger economic impact study	
South Dakota	South Dakota Department of Highways	Parcel by parcel analysis of remainder properties adjacent to completed segments of Interstate System to determine effects of the facility on (a) market value of remaining land, and (b) development of remaining land	
Tennessee	University of Tennessee	Severance damage studies being conducted as part of larger economic impact study	
Utah			
Texas	Texas Transportation Institute, Texas A and M College	Various aspects connected with acquisition of right-of-way for highway use, including studies of case histories of remainder parcels and effects of displacement of persons and investments resulting from right-of-way acquisitions	
Vermont	Vermont Department of Highways	Provide more reliable basis for estimating severance and consequential damage	
Virginia	Virginia Department of Highways		A number of case histories have been completed
Washington	Washington Department of Highways	Analyze value of remainder properties after purchase of portion for highway use, case studies	Individual land economic studies Nos 1-28, 34, 36, and 41
Wisconsin[2]	Wisconsin State Highway Commission		
Wyoming[2]	Wyoming State Highway Commission		
Nationwide	Agricultural Research Service, U.S Department of Agriculture		"The Effects on Farm Operating Units of Partial Taking for Controlled-Access Highways"

[1]In most cases, these severance damage studies are being conducted by researchers within State highway departments, although, in a few instances, work is being done under contract For additional information concerning any study, it is suggested that inquiry be made to appropriate State highway department
[2]In planning stage, others listed are underway

Relocation of People and Homes from Freeway Rights-of-Way—Community Effects

RUDOLF HESS, Chief Right-of-Way Agent, California Division of Highways

Currently, increasing concern with the social and ecnomic effects of freeway construction is characteristic of the over-all highway picture. Particular concern with the impact on the community of the displacement of people and homes from the freeway right-of-way is especially evident.

In the location and design of modern controlled-access highways, attempts are made to minimize such displacements. Nonetheless, the relocation of some people and homes is unavoidable, particularly where freeways are projected through urban areas. The effects on the community of this "necessary displacement" have generally been little researched and are largely unknown. The weight that might reasonably be imputed to this factor in the over-all locational and design picture is thus relatively uncertain as well, and the "minimizing" process at least hypothetically deficient.

In California a rather considerable body of empirical data has been gathered on the movements of freeway-displaced owners and the ultimate disposition of their former homes. This paper outlines these researches as measures of community effect, and tentatively evaluates their findings, applicability, and implications for highway planning and design.

•IT HAS BEEN estimated that the $41 billion Interstate Highway Program will require the acquisition of 700,000 parcels of land for necessary rights-of-way. A significant proportion of these parcels will be improved and the improvements and their occupants must necessarily be displaced to make way for highway construction.

Two major areas of concern for the effects of this massive displacement exist. Of primary interest is the effect of displacement on people—what action, if any, is being taken to ease the adjustment that must be made after their homes are acquired. The Federal Government recognizes this problem area. President Kennedy, in his message to Congress on February 28, 1961, stated (1):

> I urge that the Federal Highway Law be amended to require [similar] assurances of help in finding reasonable housing at reasonable cost for all those displaced from their homes by future Federal-aid highway projects. Such a step will lessen costly resistance to needed highway projects and their proper location. We must not allow needed progress in highways to come at the expense of unnecessary personal hardship to American families.

Secondarily, a less specific but no less important concern has to do with the community at large—what the effect is on the community of right-of-way acquisition and the subsequent displacement of people and their homes.

The purpose of this paper is to relate California's experience with, and summarize its study efforts into, the question of the effects of the acquisition of rights-of-way for freeway purposes on people and the community. The implications these study results may have for freeway planning and design are also categorized.

POST-WAR DISPLACEMENT

California's first freeway project (the Arroyo Seco in Los Angeles) was completed in 1940. Shortly thereafter, an ambitious construction program was brought to a halt by the outbreak of World War II. Freeway planning and right-of-way acquisition for future construction continued, however, throughout World War II. By 1945 a respectable backlog of rights-of-way was vested in the State of California.

California's population had expanded rapidly during and immediately after the war and highway needs in the crowded metropolitan areas were becoming critical. Construction engineers were understandably anxious to begin post-war construction of the many freeways that had been planned and for which rights-of-way had been acquired over the previous five years, but that had not yet been cleared of improvements.

However, an even more serious problem faced the Division of Highways at the time, caused by the same factors; i.e., a lack of construction and an increasing population. The most critically needed freeways were in metropolitan areas and it was in these areas where most future rights-of-way had been acquired but it was also in these same areas where the housing shortage had reached its peak.

The housing shortage had existed throughout the war but it had not been aggravated by right-of-way acquisition because residence units were rented back to former owners or tenants, pending future construction. With the close of World War II the Division of Highways was immediately faced with the problem of vacating and relocating hundreds of persons, to permit clearance of rights-of-way in areas where no suitable vacancies existed.

During this problem period, various groups made recommendations as to the courses of action to be followed. It was recommended, for instance, that public housing projects be quickly constructed to take care of the potential evictees, and that freeway construction be indefinitely postponed until the housing shortage was naturally alleviated by post-war construction. Another alternative suggested was the mass eviction of freeway-housing tenants on the theory that benefits to the community would offset temporary hardships to those displaced.

The first study of the effects of right-of-way acquisition on people and homes was made at this time in an effort to provide factual documentation on the basis of which decisions for action could be made. The study results were later published in a report to the California Legislature in 1948 (2).

BASIC RELOCATION POLICY

Although procedural requirements have varied from time to time since 1945, the basic policy regarding the relocation of people and homes was set forth in early 1946 by the Governor of California. It is still strictly followed. This policy is "no tenant in a residential building will be evicted unless it is established that he has a reasonably comparable place to move, even if it is necessary to delay the freeway construction project."

RELOCATION ASSISTANCE

The action taken by the Division of Highways after a study of all aspects of the complex problem and in implementation of the Governor's policy was the establishment of a sales section within its Right-of-Way Department. The duties of this sales section were to handle and process all phases of the work related to the disposal of houses and the relocation of affected tenants to other housing accommodations (3). The following procedures were adhered to during the removal and relocation process:

1. Purchasers of homes scheduled for removal were required to permit continued occupancy of the tenant in possession for a period of six months after relocation of the residence unit.
2. The purchasers also agreed to move the houses no farther than a specified distance from their original location to minimize inconvenience to tenants.
3. The aid of local municipal authorities, real estate boards, and apartment associations was solicited in screening available housing and making recommendations to tenants when housing was needed.

TABLE 2

RESETTLEMENT OF STATE'S GRANTORS

Activity	No of Grantor	Assessed Value (dollars) Of Improvements Before	Assessed Value (dollars) Of Improvements Purchased or Retained After
Retained and relocated own improvements	21	39,070 00	58,602 00
Purchased improvements from State or received improvements in exchange from State	6	4,300 00	9,921 00
Purchased new homes	21	30,280 00	52,040 00
Purchased older improvements	10	14,300 00	47,862 00
Subtotal	58	87,950 00	168,425 00
Stayed in area, did not re-invest directly in real estate	5	2,340 00	-
Moved out of area, stayed in county	12	16,390 00	-
Moved out of county	8	7,970 00	-
Whereabouts and activity unknown	3	4,100 00	-
Total	86	118,750 00	168,425 00

The Oceanside-Carlsbad pilot study permitted these tentative conclusions to be drawn:

1. It is not accurate to assume that both taxpayers and taxable improvements have been completely "written off" the community's tax and economic roster.
2. As a group, relocated improvements will support higher values than those that prevailed in previous locations.
3. Owners will attempt to better themselves by purchasing more valuable improvements with resulting individual and community gains.

It was further assumed that the sequence developed in this study was both reasonable and typical.

The conclusions derived from the Oceanside-Carlsbad study implied that the new home purchases by the displaced owners and the sale and relocation of affected homes would have the effect of completely offsetting the value of rights-of-way acquired. If this implication is valid, it could be hypothecated at this point that the number and value of improvements displaced from a right-of-way area are of little significance from a purely economic standpoint. It would not be unreasonable to draw the conclusion that the more improvements that are removed and relocated and the more owners that are caused to relocate, the more beneficial will be the effect on the community.

The Oceanside-Carlsbad area was originally selected because it was believed to be representative of other areas that would be encountered. The potential significance of the conclusions to be drawn from the data collection made it mandatory, however, that the study results be confirmed in other areas.

ADDITIONAL STUDY EFFORTS

Surveys were started in four separate areas to test the conclusions derived in Oceanside and Carlsbad: San Francisco in the route of the Southern Freeway; in Sacramento within the alignment of the South Sacramento Freeway; and in the Cities of Merced and Modesto (two central California communities being affected by realignment of two sections of US 99).

In the four studies, as well as in Oceanside-Carlsbad, values attributable to land either in or outside the right-of-way areas are ignored. It has been accepted that properly located transportation facilities require the acquisition of the land on which they are to be built, and that the traffic service which the completed facilities render is sufficient justification for the public use of the land areas needed. (This economic justification must be shown to be true, however, before approval to proceed with right-of-way acquisition is granted by the California Highway Commission.)

None of the four freeways under study are fully completed. Data collection must necessarily follow closely on the heels of right-of-way acquisition.

Each of the studies is presently in a different stage. In San Francisco, a minimum of preliminary information has been gathered. Estimates have been made of the number of improvements that are capable of being relocated, and the intentions of owners have been solicited in personal interviews. A projection has been made on the basis of this information, and it will be tested at later stages of the right-of-way clearance operation. One short section of the Southern Freeway which had been cleared at the time of the initial survey provided a small amount of helpful information for use as a preliminary indicator of possible study results.

The owners of 618 residences in San Francisco were interviewed and 457 (74 percent) indicated that they intended to relocate without assistance in other nearby areas of the city. Skilled sales section right-of-way agents estimated that fully 70 percent of all improvements to be acquired were capable of being relocated to other areas of the city.

The interviews were conducted at a time when 130 homes within the route of the Southern Freeway had been acquired. Sixty-one percent had already been successfully relocated. Following rehabilitation 30 percent of these had been sold. It was found that the average selling price after relocation and rehabilitation was slightly higher than the average value of the homes in their former locations.

The San Francisco and Oceanside-Carlsbad studies are significant in that the proportion of all improvements capable of being relocated in each area exceeds 70 percent. The routes of the two freeways lay through areas where the average age of improvements was less than 25 years; these areas, therefore, were more nearly comformed to today's building standards.

IMPROVEMENT RELOCATION

The Sacramento, Merced, and Modesto routes lay through areas that, for the most part, contained homes at least 25 years old. The study results pertaining to improvement relocations are significantly different because of this factor.

A total of 1,235 improvements were acquired in the three cities to permit freeway construction. Nearly 45 percent of the total number were relocated in or near the affected community. Individual totals were 47 percent in Sacramento, 37 percent in Merced, and 50 percent in Modesto.

Before-acquisition and after-relocation value totals are presently available only in Sacramento. There it was found that the improvements that were moved were on the average 8 percent less valuable after relocation than in their former location. (The slight depreciation in relative value has been attributed to the lack of landscaping at new sites and the less convenient aspects of the newer areas into which the homes had been moved.)

OWNER RE-INVESTMENT

The activities of affected home owners have been more completely documented in each of the three areas. In Sacramento, 358 owners had been displaced from within the right-of-way area. Sixty-eight percent of all owners had re-invested in substitute real estate in the Sacramento area at the time of the survey in 1959. The 358 owners had owned improvements within the right-of-way area valued at $2,938,464. It was found that the activities of the 68 percent who had re-invested placed a total of $2,505,978 back in the real estate market in the area (improvement value only).

Replacement improvements were found to be 25 percent more valuable than were the structures acquired by the State. The improvements were, on the average, 26 percent newer than were former ownerships. Actually, only 7.4 percent of the South Sacramento owners had purchased older homes; 24.3 percent had acquired homes of nearly the same age; and 68.3 percent had taken the opportunity presented by State purchases to better themselves by purchasing newer homes.

Merced has a population of 21,000 persons. State acquisition directly affected the homes of 224 property owners. Of this total, 105 (47 percent) immediately re-invested in alternate properties. An additional 33 percent stayed in the area but had not

re-invested in substitute property at the time of the survey. Improvements assessed at a value of $450,425 for tax purposes were displaced from within the right-of-way area. The activities of the 105 owners who re-invested returned $255,110 in assessed values to the local tax rolls.

The City of Modesto has a population of 36,585. Right-of-way requirements necessitated the purchase of 478 improvements assessed for tax purposes at $514,220. They were owned by a total of 412 grantors. Of all owners, 320 (78 percent) remained in the immediate vicinity of Modesto after relocation from the right-of-way area. Nearly 44 percent re-invested in substitute properties whose improvements were valued for taxing purposes at $407,680.

FOUR CITY TOTALS--OWNER ACTIVITIES

Properties acquired for right-of-way purposes, in the four communities where detailed after-relocation data have been secured, were purchased from a total of 1,080 owners. Of the owners who repurchased in the area, 52 percent obligated themselves to pay taxes on new or substitute improvements assessed for nearly $1,374,000, or 73 percent of the value of improvements formerly owned by all 1,080 owners. Tables 3 and 4 summarize the results of owner relocation and re-investment activities, and show the individual totals in each of the four communities.

TABLE 3

FOUR-CITY TOTALS, PROPORTION OF OWNERS RE-INVESTING IN AREA IMPROVEMENTS

Location	Owners No Before	No Re-investing	Percent of Former Re-investing
Oceanside-Carlsbad	86	37	43
Sacramento	358	244	68
Merced	224	105	47
Modesto	412	180	44
Total	1,080	566	52

TABLE 4

FOUR-CITY TOTALS, PROPORTION OF IMPROVEMENT VALUES ACQUIRED OFFSET BY OWNER RE-INVESTMENT

Location	Assessed Value (dollars)		Percent of Former Value Offset
	Improvements Before	Replacement Improvements	
Oceanside-Carlsbad	118,750	109,823	92
Sacramento	815,882	601,216	74
Merced	450,425	255,110	57
Modesto	514,220	407,680	79
Total	1,899,277	1,373,829	73

SUMMARY AND CONCLUSIONS

The Interstate Highway and the California Freeway System Programs require the acquisition of a significant number of improved properties. As a result, nearly 4,500 residence units and almost 15,000 persons are necessarily displaced from the future construction areas each year.

California's post-war experience has indicated that only in times of critical housing shortages do the people affected require assistance in the location of alternate housing accommodations. A long-range planning program, orderly right-of-way acquisition,

and well-planned clearance activities permit owners and tenants alike sufficient time to make their own arrangements without assistance.

Studies of varying depth in five areas of California have indicated the following:

1. Right-of-way acquisition, particularly in small and medium-sized communities, stimulates a rapid growth in new housing facilities.
2. The persons most affected (owners and tenants both) desire to remain in or near the community where they are established.
3. Thus far, it appears that an average of 52 percent of the persons who owned property within the right-of-way areas will re-invest monies received in alternate properties within the same community. Apparently, a sizeable proportion of former owners will take the opportunity presented by right-of-way acquisition to move in with relatives or into rental units, and invest their receipts in financial areas other than real estate. This percentage includes absentee owners who withdraw their investments from the community real estate pool, and former owners who have not been able to find substitute housing to purchase that fits their needs.
4. A widely varying percentage of homes within the right-of-way areas will be movable to other parts of the community. In all the California communities studied, an adequate supply of land for this purpose has been available.
5. It appears that the actions of owners in purchasing new, or older, substitute improvements, when coupled with the relocation of homes from within the right-of-way area, will result in a return to the community of a significant percentage of the taxable value of improvements that were displaced by the right-of-way acquisition, and that the community will actually benefit from right-of-way acquisition for a number of reasons:

   (a) A large percentage of all affected homes are found to be substandard and not capable of being relocated. They are accordingly demolished —in effect, an urban redevelopment program.
   (b) Those homes that are relocated will of necessity be provided with new foundations and as a rule new plumbing and wiring, and nearly always rehabilitated with repairs needed and new paint. Given relocation in an area comparable in location and convenience to their former area, they will be more valuable than in former locations.
   (c) Owners who relocate within the area will attempt to better themselves significantly, thus stimulating new construction and contributing proportionately larger amounts to the community tax base. Results of personal interviews with displaced owners have indicated that betterment is voluntary in almost all cases. The mobility rate of California's population and the rate of new housing starts virtually assure a continuing supply of suitable accommodations in all price brackets for those who wish to re-invest in substitute housing.

Important qualification to direct application of any conclusions or study results were found to be in order:

1. Individual estimates of the number of movable improvements in a given community must be made. The number capable of being relocated is directly affected by the age and condition of the improvements being acquired, as well as by the zoning ordinances of the community affected. (In California, thus far, the availability of land to which improvements may be relocated has not been a limiting factor.)
2. Estimates must be made of the number of absentee owners involved in right-of-way acquisition. This factor appears to have the greatest effect on the proportion of owners re-investing in an area because absentee owners often take the opportunity presented by right-of-way acquisition to invest their receipts in other holdings or other areas.
3. The availability of alternate comparable housing in an area must be estimated before the start of right-of-way clearance activities. The need for, or degree of, relocation assistance that must be given is directly affected by the quantity of comparable housing available in the area.

IMPLICATIONS

Tentative study findings from Oceanside-Carlsbad, San Francisco, and Sacramento have been utilized to assist in alternate route selection of the so-called East-West Freeway in the City of Sacramento (8). Three alternate routes were found to be feasible from an engineering standpoint for a crosstown freeway through a densely populated area of the city. All three routes passed through heavily residential areas near the fringe of the central business district. Several concerns were expressed by the freeway designers and by the people of Sacramento. Among them were those of the potential of the future freeway to affect recreation, fire districts, school districts, adjacent lands, and the community tax base. The Division of Highways completed its estimate of potential effects in January 1960.

The most significant conclusions of the study had to do with the effects of the proposed routes on the community tax base. It was estimated that the least beneficial route affected (net) only 0.65 percent of the total assessed value on the city's tax rolls. It was found that 67 to 76 percent of the total value of right-of-way acquisition would probably be offset by the relocation of homes from within the right-of-way areas and the relocation activities of owners of property within those areas. It was concluded that disturbance to the city's tax base was clearly minimal in the case of any of the routes selected. As a corollary to the study results it was therefore concluded that right-of-way acquisition costs, construction costs and traffic user's benefits should continue to be the guiding criteria in the final route selection.

The three factors mentioned are the basic criteria controlling the selection of freeway routes in California. Basic traffic service initially delimits the area through which a needed facility must be located. Once the general area of route location is selected on the basis of traffic needs, each of the three factors must be balanced against the other. Minimization of right-of-way cost will automatically minimize effect on the community tax base. Such minimization does not, however, automatically minimize the effect of right-of-way acquisition on people. The least expensive route may easily be the one most overcrowded with people who will find it difficult to relocate to other areas.

It has been concluded that proper consideration of normal right-of-way and engineering factors will effectively alleviate concern for the economic effect of right-of-way acquisition on the community at large. The real value of the studies made in this field to date would seem to be in answering questions about the magnitude of effects of right-of-way acquisition on the economy of the community, by means of the tabulations of offsetting factors involved.

It has also been concluded that the critical consideration given to the social effect of right-of-way acquisition on the people directly involved is a vital element in the route selection process. If intelligent estimates at the time of route consideration indicate a potential problem when the time for right-of-way clearance arrives, machinery such as that described in the initial section of this report must be set up well in advance to assist in relocation.

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Freeway Development and Quality of Local Planning

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•THE PRIMARY AIM of this investigation is to examine the nature and extent of local planning policy and administration regarding freeway development in particular and local transportation planning in general. An area of Washington State including one-half the State's population was selected as a sample for the analysis.

In the recent past, authorities in the field of highway planning have expressed concern over the possibility that the efficiency of limited access highways will be impaired by congestion at egress points which will cause traffic to back up on the freeways and thus diminish the volume and speed of through traffic flow. Among the factors most frequently cited as causes for this congestion at freeway interchanges are the development of land uses having high traffic generating characteristics in the proximity of these interchanges, and the failure of local agencies to control access along the approach roads.

Although the construction of trunk highway facilities is usually a function of State government, the establishment of policies for the use of land is traditionally a function of local government. Assuming that concern over the possibility of congestion at freeway interchanges is well-founded, it is pertinent to ask what policies for the use of land at freeway interchanges have been adopted by local governments, and what the status of the legal and administrative basis is for the formation and implementation of such policies.

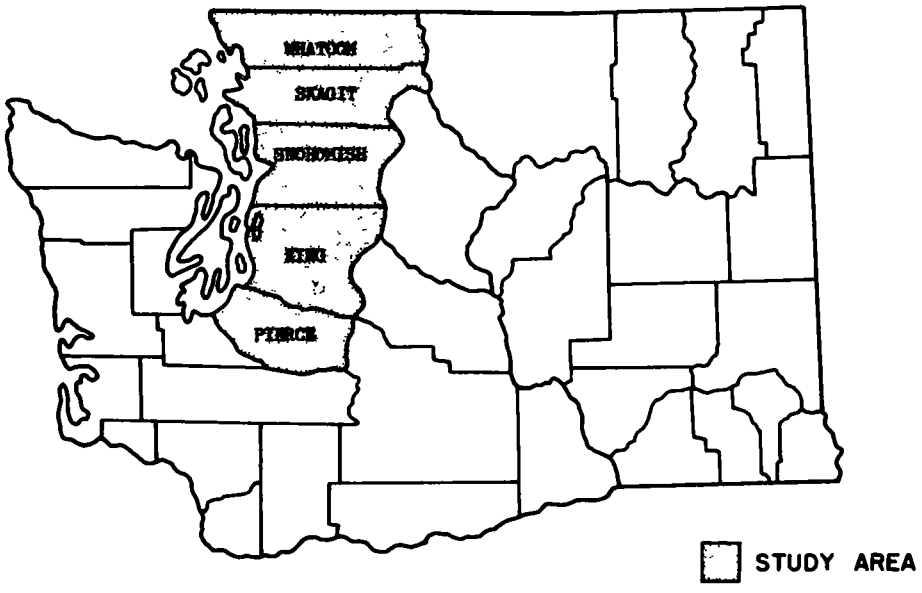
With this specific problem as its underlying concern, this report summarizes the findings of an investigation of the nature and extent of local planning policy regarding the integration of land use and transportation planning in Washington State.

METHODOLOGY

Five contiguous counties (Whatcom, Skagit, Snohomish, King, and Pierce) running south from the Canadian border along Puget Sound were selected as the study area for this investigation (see Fig. 1). This area contains all of Highway Districts 1 and 7, is the locale of major sections of FAI 5 and 90 and all of FAI 405, and contains a larger number of municipalities engaged in local planning programs than any area of similar size in the State. Additional factors in the delineation of this area for study are its proximity to the University of Washington, contractor for this study, and the fact that 54 percent of the State's population lives in these five counties (1).

Within the study area 41 municipalities, including the five counties, were selected for investigation. The municipalities selected are those located on the Interstate highway routes and those that have participated in Federal 701 planning programs (see Tables 1 and 2). Thirty-five of the 41 municipalities cooperated in this research effort by answering questionnaires or permitting interview contact (see Fig. 2). (Section 701 of the National Housing Act of 1954 authorizes grants of Federal funds to facilitate and stimulate planning in small municipalities and in metropolitan and regional areas. One of the main objectives of the legislation is to encourage communities to develop comprehensive plans. From 1954 to 1961 the Federal grant could not exceed 50 percent of the estimated cost of the work for which the grant was made. At the present time, up to 75 percent of the estimated cost may be provided by Federal grant in certain instances. The Federal funds must be administered through an official State planning agency.)

To obtain a rounded perspective of the nature of municipal planning policy, the following topics have been investigated:



Base Map: Employment Securities Dep't. - 1961

Figure 1. State of Washington.

1. The Legal Framework for Municipal Planning in Washington State.—This phase of the study consisted of an investigation of the constitutional and legislative basis for the planning function of local governmental units in Washington. The purpose was to ascertain the nature and scope of the authority granted municipalities for local planning.

2. The Financing and Staffing of Planning Agencies in the Study Area.—This information is presented with the assumption that the size of the planning budget and the size and professional training of the planning staff are indicators of the interest and competence of a municipality in local planning.

3. The Legal Sufficiency of Planning Programs in the Study Area.—The intent is to determine to what extent municipalities engaged in local planning programs have complied with the mandatory provisions of the enabling legislation under which they operate. Failure to comply with the requirements of law leaves policy decisions vulnerable to attack and, in a sense, useless.

4. The Nature of Municipal Comprehensive Plans in the Study Area.—Because a comprehensive plan is the municipality's expression of its planning policy, it is pertinent to determine what instruments constitute the plan and what elements the plan contains. Knowledge of the instruments that constitute the comphrensive plan is essential in ascertaining the policy statements contained in the plan. The elements contained in the plan are indicators of the scope of planning within the municipality.

5. Policies Regarding the Integration of Land Use and Transportation Planning in the Municipalities Studied.—This phase of the research consisted of an analysis of the actual policy statements contained in the comprehensive plans of the municipalities studied. The purpose was to determine what policies, if any, exist concerning the relationship between the development of land and the location of transportation routes.

The analysis of the legal framework for local planning is based on provisions of the State constitution, provisions of the two existing planning enabling acts (RCW 36.70 and RCW 35.63), court decisions relating thereto, and commentaries on these provisions authored by legal and planning professionals in the State. Information on the financing and staffing of planning agencies and the legal sufficiency of planning programs was obtained from three sources: (a) questionnaires circulated to the municipalities, (b) ordinances and official records held by city clerks, and (c) the files of the county auditors in the respective jurisdictions.

Information concerning the nature of the comprehensive plans and the policy statements contained in these plans is based on an analysis of the instruments that constitute the comprehensive plans of the selected municipalities. Copies of these instruments were obtained during the course of the investigation.

LIMITATIONS

A study that deals with one section of the country and then attempts to extrapolate the results into general conclusions obviously has some limitations of scope. Immediately the question is raised whether planning policy, planning administration, and the public acceptance of planning can be significantly different in other parts of the country so that the conclusions are not valid as general statements.

Unless similar studies are conducted in other parts of the country this question cannot be answered categorically. In defense of the generalization, however, the research effort with which the authors are associated has examined the quality of local planning, although in more specific respects, in other parts of the country in previous studies, and concludes that the picture gleaned from this pilot study in the State of Washington is generally representative of the country at large (2, 3).

Other limitations relate to reliability of the record as a means of evaluating planning effort as against perhaps the deterministic role of certain key officials or citizens, and perhaps even the physical results themselves. Can it be, for example, that a municipality without much to see as far as the written record is concerned can have a superior policy in effect and actually point to a record of accomplishments in terms of some avowed goals that may not be specifically documented? The authors doubt that this situation is either possible or plausible. Certainly, if the policies are not expressed, there is a question as to the success of planning as a democratic process. It is more likely that municipalities without policy and without legally sufficient programs are also without any significant results in this general field of municipal effort.

In addition to the limitations implied in the selection of one area of the State and

TABLE 1

MUNICIPALITIES LOCATED ON INTERSTATE HIGHWAY ROUTES IN STUDY AREA

Route	County	Municipality
FAI 5	King	Kent
		Seattle
		Tukwila
	Pierce	DuPont
		Fife
		Milton[1]
		Tacoma
	Skagit	Mount Vernon
	Snohomish	Everett
		Lynnwood
		Marysville
		Mountlake Terrace
	Whatcom	Bellingham
		Blaine
		Ferndale[1]
FAI 90	King	Issaquah
		Mercer Island (city)
		Mercer Island (town)
		North Bend
FAI 405	King	Bellevue
		Bothell
		Houghton
		Kirkland
		Renton

[1]Did not answer questionnaire.

TABLE 2

MUNICIPALITIES THAT HAVE PARTICIPATED IN FEDERAL 701 PLANNING PROGRAMS IN STUDY AREA

Anacortes	Kent[1]
Arlington	King County[1]
Auburn	Mountlake Terrace[1]
Bellevue[1]	Mount Vernon[1]
Blaine[1]	Orting[2]
Buckley[2]	Pierce County[1]
Burlington	Puyallup
Eatonville[2]	Stanwood[2]
Edmonds	Steilacoom
Enumclaw	

[1]Located on Interstate route.

[2]Did not answer questionnaire.

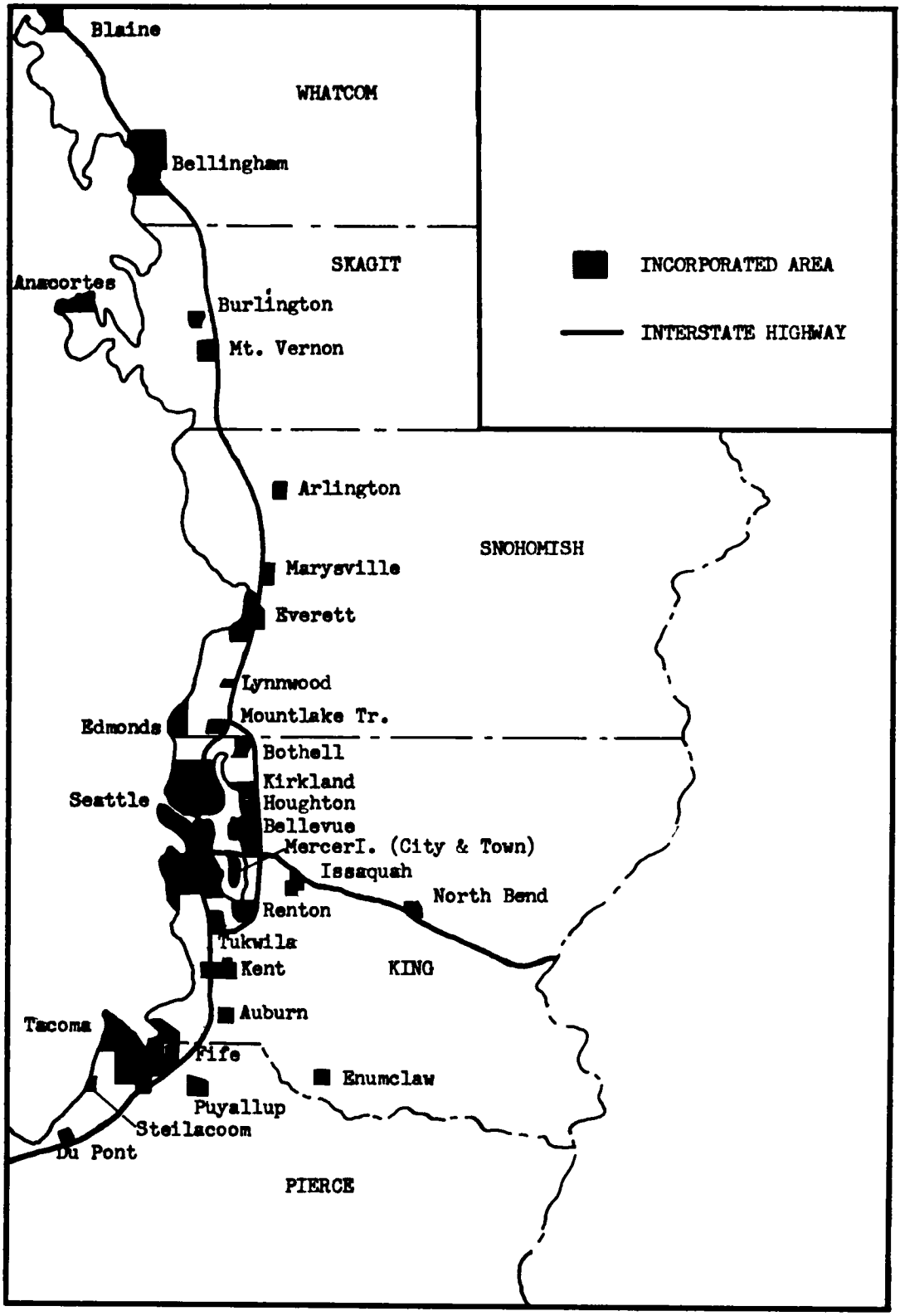


Figure 2. Selected Municipalities in Western Washington State.

the fact that 6 of the 41 municipalities selected for investigation did not participate in the study, the following facts should be noted:

1. A copy of the comprehensive plan of Blaine, the land use portion of which has been officially adopted, was not available. However, the consultant who prepared the plan was interviewed and information on policy statements obtained.
2. Although the majority of the 35 municipalities were visited and the questionnaires completed through personal interviews, four questionnaires were handled by mail (Whatcom County, Blaine, Bellingham, and Enumclaw).
3. Only those aspects of transportaion planning that involve highways, roads, and streets were considered in the analysis of policy statements. Policies concerning parking, terminal and loading facilities, and modes of transportation other than automobile were not included.

FINDINGS

This chapter is divided into five parts of which the first two serve as a framework for interpreting the latter three. The first part, which describes the legal framework

TABLE 3

FINANCING AND STAFFING OF PLANNING AGENCIES AS OF FALL 1961

Jurisdiction	Population	Staff						1961 Budget (dollars)			Total Dollars per Capita for Planning 1961	Annual Dollars per Capita for Planning 1961
		Total	A.L.P. Members	Other Professionals	Others	Consultants 1961	701 Projects	Total	Annual	Special		
King Co.	935,014 288,267[a]	22	5	9	8	3	1961	172,500	148,500	24,000	0.60	0.52
Pierce Co	321,590 139,522[a]	7	2	1	4	1	1960	68,000	64,000	4,000	0 49	0 46
Snohomish Co.	172,199 90,481[a]	3	1	1	1	0	No	24,000	24,000	0	0.27	0.27
Whatcom Co.	70,317 28,532[a]	1	1	0	0	0	No	9,500	9,500	0	0 33	0.33
Skagit Co.	51,350 26,193[a]	0	0	0	0	0	No	0	0	0	0	0
Seattle	558,000	22	9	0	13	0	No	157,000	155,000	2,000	0 28	0.28
Tacoma	149,000	11	6	2	3	0	No	108,200	107,300	900	0.73	0.72
Everett	40,400	1	0	1	0	0	No	10,000	10,000	0	0.25	0.25
Bellingham	35,000	2	1	1	0	0	No	18,100	18,100	0	0.52	0.52
Renton	18,800	3	2	0	1	0	No	26,800	26,800	0	1.43	1.43
Bellevue	13,100	3	1	1	1	0	1958	20,400	20,400	0	1.56	1.56
Mercer Is (city)	12,800	0	0	0	0	2	1960	14,800	14,550	250	1.16	1.16
Auburn	12,450	0	0	0	0	0	59-60	1,300	1,300	0	0.10	0.10
Puyallup	12,250	0	0	0	0	0	1958	1,500	1,500	0	0.12	0.12
Mountlake Tr.	10,046	0	0	0	0	0	1958	1,000	1,000	0	0.10	0 10
Kent	9,085	0	0	0	0	1	1958	4,400	400	4,000	0 48	0 04
Edmonds	8,500	0	0	0	0	1	60-61	7,000	3,500	3,500	0.82	0 41
Anacortes	8,400	0	0	0	0	1	60-61	2,500	100	2,400	0.30	0.01
Mt. Vernon	8,000	0	0	0	0	1	60-61	5,200	200	5,000	0.65	0.03
Lynnwood	7,548	0	0	0	0	0	No	4,000	4,000	0	0 53	0.53
Kirkland	6,150	0	0	0	0	1	No	1,500	1,000	500	0.24	0.16
Enumclaw	3,269	0	0	0	0	1	59-61	200	200	0	0.06	0.06
Marysville	3,117	0	0	0	0	0	No	1,000	1,000	0	0.32	0.32
Burlington	3,031	0	0	0	0	0	60-61	2,700	200	2,500	0.89	0 07
Houghton	2,645	0	0	0	0	0	No	500	500	0	0.19	0.19
Bothell	2,519	0	0	0	0	0	No	450	450	0	0.18	0.18
Arlington	2,050	0	0	0	0	0	1958	1,500	1,500	0	0.73	0.73
Issaquah	2,008	0	0	0	0	1	No	1,600	0	1,600	0 80	0
Tukwila	1,974	0	0	0	0	0	No	400	400	0	0.20	0 20
Blaine	1,735	0	0	0	0	1	60-61	50	50	0	0.03	0 03
Steilacoom	1,580	0	0	0	0	1	Pend	1,200	200	1,000	0.76	0.13
Fife	1,500	0	0	0	0	1	Pend	4,300	2,300	2,000	2.87	1 53
North Bend	978	0	0	0	0	0	No	0	0	0	0	0
Mercer Is. (town)	546	0	0	0	0	1	No	0	0	0	0	0
DuPont	353	0	0	0	0	0	No	0	0	0	0	0

[a] Unincorporated population.

for municipal planning in Washington State, provides one important set of criteria by which to interpret and evaluate expressions of local planning policy. It sets forth in a minimum form the basic instructions that the State has given in its enabling legislation. Washington planning law is complicated in that there are two planning enabling acts, one for the cities and counties and the other for counties only, at their option. Twenty-five years separated the passage of these acts and they are radically different as a quarter-century of time and experience would suggest. The legal framework described in this part includes some references to superior court decisions in the study area which show not only that zoning ordinances have been successfully attacked because of deficiencies in the comprehensive plan (actually twice in the same jurisdicition) but that without following the procedural requirements as stated in the law the implementary measures for local planning are vulnerable.

Information on the financing and staffing of the agencies has been included in the second part because of the importance of knowing these facts in judging the ability of a local agency to carry out the many procedures and execute the many instruments required in the process of developing a comprehensive plan and implementary ordinances. It is evident that even municipalities of modest size cannot undertake this activity without staff and budget. Furthermore, as the results show, there is almost a direct relationship between the ability of a municipality to function in this aspect of government and the the budget it provides to do so. In terms of a relationship to the national highway program, it seems almost ludicrous to municipalities that budget virtually nothing for planning activities, to function effectively in the area of developing land-use policy and controls for interchange areas where the highway facilities alone cost several million dollars and where the land use investments may be of equal scale. One municipality, Tukwila, became incorporated essentially to give private enterprise free license at a freeway interchange.

Information on planning programs under the financial sponsorship of Section 701 of the U.S. Housing Act is included to give a basis for evaluating whether this Federal program is increasing the sophistication of local planning programs. Before findings are presented, it is necessary to caution that the interpretation of these findings is made in the chapter following. It has been considered desirable to separate the interpretations from the actual findings because of the possible subjective viewpoints that might creep into the interpretation. Tables 1 through 6 convey the findings in concise form, and the statements presented here have the role of augmenting and documenting the tabular information.

Legal Framework for Municipal Planning Programs in Study Area

1. Municipal planning is authorized by two general laws (RCW 35.63, 1935, as amended, and RCW 36.70, 1959) and the home rule provisions of the State constitution.
2. Both enabling acts are permissive but they contain provisions that must be followed by municipalities electing to establish planning programs.
3. Both enabling acts give the municipalities that adopt them power to establish policies for the integration of land use and transportation facilities.
4. There are many points of difference between the two enabling acts. In general, RCW 36.70 is more detailed than RCW 35.63 and contains planning concepts that evolved after RCW 35.63 was drafted. Among the specific points of difference affecting the nature of the comprehensive plan and the policies that it contains include the following:

   a. RCW 35.63 does not define the term "comprehensive plan," whereas RCW 36.70 describes it in specific terms, including the idea that it is a policy statement.
   b. Although RCW 35.63 lists objectives that the plan should be designed to achieve, it does not mention the elements the plan should contain. RCW 36.70 lists and explains both the required and the optional elements.

5. RCW 35.63 contains the following requirements:

a. To avail itself of the powers conferred in the planning enabling act, a city council or board of county commissioners must create a planning commission.
b. The planning commission must hold one regular meeting each month for not less than nine months in each year.
c. The planning commission must adopt rules for transaction of its business and must keep a written public record of its proceedings.
d. The planning commission must prepare a comprehensive plan for the physical and other generally advantageous development of the municipality.
e. Before recommending the comprehensive plan to the municipality the planning commission must hold at least one public hearing on the plan, giving notice of the time and place by publication in a newspaper of general circulation in the municipality and in the official gazette, if any, of the municipality.
f. A copy of the ordinance or resolution adopting or embodying the plan or any part thereof or amendment thereto, duly certified as a true copy by the clerk of the municipality, must be filed with the county auditor.
g. A similarly certified copy of any map or plat referred to or adopted by the ordinance or resolution must be filed with the county auditor. The auditor must record the ordinance or resolution and keep on file the map or plat.
h. Proposed amendments, supplementations, or modifications to any plan must first be heard by the commission and the decision must be made and reported by the commission within 90 days of the time that the proposed amendments, supplementations, or modifications were made.

6. There have been at least four Superior Court decisions in Washington State that have invalidated zoning ordinances because in the opinion of the Superior Court judge the municipality did not have a comprehensive plan. Three of these cases involved municipalities in the study area. None reached the State Supreme Court.

7. The Superior Court cases in the study area indicate that the procedural requirements of the planning enabling act under which a municipality is operating must be followed, and the court decisions require that the comprehensive plan be adopted in written form by the municipality and the instrument adopting the plan together with any maps or plats referred to must be filed with the county auditor (Hon. Malcom Douglas, Superior Court, King County, Washington, State ex rel. Doull et al. v. King County Commissioners, oral opinion, July 23, 1958; Hon. James W. Hodson, Superior Court, King County, Washington, State ex rel. Lee v. Gibbs et al., oral opinion, June 11, 1956).

8. First-class (charter) cities may expand their planning programs beyond the permissive provisions of RCW 35.63 but they must meet the mandatory requirements of the act because it is a general law.

9. Of the five counties in the study area, three are operating under the provisions of RCW 36.70 (King, Pierce, and Whatcom), one is operating under RCW 35.63 (Snohomish), and one has no planning program (Skagit).

10. Of the 30 cities investigated, 26 have created a planning commission by ordinance, one by charter (Seattle), and one has a planning commission that was not officially created (Kirkland). Two small cities have no planning program (North Bend and DuPont).

Financing and Staffing of Agencies Studied, Fall 1961

1. Counties

a. Four of the five counties in the study area have permanent full-time planning staffs, ranging in size from 22 persons in King County to one person in Whatcom County. Skagit County has no planning staff.

b. Two of the five counties (King and Pierce) have retained the services of planning consultants in 1961.
c. Two of the five counties (King and Pierce) have participated in Federal 701 projects.
d. The 1961 budget for planning ranges from $172,500 in King County to $9,500 in Whatcom County. Skagit County has no budget for planning.
e. The total dollars per capita (based on unincorporated population and including short-term projects) budgeted in 1961 ranges from $0.60 in King County to $0.27 in Snohomish County.
f. The annual dollars per capita (based on unincorporated population and excluding short-term projects) budgeted in 1961 ranges from $0.57 in King Coutny to $0.27 in Snohomish County.

2. Cities

a. Six of the 30 cities investigated have permanent full-time planning staffs ranging in size from 22 in Seattle to 1 in Everett. The six cities with planning staffs are those with the six largest populations. No city having less than a 13,000 population has a planning staff.
b. Twelve of the 30 cities investigated have retained planning consultants in 1961. None of these 12 cities has a permanent planning staff.
c. Fifteen of the 30 cities have participated in Federal 701 programs. Only one of these cities (Bellevue) has a permanent planning staff.
d. Of the 30 cities three had no budget for planning in 1961. The 1961 planning budgets ranged from $157,000 in Seattle to $50 in Blaine.
e. The total dollars per capita budgeted for planning in 1961 ranges from $2.87 in Fife to $0.03 in Blaine.
f. The annual dollars per capita budgeted for planning in 1961 ranges from $1.56 in Bellevue to $0.03 in Blaine.

3. 701 Programs (This information is based on data provided by the Washington State Department of Commerce and Economic Development, July 6, 1961.)

a. As of July 6, 1961, a total of $496,442 had been expended on 701 projects in Washington State. One-half of this total was provided by Federal grant and one-half by local matching funds and contributed services.
b. $214,060, or 43 percent of the $496,442, was expended in the study area.
c. As of July 6, 1961, applications for projects totaling $76,756 were pending in the State.
d. $36,756, or 48 percent of the $76,756, is for projects in the study area.
e. As of July 6, 1961, 43 projects had been undertaken in the State. In 27 of these projects the contractor was a private consulting firm, in 13 the contractor was a public agency, and in two the contractor was a public agency and a private consultant.

Legal Sufficiency of Planning Programs, Fall 1961

1. Of the 35 municipalities studied 31 have created planning agencies according to

law. One (Kirkland) has a planning commission that was not officially created, and three have no planning program (Skagit County, North Bend, and DuPont).

2. Of the 31 municipalities, only three (King County, Mountlake Terrace, and the City of Mercer Island) have fulfilled all of the madatory requirements of the act under which they are operating. Six jurisdictions are in the process of creating a comprehensive plan and may fulfill the mandatory requirements of the enabling acts.

3. Of the 31 municipalities, 28 are operating under RCW 35.63 (including Snohomish County and Seattle) and three are operating under RCW 36.70 (King, Pierce, and Whatcom Counties). (Although the Seattle Planning Commission is created by charter, the city must comply with the mandatory provisions of RCW 35.63.)

a. In the 28 jurisdictions operating under RCW 35.63 (see Tables 4 and 5):

1) Nine planning commissions have not adopted rules for the transactions of their business, as required by law;
2) Two planning commissions do not keep a public record of their proceedings as required by law;
3) Five planning commissions have not prepared comprehensive plans; however, all five are in the process of doing so;
4) Five planning commissions have not held a public hearing before presenting the plan to the municipality as required by law, or hold no record of such a hearing;
5) Nine planning commissions did not publish a notice of public hearing before presenting the plan to the municipality, as required by law, or hold no record of such a notice;
6) Twelve municipalities have comprehensive plans that have not been officially adopted, according to law (in Tacoma, two parts of the plan were adopted by ordinance according to law, but one part was adopted by resolution);
7) Of the 12 cities that have adopted a comprehensive plan according to law, five have not filed certified copies of the ordinance adopting the comprehensive plan with the county auditor, as required by law;
8) Of the 12 cities that have adopted a comprehensive plan according to law, four have not filed maps referred to in the ordinance adopting the comprehensive plan, as required by law;
9) Ten municipalities have not followed the procedure for adopting and filing amendments and supplements to the comprehensive plan, as required by law.

b. Of the three counties operating under RCW 37.60:

1) King County has complied with all of the mandatory requirements pertaining to the establishment and operation of the planning agency and the adoption, approval, and certification of the comprehensive plan;
2) Pierce County has prepared a plan that has been adopted by the planning commission, and is being prepared for conveyance to the Board of County Commissioners for approval and certification;
3) Whatcom County is in the process of preparing a comprehensive plan according to the provisions of the enabling act.

Contents of Comprehensive Plans, Fall 1961

1. Nine of the 35 municipalities investigated have not prepared comprehensive plans. However, six of the nine are in the process of preparing plans.

TABLE 4

LEGAL SUFFICIENCY OF PLANNING PROGRAM[1]

Jurisdiction	Population	Instrument Creating Planning Comm	Monthly Meeting of Planning Comm	Rules Adopted by Planning Comm	Public Record Kept by Planning Comm	Comp. Plan Prepared by Planning Comm	Public Hearing Held on Plan	Notice of Public Hearing Published	Plan Adopted by Council or Board	Adopting Ord Filed with Auditor	Map Filed with Auditor	Plan or Ord Amended	Procedure for Adopting and Filing Amend's Followed
Snohomish Co	179,000	R	Y	Y	Y	Y	Y	NR*	N*	N*	Y	Y	NR*
Skagit Co	51,800	N	-	-	-	-	-	-	-	-	-	-	-
Seattle	558,000	C	Y	Y	Y	Y	N*	N*	R*	N*	N*	Y	N*
Tacoma	149,000	O	Y	Y	Y	Y	Y	Y	O/R*	Y	Y	Y	Y
Everett	40,000	O	Y	B*	Y	Y	Y	Y	R*	Y	Y	Y	Y
Bellingham	35,000	O	Y	Y	Y	P	-	-	-	-	-	-	-
Renton	18,800	O	Y	Y	Y	P	-	-	-	-	-	-	-
Bellevue	13,100	O	Y	N*	Y	Y	Y	Y	R*	Y	Y	Y	N*
Mercer Is (city)	12,800	O	Y	Y	Y	Y	Y	Y	O	Y	Y	N	-
Auburn	12,450	O	Y	Y	Y	Y	Y	Y	N*	N*	Y	Y	N*
Puyallup	12,250	O	Y	Y	Y	Y	Y	Y	O	N*	N*	N	-
Mountlake Tr	10,046	O	Y	Y	Y	Y	Y	Y	O	Y	Y	N	-
Kent	9,085	O	Y	Y	Y	Y	Y	NR*	R*	Y	Y	Y	N*
Edmonds	8,500	O	Y	Y	Y	Y	Y	Y	O	Y	Y	Y	N*
Anacortes	8,400	O	Y	Y	Y	P	-	-	-	-	-	-	-
Mt Vernon	8,000	O	Y	B*	Y	Y	N*	N*	N*	N*	N*	N	-
Lynnwood	7,548	O	Y	B*	Y	Y	Y	NR*	O	Y	Y	Y	N*
Kirkland	6,150	N*	Y	Y	Y	Y	Y	Y	O	N*	N*	Y	N*
Enumclaw	3,269	O	Y	Y	N*	Y	Y	Y	O	Y	Y	N	-
Marysville	3,117	O	Y	N*	Y	Y	Y	Y	O	N*	N*	Y	N*
Burlington	3,031	O	Y	Y	Y	Y	Y	Y	N*	N*	N*	N	-
Houghton	2,645	O	Y	Y	Y	Y	NR*	NR*	O	Y	Y	N	-
Bothell	2,519	O	Y	Y	Y	Y	N*	N*	O	N*	N*	N	-
Arlington	2,050	O	Y	N*	Y	Y	Y	Y	R*	Y	N*	Y	Y
Issaquah	2,008	O	Y	N*	N*	Y	Y	Y	R*	N*	N*	N	-
Tukwila	1,974	O	Y	Y	Y	Y	Y	Y	O	N*	Y	Y	N*
Blaine	1,735	O	Y	N*	Y	Y	Y	N*	O	N*	N*	Y	N*
Steilacoom	1,580	O	Y	Y	Y	Y	N*	N*	N*	N*	N*	N	-
Fife	1,500	O	Y	Y	Y	N	-	-	-	-	-	-	-
North Bend	978	N	-	-	-	-	-	-	-	-	-	-	-
Mercer Is (town)	546	O	Y	B*	Y	P	-	-	-	-	-	-	-
DuPont	353	N	-	-	-	-	-	-	-	-	-	-	-

[1] Code: Y = yes; N = no or none; NR = no record held by agency; P = by practice, not written; P = presently being prepared; R = resolution; C = charter; O = ordinance; * = legal deficiencies

2. In the 26 municipalities that have completed comprehensive plans:

   a. Five comprehensive plans consist of a single element—land use;
   b. Twelve comprehensive plans contain two elements—land use and circulation;
   c. Nine comprehensive plans contain one or two elements in addition to land use and circulation. The additional elements vary among the municipalities but consist of one or two of the following: community facility plan, recreation plan, parks and parkway plan, neighborhood plan, population density plan, CBD development plan.

3. In the 26 municipalities, the instruments that constitute the comprehensive plan vary from a single map without text to a series of maps, reports, and ordinances.

   a. In three municipalities the plan consists of a single map without text, and in one city the plan is a single sheet containing map and text.
   b. In two municipalities the plan consists of the zoning ordinance and zoning map, and in one municipality the plan is comprised of a comprehensive plan plus the zoning ordinance and zoning map.
   c. Eight municipalities consider the zoning ordinance a part of the

comprehensive plan, and three of these also include the subdivision regulation as a part of the plan.

d. Eight municipalities have comprehensive plans consisting of a single report containing maps and texts.
e. The plans of municipalities not previously included consist of some combination of maps, reports, and ordinances.

Policies Regarding Integration of Land Use and Transportation Planning in Municipalities Studied

1. Although only 13 of the 35 municipalities reporting have officially adopted comprehensive plans according to law, ten others have comprehensive plans that have received some type of recognition by by the legislative bodies of the municipalities.

2. Of the 23 previously noted municipalities that have taken some action to recognize their comprehensive plans as municipal policy, 8 have plans containing no policy statements concerning the integration of land use development and transportation planning other than a reiteration of the general statement of objectives contained in RCW 35.63, broadly relating to the public health and welfare.

3. The following statements are the only policies that appear frequently in the 15 plans, or planning reports, containing policy statements regarding the integration of land use and transportation planning:

a. Easy access to major arterials should be a factor in designating areas for commercial and industrial use (5 municipalities).
b. Freeways and/or major arterials should be used as boundaries for community and neighborhood units (9 municipalities).
c. The circulation system should consist of a hierarchy of major arterials, collectors, and local access streets designed to discourage through traffic in residential areas (7 municipalities).
d. The major arterial system should focus traffic on the central business district (CBD) but should allow through traffic to bypass the CBD (7 municipalities).

TABLE 5

NUMBER OF LEGAL DEFICIENCIES IN MUNICIPAL PLANNING PROGRAMS

No. of Deficiencies	Location
0	King Co.
	Mercer Is. (city)
	Mountlake Tr.
1	Tacoma
	Edmonds
	Enumclaw
2	Everett
	Puyallup
	Houghton
	Tukwila
3	Pierce Co.[1]
	Bellevue
	Auburn
	Kent
	Lynnwood
	Burlington
	Arlington
4	Snohomish Co.
	Kirkland[2]
	Marysville
	Bothell
5	Whatcom Co.[1]
	Bellington[1]
	Renton[1]
	Anacortes[1]
	Issaquah
	Blaine
	Steilacoom
	Fife
6	Seattle[3]
	Mt. Vernon
	Mercer Is. (town)[1]

[1] In process of preparing plan, may intend to fulfill legal requirements.
[2] Planning commission was not created by ordinance, as required by law; all of its actions may be invalib.
[3] Planning commission created by charter but must meet mandatory requirements of RCW 35.63.

e. Retail shopping facilities should be confined to "districts" or "centers" that minimize traffic congestion on thoroughfares (9 municipalities).

4. The following policy statements appeared twice in the 15 plans or planning reports:

a. High density residential areas should be located near major arterials (Seattle and Tacoma).
b. New retail business districts should not locate on two sides of a major street (Houghton and Issaquah).

TABLE 6

CONTENTS OF THE COMPREHENSIVE PLAN[1]

Jurisdiction	Population	Plan Prepared by Commission	Element			Instrument Constituting Comprehensive Plan
			Land Use	Circulation	Other	
Snohomish Co.	179,500	Y	Y	N	N	M
Skagit Co.	51,800	N	N	N	N	N
Seattle	558,000	Y	Y	Y	C	M
Tacoma	149,000	Y	Y	Y	N	R-2, Z, S
Everett	40,400	Y	Y	Y	N	M-2
Bellingham	35,000	P	N	N	N	N
Renton	18,800	P	N	N	N	N
Bellevue	13,100	Y	Y	Y	Pk	O, M-3
Mercer Is. (city)	12,800	Y	Y	Y	N	O, M
Auburn	12,450	Y	Y	Y	N	R-2
Puyallup	12,250	Y	Y	Y	D, F	R-3, M-10
Mountlake Tr.	10,046	Y	Y	Y	N	M
Kent	9,085	Y	Y	Y	F	M
Edmonds	8,500	Y	Y	Y	N	O, M, S, Z
Anacortes	8,400	P	N	N	N	N
Mt. Vernon	8,000	Y	Y	Y	B	R
Lynnwood	7,548	Y	Y	Y	N	O, M, Z, S
Kirkland	6,150	Y	Y	N	N	M, Z
Enumclaw	3,269	Y	Y	Y	F	R
Marysville	3,117	Y	Y	N	N	Z
Burlington	3,031	Y	Y	Y	B, F	R
Houghton	2,645	Y	Y	Y	N	R
Bothell	2,519	Y	Y	Y	B	R
Arlington	2,050	Y	Y	Y	F	R
Issaquah	2,008	Y	Y	Y	C	M, R
Tukwila	1,974	Y	Y	N	N	M, Z
Blaine	1,735	Y	Y	N	N	R
Steilacoom	1,580	Y	Y	Y	N	R
Fife	1,500	P	N	N	N	N
North Bend	978	N	N	N	N	N
Mercer Is. (town)	546	P	N	N	N	N
DuPont	353	N	N	N	N	N

[1] Code: Y = yes; N = no or none; P = presently being prepared; C = community or neighborhood plan; Pk = park or recreation plan; D = population density plan; F = community facilities plan; B = CBD plan; M = map; R = report; Z = zoning ordinance; S = subdivision regulations; O = text of adopting ord. or resolution; 2 = separate instruments of same type

c. Access to major streets from business establishments should be controlled (Houghton and Issaquah).

5. Only one municipality (Tacoma) has adopted a policy to control land use at freeway interchanges. (Pierce County has a similar provision in its zoning ordinance which ordinance is considered part of the comprehensive plan. However, the plan has not as yet received official certification by the county commissioners.) Tacoma includes the zoning ordinance as a part of its comprehensive plan. This ordinance contains policy statements in the form of statements of "intent" which preamble various sections of the law. The policy involving the use of land at freeway interchanges appears under the title "C-F Freeway Commercial Districts" and provides as follows:

> The intent of the freeway commercial district is to permit the establishment of facilities to serve the special needs of the persons and vehicles traveling on limited-access highways. It is intended that such districts be placed at locations providing the highest degree of usefulness to freeway users while at the same time creating a minimum of traffic congestion at freeway ingress and egress points. The protective standards for site development contained in this section are intended to minimize any adverse effects of such districts for the safe and efficient use of the facilities in such districts.

CONCLUSIONS

Legal Framework

The role of evaluating the legal framework in which comprehensive planning operates is complex in the State of Washington, and no doubt of equal complexity in many other States. The complexity in Washington mainly arises out of the fact that there are two enabling acts governing local planning, as has been mentioned earlier. The old planning act, dating to 1935 is still typical of the planning acts of a majority of the States. It is a law that was enacted under greatly different conditions of urban development and social problems than exist today. It reflects interest in resource development and gives only the broadest guides to serve as a philosophy on which to base local planning. Statements underlying the reasons for local planning are so broad as to be almost useless in terms of specific interpretations through implementary ordinances.

This commentary does not imply that a State enabling act needs to be written in very specific terms. It is, after all, an intermediate step between the general grant of police powers to local jurisdictions and some very broad instructions in regard to local planning. However, at some point in the legislative process, whether at the State or local level, there must be a great deal more specificity of legislative intent in order to develop local comprehensive plans than given by planning enabling acts circa 1935. The need for this detail shows up in the Washington State enabling act adopted in 1959, which is approximately four times longer than the earlier act. In fact, the adoption of this degree of specificity in a State enabling act implies that there has been a lack of needed legislative instruction at the local level. For example, to bridge the gap between the generalizations of the old State enabling act and implementing ordinances it would be necessary for a local legislative authority to develop the kind of instructional framework that the new planning act includes. This specificity could be in the form of adopted policy statements, preambles to local implementing ordinances, or statements of intent in the ordinances themselves. (The City of Tacoma actually developed general statements of legislative intent within its zoning ordinance, while operating under the older enabling act.)

There is no doubt that States are moving in the direction of adopting the degree of specificity regarding local planning policy that the new Washington act includes. As a matter of fact the new Washington act was modeled closely after the new California act, which in turn reflected new ideas of enablement in some of the other States, particularly New Jersey.

There is also no doubt that it would take a fairly sophisticated local government to bridge the gap of generalization in most State planning enabling acts in terms of developing the needed framework for local comprehensive planning policy. Further, though municipalities may, through competent advice, meet all of the specific requirements of a State enabling act, this action may be relatively empty if the intermediate policy framework is missing. It must be emphasized that even the finding that a municipality meets all of the legal requirements of a State enabling act under which it operates does not necessarily mean that it has an adequate policy underlying its comprehensive plan, or a good substantive plan.

These points disclose the complexity of evaluating the local comprehensive plan. The legal framework consists of not only what is said in the State enabling act, but also what policy statements are in subsequent municipal ordinances. Furthermore, these statements are questions that experienced planners, attorneys, and public administrators argue about, because the line of demarcation between general State enablement, local policy statements expressed in ordinances, and administrative orders is never clearly defined. There is also the difficulty that newly elected or appointed municipal officials have in wrestling with these problems. Unfortunately, this study did not have time to go into an analysis of the degree of sophistication of local officials in these matters, which remains an unwritten chapter in this type of feedback research.

Financing and Staffing

The discussion under the first part of the preceding section implies that staff services of some sophistication are needed not only to develop the necessary implementary instruments but to educate continually members of local government bodies concerned with the planning activity. It is perhaps a common misapprehension among the officials of local government, particularly new ones, that a plan is something that is drawn and then filed—that a plan is a set of lines or colored areas on a map needing only periodic revision. The mere fact that municipalities may be small is no indication that their problems are small. In most instances, suburbanizing communities need the most advanced level of professional planning service, and in fact a much higher per capita budget than their long-established "mother" cities.

Findings of this research show that in the study area no city under 13,000 inhabitants has a permanently employed professional planning official. On the other hand, most of the small communities have been able to employ planning consultants for limited periods of time, and have engaged in comprehensive planning studies under the auspices of the Housing and Home Finance Agency, through the 701 planning assistance program. In instances where these programs have been used to develop comprehensive plans there was rarely a continuation of sufficient planning budget to either develop implementary measures or allow for the continuation of the service even on a marginal basis, or both. Although there are some serious problems with the 701 programs in terms of developing coordinated urban area plans insofar as they are conducted on a piecemeal basis, discussion here is limited to an anlysis of the degree of inspection given to the 701 contractors. In Washington, the State Department of Conservation and Economic Development has jurisdiction of administering the 701 program of the Federal Government, but it has not been allocated sufficient funds to develop any criteria for these programs or to review work of the contractors in any way. With the exception of a few States (notably, New Jersey) this seems to be characteristic of 701 supervision and review throughout the country. Furthermore, one of the most important deficiencies in the 701 program, as far as Washington State experience in the study area is concerned, is the lack of follow-through by the municipalities after the planning contractor leaves. This is evident by the substantial failure of local governments engaged in these contracts to execute even the minimal requirements of the State law. For example, in the study area there was absolutely no difference between the municipal performance in regard to legal sufficiency of their planning programs between those cities engaged in 701 contracting and those not. As a matter of fact, cities employing 701 contractors have among the worst records in terms of merely meeting the minimal requirements of State laws concerned.

The object of this discussion is not to be critical of the 701 program in itself, but to evaluate its results in terms of questions that impinge on the coordination of highway and land development. In this regard, no city in the study area having a 701 contract had evolved any criteria. Perhaps the most important conclusion is that the provision of planning budget alone is not sufficient to advance the activity. State and Federal agencies certainly cannot place much credence in these 701 plans on the surface of it. They may mean something, but in all probability, the level of planning acceptance and policy formulation will not be much different than what existed before the contract was carried out.

Legal Sufficiency

A surprising finding of this study was the failure of most of the municipalities in the sample to undertake even the clearly stated mandatory requirements of due process as provided for in the State planning enabling acts. For example, in spite of the very clear mandate for municipalities to file plans and amendments to them with the county auditors before such plans and amendments would be official, an overwhelming majority of units of government analyzed had not gone through this requirement. Although it is true that most of these cities engage in local planning implementary activities through the exercise of the police powers and remain unchallenged, they are nevertheless vulnerable to attack any place along the line. Further, these failures are a rather basic contravention of the democratic process in government.

There are perhaps three important conclusions to be drawn in regard to legal sufficiency:

1. Weakness in Local Administration. —The record of the cities studied reflects a weakness in local administrative development. If there is failure to meet the barest essential requirements established by State law in setting up a planning program there will no doubt be deficiencies in the administration of the program itself. This kind of a failure implies administrative weakness all down the line. It implies problems in developing administrative measures that would carry out any policy, however well that policy was founded.

2. Inability of Small Units of Urban Government to Effectuate Mandatory Provisions Properly. —The findings here further reflect basic problems in the structure of urban area government in that it is mainly the large units of local government (in this case, the two major counties and one of the principal cities) that carry out the administrative provisions of the State law in reasonably good order. (Seattle, the largest city in the area, actually shows up as having a poor record in this aspect but this is due mainly to an untested interpretation that the city holds to the effect that it is not bound by the State enabling law by virtue of its home rule privileges.) This finding implies that there is no substitute for a continuing professional planning staff and legal department as well. The three units of government mentioned have legal departments that scrutinize all aspects of local legislation and administration; whereas in the smaller units of government, with possibly one or two exceptions, one must conclude that if there is not adequate continuing planning advice there is also inadequate legal advice, judging by the record. Perhaps legal services in these units is on a hit-or-miss basis, or not adequately provided for financially. Unfortunately for the State highway development programs many of the interchanges occur in the smaller suburban cities where the level of planning is most subject to deficiencies. Also, even considering the development of the federated approach to urban area government, wherein there might be centralized planning staff (as is the case of the Municipality of Metropolitan Toronto) the exercise of police power at the local level may not be any better administered than it is now.

3. Inadequacies in State Planning Enabling Acts. —In all fairness to the administrations in the smaller cities studied one must conclude that vagueness and inadequacies in State enablement itself (particularly the 1935 act) might be responsible for poor follow-up record at the local level. For example, it is not clear in the older Washington planning enabling act just how the comprehensive plan is to be adopted and what it shall contain. Another provision requires that the ordinances themselves which implement

the comprehensive plan should be part of the comprehensive plan itself, which makes it difficult to distinguish between a policy document and implementary ordinances.

Contents of the Comprehensive Plans

There is a widespread lack of agreement among the municipalities studied as to precisely what the comprehensive plan is, what materials it should contain, and what instruments should constitute the plan. The situation may be due in part to the ambiguity of the old enabling act, RCW 35.63, but it is probably also due in part to the variety of opinions on this matter held by professional planners.

The disagreement among planning law authorities on the nature of the comprehensive plan stems primarily from a more fundamental disagreement concerning the scope of the planning function of local government. In a casebook, Haar (4) presents a series of definitions of city planning that have been given at various times. These definitions show no uniform evolution of thought on the scope of municipal planning. They express a variety of concepts of the planning function ranging from design of the physical environment to an all-encompassing planning of municipal policies; and they imply a spectrum of goals ranging from the protection of property values to the promotion of general social values.

This disagreement among authorities in the field can be seen in varying views on specific questions as well. One example is the disagreement arising over the question of adoption of the comprehensive plan by the municipality. Beuscher (5) recommends that the plan be reviewed by the planning commission and sent to the council for adoption. Haar (6), on the other hand, has suggested that the plan be adopted as an impermanent constitution, on which implementing ordinances can be based. Webster (7) disapproves of adoption by the city council because of the difficulty of changing the plan once it is law. With this evident lack of agreement among eminent planning legal authorities on both the scope of local planning and on specific issues involving the nature and content of the comprehensive plan, perhaps it is to be expected that local plans will vary widely in character.

The ambiguity of the old Washington enabling act and the variety of opinions held by professionals is reflected in judicial decisions relating to the comprehensive plan. In a King County Superior Court decision of 1958 Douglas referred to the plan of King County as the comprehensive zoning plan (Hon. Malcom Douglas, Superior Court, King County, Washington, State ex rel. Doull et al. v. King County Commissioners, oral opinion, July 23, 1958). In a 1956 decision, also in King County Superior Court, Hodson made the following statements regarding the comprehensive plan of King County (most populous county in the State):

> Well, I think for at least two of the main reasons which have been advanced here I will have to conclude, that we (King County) do not have a comprehensive plan as contemplated by the statute and, as far as I can see, we never have had one. So far as I know, the question has never been presented even in trial court before and I am sure has never been presented to the Supreme Court. Certainly it is a question that has got to be finally answered and I hope that there will be an appeal here to the Supreme Court rather than attempting to patch up the situation locally so that we will know in the future just what we are expected to do under this statute...But I am afraid that I am bound by my duty here to read the statute and declare what I think it menas, and I think it means something in writing which can be filed, which looks to the future and which takes in not areas of seven sections or so, but whole big areas of 30 or 40 square miles, including not only shopping, and industrial, and professional areas, but residences, parks, golf clubs and hospitals, clinics, fire stations, post offices, police stations, city halls: everything arranged by a predetermined scheme to which all subsequent zoning must conform. I think this is what they were driving at. (Hon. James W. Hodson, Superior Court, King County, Washington, State ex rel. Lee v. Gibbs et al., oral opinion, June 11, 1956.)

It is interesting to reflect that in 1956, 21 years after the Washington State planning enabling act was passed, and the same length of time since the founding of a continuous local planning function in King County, a judge would make the statement that in his opinion there had never been a comprehensive plan.

Perhaps the greatest stumbling block for State highway agencies is a lack of knowledge as to how to treat local comprehensive plans, from the standpoint of their content as well as their meaning. In the study area in question, comprehensive plans vary from a single sketch, without any statements to accompany it, to a well-developed document of policies, accompanied by maps, studies, and preamble statements accompanying most sections of the zoning ordinance. In some cases the local comprehensive plans cannot be distinguished from a slick paper, chamber-of-commerce-type, promotional brochure, and in other jurisdictions it could not be distinguished from the zoning ordinance itself.

On this question, comprehensive plans from other parts of the country include such widely divergent items of interest as annual precipitation, history of the area, and pictures of recently constructed public buildings. Not only is there widespread variation in the concept of the comprehensive plan from State to State, but as this study shows between municipalities of the same State. There is no doubt that this phase of local government is a complex one and a frustrating one to develop with clarity. There is no doubt also that there must be movement in the direction of developing local plans, whatever the difficulties are, if more foresight is to be attained in self-government. At the same time, there is no doubt that this activity of State and local government is still in its earliest developmental stages and that State highway agencies will not only have a difficult time in interpreting local plans but in judging their ability to control urban activities having a bearing on trunk transportation needs.

Policies Regarding Integration of Land Use and Transportation Planning

To date, most municipalities studied have been unable or unwilling to adopt policies concerning the integration of land use development and transportation facilities.

Assuming the willingness of the local governmental units to develop and implement such policy, it is doubtful that current planning practice can provide a sound basis for its formulation. Transportation studies employ land use analyses to determine the transportation-generating characteristics of broad categories of land uses. However, experience has shown that land uses change radically through time, especially at freeway approaches (8). A logical determination of what land development pattern should occur at these locations is an extremely difficult problem, and one with which a hard-pressed, local planning staff harried with zoning amendments can rarely cope.

Assuming further that a predictive or desirable intersection land use pattern is evolved for a particular urban area, the question remains whether such a pattern can then be accepted by all municipalities in the area. It is probable that the smaller the municipality the more important would be unique circumstances of the area and the less likely would be the possibility of applying a model developed for the urban area in general. Also, it is the small municipality which is least able to finance research or feedback analysis on the consequences of policy. These considerations raise the doubt that smaller municipalities in metropolitan areas can be expected to develop meaningful policies for the integration of land use development and transportation facilities.

Because only one municipality in the study area (Tacoma) has adopted an official policy concerning the development of land at freeway interchanges, it would appear that units of local government are not aware of the need for such a policy or are unable to develop a policy to meet the need.

The expressed concerns over congestion at freeway interchanges are often based on a desire to protect the efficiency of limited access facilities which represent an enormous investment of Federal and State funds. But is this goal a motivating concern to the municipalities that control the land use at freeway interchanges? Perhaps in the larger cities the over-all problems arising from congestion attendant on land use are evident, but in small municipalities in which the land at a freeway interchange provides prime commercial and industrial sites with the attendant potential for a high property

tax return, the major concern may not be the efficiency of the limited access facility. It is significant that the interchanges with the highest traffic volume are not always located within the limits of a large municipality. Of the four interchanges that are junctures of Interstate routes in the Seattle area, only one is within the corporate limits of Seattle. Two of these interchanges are located in the unincorporated area of King County, and one falls within a town of 1,974 inhabitants (Tukwila, which was specifically incorporated to facilitate a regional shopping center adjacent to the interchange). At one of the two interchanges in unincorporated King County, a regional shopping center and office building complex is planned for 1963.

General Conclusions

1. Local planning effort, as it exists, has not been concerned with studies regarding the development of policy for controlling land uses at freeway interchanges.
2. There is doubt whether any effective program of control could be evolved by a mandatory requirement of the State that local governments do so.
3. Grants made under section 701 of the U.S. Housing Act are probably ineffectual as concerns the question of the integration of land use development with State trunk freeway facilities.
4. Comprehensive plans are not as a rule significant instruments on which to base highway interchange planning policy.
5. It is doubtful whether State agencies could effectuate a program for land use control at highway interchanges if the controls themselves and adjustments of these controls were left up to local government.
6. It is questionable whether the State could effectively administer its own roadside zoning program in an urban area because of the problem of fractionalizing land use policy between State and local government.
7. In all probability, the extension of access controls to portions of approach roads or design solutions involving the temporary public ownership of abutting land offer the most feasible alternatives to the reduction of interchange congestion.

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Discussion

KURT W. BAUER, Assistant Director, Southeastern Wisconsin Regional Planning Commission, Waukesha, Wisc. —It appears that the authors' findings regarding the quality of local planning are basically similar to those of the Wisconsin study "A Method for Attaining Realistic Local Highway System Plans," presented by the writer and published in HRB Bulletin 326. The writer feels it is significant that these two studies, independently carried out, different in scope and purpose, and covering widely separated geographic areas, seem to verify each other in some of their basic findings. If the lack of sophistication in the local planning efforts is as prevalent as these two studies indicate, there is real cause for concern.

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