A Summary and Reappraisal of Access Control

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In the last 20 years evolution of laws and doctrine relating to control of highway access has progressed from the stage where primary concern was to establish a sound legal basis for the construction of express-type highways to a stage where currently the main interest is in problems of the interpretation and administration of access control laws. Success in applying existing access control law to the problems now arising in the construction, modifications, and operation of controlled-access highways depends on securing renewed recognition of certain basic characteristics of the balance of public powers and private rights involved in the access control problem.

The optimum balance among competing demands made on the law is jeopardized by recent court decisions which fail to preserve the flexibility of administrative choice as to when police power or eminent domain may be used to control access. Restrictive interpretations of administrative authority to control access may be found in judicial definitions of abutters' rights which have subtly expanded the concept of access to include interests in the flow of traffic and visibility of the roadside from the highway, in judicial reluctance to accord engineering judgments regarding modern highway design and use a status in law commensurate with their importance in fact, and in a general failure of the valuation process to provide workable distinctions in the determination of compensation for access damages.

To some extent the improvement of those aspects of access control which are still controversial may be expected to come naturally as lawyers and courts become more familiar with the economic and engineering necessity for the major elements of access control, and acquire professional skill in the use of these new sources of evidence. In some instances, however, shortcomings in the statutory structure of access control laws and the conceptual basis of legal doctrine relating to highways may be correctible only through more far-reaching revision of the law.

THE YEAR 1962 may be said to stand slightly more than two decades into the Expressway Period. This is scarcely long enough to have worked out and tested answers to the complex problems involved in adjusting to these facilities, or, indeed, to have discovered all of the points at which adjustment must be made. But it is long enough for Americans to have clarified thinking on why they want express highways, and how and where they want them to be built, and how much they are willing to pay in costs—direct and indirect, social and economic, political and cultural. The process of matching objectives with effective and equitable programs of action is constantly going on; the process of re-examining and reappraising all of these factors must also be continuous. Also, because the expression and implementation of both the objectives and the action programs for the expressway construction are found in the system of laws, it is inevitable that highway laws form the focal point of this reappraisal.
Looking back over roughly 20 years of expressway law, it is evident that so far a principal preoccupation has been with the task of establishing an adequate legal basis for roadbuilding agencies to plan, construct and operate express highway facilities. To have accomplished this through legislation in 50 States and the Congress, together with the necessary body of implementing law from administrative agencies and the courts, is, of course, cause for satisfaction. But, as the national community now begins to live with and use these facilities, it is clear that the legal system will be relied on to provide both the basis and the framework for other adjustments to the expressway highway. Here is where the need for reviewing and reappraising the law is emerging most sharply.

**ASPECTS OF ACCESS CONTROL**

Control of access to the highway from roadside land is the most striking feature of the express highway concept, and, if there is to be a full and smooth adjustment of the economy and society to these highways, the laws relating to access control must reflect the best possible accommodation of many interests that are affected by it. Access control may be viewed from the position of the highway engineer, the highway-user, the landowner whose special interest is in the present use of his land, the planner whose interest is in the future use of land, and the lawmaker whose concern is with the policy-governing allocation of community resources to transportation facilities among the other various public needs.

The highway engineer views access control in terms of the gap between motor vehicle use and the traffic capacity of the highway system. By carefully classifying and designing the segments of the highway system according to particular functions, the movement of traffic on the scale demanded at present and in the foreseeable future can be expedited with safety. For that segment which is relied on to handle the greatest volume of traffic, control of access from the margins of the highway is considered essential. Within other segments of the highway system not devoted exclusively to serving through-traffic there are many locations where the engineer still deems it necessary to control access for limited stretches, or to assure the flow of traffic through key intersections. Access control is a flexible device for implementing the concept of functional specialization in highway design.

Not only does the highway engineer resort to access control design facilities for present traffic, but he also sees in access control a device for protecting this traffic capacity throughout the expected operational lifetime of the highway. To the highway engineer this is of great importance because the time and expense needed to build modern arterial highways is so great as to make it prohibitive to rebuild them or bypass them more frequently than their normal wear-out period of time.

The highway user views access control in terms of travel time, transportation costs, and highway convenience. He sees the Interstate System as having the effect of shrinking the size of continental United States by 29 percent, for this represents his saving in travel time and transportation cost in long trips. On a lesser scale, every metropolitan commuter views the expressways that he uses daily in terms of savings of a similar character. To enjoy these advantages, however, the expressway user has had to readjust his standards and habits of travel to a new pattern of service and access to the roadside lands. Services of necessity (such as police protection, emergency road services, and accident aid) should be distinguished from those of convenience, such as fuel, food, comfort, lodging, communication, and information. Official agencies assume responsibility for services of necessity on controlled-access highways, but,

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except in the case of toll roads, services of convenience can be obtained only by leaving the through-traffic roadways at controlled-access points. Driving plans and habits of the motoring public have had to change to take this into consideration.

The landowner, whose chief interest is in achieving the highest and best use of his land, is likely to view control of access with mixed feelings. He recognizes that land use and land value is basically dependent on accessibility. He is accustomed to equating accessibility with direct access; a driveway from his land onto the adjacent main highway is easy for him to see and understand. He is not so sure what will happen to his accessibility when the highway designers finish rearranging his access to harmonize it with their plan for the new expressway. In this spirit he approaches the problem of adjusting his own plans to the presence of the express highway. To the extent that construction of a controlled-access highway alters accessibility of a site, the highest and best use of that site may change. As these changes occur, the arrangement of access which is necessary or suitable for the development of that site in its new use may change. Thus the landowner asks how the means of access should be arranged to maximize the advantages of accessibility that the new highway confers. He is likely to find different answers for farm land, suburban residential areas, urban multiple-unit dwellings, industrial sites, institutional sites, commercial districts, and roadside business, because in each of these cases, the optimum arrangements of access tend to reflect the differing characteristics of these uses. As experience is acquired in development of suburban residential housing, industrial parks, shopping centers, motorist services, and other specialized land uses adjacent to controlled-access highways, judgments regarding suitable arrangement of access have changed and will continue to change.

The planner tries to foresee the possible future development and arrangement of land uses, and he views access control as a tool capable of use in delineating areas according to the functional characteristics of their land-uses. He sees the expressway not merely as an engineering device for penetrating the massive development of urban areas without forfeiting traffic-carrying capacity but also as a boundary or separator for the major functional subdivisions within the urban area—residential, industrial, commercial, recreational, etc. In making use of access control in the planning process, various interests and values that may not be considered elsewhere are weighed and evaluated. For example, where should the expressway be located in order to encourage the type of land-use pattern that is deemed desirable? Will the proposed locations for expressway interchanges attract high-traffic generator land uses to sites where secondary streets and roads are incapable of handling the traffic volumes? What dislocation will be caused to local residents in areas where right-of-way must be acquired? What timing should be used in the construction of an expressway system in order to maintain a proper balance in the establishment of the complete range of public facilities that are necessary for private development of land? These and many other matters that arise as indirect or long-range consequences of access control are of particular interest to the planner when he views expressways.

Planners have often appeared critical of highway engineering decisions relating to expressway design, route location, and the like, asserting that these decisions have not given adequate consideration to the long-range or community-wide effects of access control. Some of this is understandable because engineering judgments must be made under pressures not felt by planners. More often, however, this criticism is evidence of insufficient coordination rather than divergency of viewpoints.

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3 This is not to suggest that planners work entirely in isolation from those who design and program highway construction. Modern highway agencies provide for the planning function as an integral part of their operations. At most, therefore, planners may claim that the long-range view is their special (rather than "exclusive") concern and contribution to the highway program. Further comment on this distinction between planning and programming may be found in the HRB Special Report on "Highway Programming, An Analysis of State Legislation," to be published in 1962.
4 See discussion in Owen, W., "Cities In The Motor Age" New York, 1959.
In the American system of government, responsibility for determination of public policy resides preponderantly in the legislative branch. Therefore, when the lawmaker views access control his field of vision must be wide enough to take into account all the viewpoints just mentioned, striving to reconcile them where their demands compete, and anticipating future needs where present tendencies have not yet attained full growth. Also, because means can never entirely be divorced from ends, he must ultimately formulate highway policy in the light of currently controlling financial policy. Because expressways are costly and functionally specialized structures, the balance of costs and benefits, both direct and indirect, is relevant. Once this balance has been struck, it is pertinent to ask how and among whom the costs of expressways are to be allocated. The answer to this question will be felt throughout the entire framework of law surrounding construction and operation of controlled-access highways, from the basic decisions on route location and design standards to the technical rules of evidence governing determination of value for public acquisition of access rights.

The suggestion that the access control concept has these many aspects is, of course, not new or novel. With any thought about this matter it is clear that access control means different things to various segments of the public who are involved in or affected by highway construction and use. What is important is that these viewpoints continue to be considered together in balanced perspective when policy decision are made regarding the law relating to controlled-access highways. The posture of the law and its particular provisions should, if they are to be sound, reflect the best possible accommodation and reconciliation of all these interests. As expressway law moves from its task of providing a framework for applying the access control concept in the construction and operation of the highway system, the success with which these various aspects and viewpoints are reflected in the law may decisively affect the quality of its doctrine.

RELATIONSHIP OF ROADSIDE AND ROADWAY

Reappraisal of the present body of access-control law in the light of the tasks that it is now being called on to perform should start with some reference to its historical roots. History is important because in the Anglo-American legal tradition precedents tend to be at least as persuasive as principles in legitimizing the use of power in the name of the public interest. Accordingly, the historic legal relationship between private use of roadside land and public use of the road itself becomes a primary reference point for courts and legislators when considering the policy at the basis of access control.

The English Statute of Winchester in 1285, which required landowners to clear a strip 200 feet wide along the margins of market roads, and the subdivision control ordinances enacted by many American local governments within the past decade have a common rationale in the policy that private interest in the use of roadside land should defer to public interest in the use of the roadway. This policy rests on three factors—public safety, promotion of the efficiency and convenience of transportation within the community and between communities, and the benefits that the highway confers on the roadside land. Controlled-access highway design is a relatively new form of expressing this servitude, but its rationale is essentially the same as various other forms that the historic servitude has taken. Other expressions of this servitude (such as modern building codes, set-back requirements, urban zoning, and community planning) can all be traced to municipal ordinances in the American colonial period, and thence to the English common law.

A review of American highway law in the 18th and 19th centuries suggests that the concept of the servitude of the land to the highway was not only used defensively to protect the public's paramount interest in transportation but also actively to promote that interest. Witness to this are the long survival of the "statute labor" system for road construction and maintenance, the duties of the roadside landowner to keep the ditches and roadside slopes scoured and cleared, and the traveling public's right to detour through private land where the highway became founderous. Evidence of the

servitude is also clear in the 18th and early 19th century cases on common law nuisance.

Compared to this long-standing body of law, the doctrine that abutters have certain rights to light, air, view, and access as against the public in its role as proprietor of the highway system is a relatively recent development. Up to, say, 100 years ago the landowner could find an extensive body of property law defining his rights and duties with respect to his neighboring landowners, but scarcely any law recognizing any right against the public highway agency. Essentially, early 19th century American law acknowledged little more than that the landowner had a right, based on equity and natural justice, to be compensated for land actually appropriated or buildings destroyed to build highways. Change of grade was the usual cause of complaint, but courts held that interference with access because of this was not compensable. History suggests that the doctrine of this period was influenced by the fact that land was plentiful, that even in urban areas development was not critically dense, and that the protection given to property under the new constitutions was considered essentially the same as that accorded under the English common law during colonial times.

The seeds from which an expanded concept of property and a doctrine of abutters' rights grew were sown in the "western" courts (Ohio and Kentucky) and the writings of various American legal scholars during the middle years of the 19th century. Between 1850 and 1880 the concept that property was "taken" in the constitutional sense only if it was physically appropriated or destroyed was extended to include instances of interference with the landowner's use of his land. As urban land became more densely developed, and as land use became more dependent on accessibility to markets, access became more closely associated with the use of property, and hence more closely identified with the constitutionally protected right of property. Giving encouragement to this idea, treatises on eminent domain in the 1880's declared that although rural highways were established largely for the accommodation of the traveling public, city streets were laid out either wholly or partly to afford access and frontage to adjacent land. The stage was thus set for the famous New York elevated railroad cases, which, starting in 1880, somewhat obscurely established the compensability of injuries to light, air, view, and access due to the placement of non-highway structures in the public streets.

By 1900 a considerable body of case law had been made regarding interference with the abutters' rights to light, air, view, and access due to unusual or unexpected changes in the condition of the adjacent street. The doctrine of abutters' rights was accepted, although its theoretical foundations were still so obscure as to prompt Holmes to make the remark that it would have been in no way amazing if the courts had completely reversed their conclusion and held that abutters had no special rights in or to the public highway except as specifically granted by contract or status. Hindsight would now seem to suggest that the doctrine of abutters' rights originated as a step by the courts to protect landowners' expectations that, when they developed street-front land for a certain purpose which depended on access, such access would not be destroyed by changes in the design of the street without compensation.

This concept and doctrine of abutters' rights, evolved by the courts to protect landowners' "reliance interests" in the industrial revolution of the late 19th century, has become the starting point for courts as they face the transportation revolution of the mid-20th century. In their interpretation of legislation authorizing the access control for selected segments of the highway, the courts have applied the touchstone of reasonableness and suitability. If a limitation on the existing access leaves the abutting landowner with connections to the adjacent highway which are "reasonable and suitable" for the highest and best use of his land, he is said to suffer no injury for which he can

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6 Lexington & Ohio RR Co. v. Applegate, 8 Dana(Ky) 289 (1839); Crawford v Village of Delaware, 7 Ohio St 469 (1857).
7 Lewis, J., "Eminent Domain" 8100 Chicago (1888).
claim compensation under the constitutional guarantee of private property. "Reasonability and suitability" are matters of fact, to be proved by the evidence in each instance.

Lawyers have little cause to quarrel with this approach to the law establishing access control. Certainly it is the traditional and tested method of interpreting American constitutional guarantees of property against governmental police power action. The success of this doctrine in action, however, depends on the current validity of the courts' concept of public welfare and the scope of the landowners' reliance that can be harmonized with this concept. The next step in a reappraisal of access control calls for a judgment on this all-important question.

ACCESS CONTROL POWERS AND THEIR USES

Surveying the range of legal powers available to the public for implementing the concept of access control, one may consider five familiar categories: (a) the power to regulate private use of property referred to as "the police power"; (b) the power to appropriate private property for public use upon compensation, known as the eminent domain; (c) the power to spend public monies in aid of public purposes, or the power to make contracts; (d) the power to tax and license; and (e) the planning function of public agencies.

Police Power

The power to regulate private use of property has historically been asserted in two forms; i.e., through the action of nuisance and through use restrictions of general applicability imposed by statutes or administrative regulations.

The Action of Nuisance. — At the present time the action of nuisance receives little attention in implementing control of access in the expressway era. This is notwithstanding its long history of active service in the 17th, 18th, and 19th centuries, when it was the chief means of protecting the public highways from encroachments, injuries, and annoyances, and enforcing the positive duties of the roadside landowner with respect to the road. Although a sound theoretical basis exists for recognizing access as a "highway nuisance" under certain circumstances, 20th century court decisions contain little discussion of the common law nuisance aspect of roadside activity except as it affects the normal or intended use of neighboring private lands. If interference with the normal or intended use of the adjacent highway is indeed an operational factor in common law nuisance cases, it is required to appear clothed in the garb of the neighboring property owners' interests rather than in its own name and right.

Although the doctrine of common law nuisance has been slow to recognize private access as a form of nuisance to the public highway, there is evidence that actions based on statutory declarations of nuisance have been used to protect the highway from several types of roadside activity which create problems closely akin to vehicular access. One of the most common examples involves the declaration that certain types of roadside advertising are nuisances, and therefore subject to abatement for the protection of the highway. On judicial review such statutory declarations have generally withstood the challenge of their constitutionality under the concept of due process.

Perhaps even more interesting to study is the indirect effect that land-use control laws have on the development of nuisance doctrine through their influence in establishing the character and standards of a community or an area therein. Not only do the standards of nuisance show a tendency to coincide with those of the standards of zoning that prevails in the area, but the application of nuisance doctrine to unzoned land is often carried out by reference to the zoning of nearby comparable areas.

11 For example, Fuller v Fiedler, No. 107570, Cir. Ct., Dane County, Wis., May 2, 1961.
On principle, excessive use of private access to an adjacent public highway qualifies as a nuisance equally as much as any discordant or obnoxious land use. Yet the relationship of access controls and nuisance doctrine has never been as clearly articulated by the courts as has the relationship of land-use controls and nuisance. As a result, the present body nuisance law offers the basis for a simple, flexible, and effective method of controlling access, but fails to offer the highway counsel a body of precedents directly applicable to the cases where vehicular access demands are the point of contention.

Regulation of Land Use and Highway Use. — The growing body of regulatory legislation dealing with the use of the highway and roadside access may be organized around a three-fold classification: (a) those intended to protect the integrity of access control established in the original design and construction of the highway, (b) those intended to introduce control of access into the design or operation of highways originally designed as land-service roads but now unable to accommodate traffic demands adequately or safely, and (c) those intended to exercise control over the traffic-generating capacity of roadside land and thus forestall the development of conditions jeopardizing the safety, efficiency, and convenience of the adjacent highway.

With respect to the first group, there is little controversy over the extent to which engineering judgment may be implemented by the police power. Because abutting owners can have no expectation of access to expressways built on new location, no legal rights of access are taken or impaired by enforcing access control in their operations. Prevailing doctrine is summed up in the comment in a recent Federal court decision that the law requires the public to pay only for what it takes, not for what it declines to give. 13

A striking contrast occurs, however, in the cases dealing with establishment of access control for existing highways of conventional design. Here the courts are badly divided on the question of how much the roadside landowner should reasonably expect to adjust his land use to changes in the design or control of the highway without compensation. Curious patterns seem to appear when the fact situations are compared. For example, as long as the highway agency applies its regulatory measures to the movement of traffic within the traveled portion of the roadway, there is ample precedent for imposing noncompensable limitations upon the access of roadside land. These include the familiar laws relating to one-way traffic, no turning, channelization of traffic by marked lanes, and the use of a wide variety of median strips and similar barriers. When, however, the regulatory device or rules are applied to the edge of the roadway or the right-of-way (as in the case of marginal curbs, fences, or simply by refusal to permit driveway cuts and access connections) or when the highway is reconstructed on a wider right-of-way use physical design to achieve the needed channelization and elimination of interference at intersections and along the highway margins, use of the police power becomes extremely controversial.

This is, of course, a most unsatisfactory basis for expressing the policy of access control or applying it to the cases. Why should the existence of abutters' access rights, or the question of whether they are taken or damaged in the constitutional sense, depend on whether the public highway agency happens to establish its measures for access control within the existing roadway or at the edges of the right-of-way? Illustrative of this is the problem of determining when the substitution of frontage road access for previous direct access necessitates compensation of the landowner. Reduced to its elements the action of the highway engineer in this case merely seeks to achieve the same engineering objectives as sought by the traffic engineer who works within the physical confines of the street or roadway, but many courts have treated this situation as if it involved a vastly more complex problem. After almost 20 years courts are still struggling with the riddle of the Ricciardi case which spoke in terms of a distinction between actions that had the effect of "re-routing the highway in relation to defendant's property rather than a mere re-routing of traffic in relation to the highway." 14

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14 People v Ricciardi, 23 Cal(2d) 390 at 399 (1943).
As an axiom this has a certain appeal. But as applied to the infinitude of fact situations which are presented by the highway engineer's work, it has created a confusing pattern of precedents as the courts, by their device of inclusion and exclusion, case-by-case, have tried to say where the relationship of the highway to roadside land begins and ends. Reappraisal of the doctrine that has evolved in connection with access control for existing highways suggests that what is needed most is a reversion to the test of reasonableness and suitability of the access arrangement before and after control in the light of the landowner's use of his roadside site, with emphasis on establishing a better understanding of the role of access in various land uses and a reaffirmation of the premises on which the current public policy of access control rests.

In applying this test it is possible that semantics may have a more influential part in legal evolution than lawyers have heretofore recognized. When a highway is redesigned and reconstructed so as to segregate through traffic and local traffic physically, a landowner often receives direct access to a "frontage road" or "service road" in lieu of the direct access he formerly had to the single roadway on which all types of traffic were mixed. Has he thereby been deprived of his access to the highway? To the design engineer these outer facilities provided for local traffic are functionally specialized component parts of the highway just as the limited-access through-traffic lanes are inner components of the same highway. From the engineering viewpoint both of these components are combined in the over-all design of the expressway, and are viewed as different lanes of the same thoroughfare rather than different or separate roads. One may speculate about what might have been the courts' reaction if the descriptive term "frontage lane" had been used instead of the suggestive term "frontage road" when the statutes and cases involving access control first arose. It is possible that the lawmakers' choice of words has had the effect of driving the law further away from rather than closer to the engineering concept that is basic to the express highway.

The group of regulatory laws aimed at controlling the traffic-generating tendencies of roadside land use includes a wide range of devices for zoning and special purpose regulation, such as set-back lines, subdivision controls, and roadside zoning. Acceptance of these devices is high, and, where applied in timely and perspective manner, their capability of improving the functional relationship between highways and roadside land is demonstrable. If they have any shortcoming it is because they must be applied before or at the moment when land development occurs in order to be most effective. The growing use of transportation criteria in planning and zoning is encouraging, for, as in the case of the evolution of nuisance doctrine, it inevitably has an effect on both the decisions of private developers of land and the decisions of the courts in the enforcement of roadside land-use controls. From both directions, therefore, this influence helps achieve a more amenable relationship between the use of the highway and the development of roadside land.

Due Process for Access Control. — The application of statutory standards of access control to particular segments of the highway system or particular parcels of roadside land raises questions of the fairness of both the substance and the procedure of administrative actions. This concept of fairness is expressed in the element of due process of law which is required to be present in all instances of the implementation of public policy through the police power. It has been relatively easy to satisfy this requirement in the initial establishment of access control. Public hearings on the location of controlled-access highways are specifically provided for in several states, and in others the general law relating to administrative procedure have been held applicable to designations of access control. It may, however, be questioned whether these procedures which have satisfied the requirement of due process in the initial designation of controlled access will be sufficient to guarantee the continuing fairness of this control over a period of time when the access needs of the roadside land and the access control needs of the highway will change.

This problem may be illustrated by the case of a roadside owner who sells part of his land after control has been imposed on access to the adjacent highway. This landowner may remain satisfied with the controlled arrangement of access as originally established, but the buyer to whom he sells part of his tract may urgently desire to open his own direct access to the highway. Yet when this buyer applies to the state highway agency for permission to open a new driveway, his request may summarily

16 See, for example, Nick v State Highway Commission, 13 Wis(2d) 511, 109 NW(2d) 71 (1961).
be denied. A similar situation may arise where a landowner who was originally authorized access for residential purposes later wishes to develop his land for roadside business but is refused permission to modify his access to serve this use. Regardless of the merits of these requests, they raise a basic legal problem for highway counsel; namely, after access control has been established, when and how may it be modified to accommodate the changes that occur in the use of the highway and roadside areas? Also, who shall be permitted to initiate these modifications?

Judicial review of administrative decisions is as familiar and accepted as judicial review of legislative actions. It must, however, be used with great discrimination if it is to avoid destroying much of the effectiveness of the administrative process. If, for example, the owner of a tract of land subdivides so that 20 lots front on a controlled-access highway, is it appropriate or necessary that the law should recognize a right of action for each of the 20 purchasers of lots to demand judicial review of the highway agency's refusal to issue a driveway permit? Is it even practical to suggest that each landowner abutting a controlled-access highway has a right to take the highway agency into court at his pleasure by repeated unsuccessful applications for permission to add to or change the access that the agency has allowed in its original plan. If it is not, what is the alternative? Is it to vest the power to modify the arrangement of access exclusively in the highway agency with no recourse from the agency's ruling?

Current state access control laws do not clearly provide the mechanism for access control arrangements to be self-adjusting; yet, as the patterns of land use and highway use change, the need for periodic adjustments and modifications will surely become apparent. When this time comes, the law must have an answer for the landowner who claims, in good faith, that the prevailing arrangement of controlled access has become obsolete and unrealistic, and thus constitutes a "taking" of property without due process of law.

The Power of Eminent Domain

Discussion of the law of eminent domain is usually carried on in terms of the key words contained in constitutional guarantees of property rights. So it is natural to find that the focal points for development of legal doctrine relating to condemnation of access rights have been the concepts of "property," "taking or damaging," "public purpose," and "just compensation." The early controversies over whether the eminent domain could lawfully be used to acquire or extinguish abutters' rights of access have now largely been settled. Except for an occasional dispute over whether the condemnor's highway plan is sufficiently definite to justify advance acquisition or excess condemnation, the authority to use eminent domain to implement access control is no longer challenged. On the other hand, two areas of controversy are particularly apparent: (a) the question of when eminent domain must be used in preference to the police power, and (b) the matter of standards for valuation of access rights when they are acquired for highway purposes.

Use of Eminent Domain Powers.—Determination of whether to use the police power or the eminent domain to control access is inherently a difficult matter because it requires agreement on when an abutter's access is reduced below the point where it is reasonable and suitable for his land use. Under any circumstances, this is likely to pose an intricate problem in analysis of the evidence and balancing the conflicting interests of the parties involved. To this inherent difficulty another has been added by the fact that in some states the courts have interpreted the highway agency's statutory authorization to use eminent domain as the exclusive method of implementing the policy of access control. Actually, a close reading of the statutes in the context of their legislative and engineering background makes it clear that they do not purport to say when eminent domain must be used, but only that it may be used. To equate the discretionary "may" with the mandatory "must" is well-nigh fatal to the development of any kind of workable doctrine of access control, yet in some places the area of administrative discretion regarding the choice of powers to be used is still obscured by decisions of this sort.

16For example, Burnquist v Cook, 220 Minn 48, 19 NW(2d) 394 (1945).
17Compare State v 0.622033 Acres of Land, 49 Del 174, 112 A(2d) 857 (1955) and State ex rel Sternoff v Superior Court, 52 Wash(2d) 282, 325 P(2d) 300 (1958).
18For example, Smith v State Highway Commission, 185 Kan 445, 346 P(2d) 259 (1959); Florida State Turnpike Authority v Anhoco Corp., 116 So(2d) 8 (Fla 1959).
In addition, but not so clearly discernible in the language of the courts, there is tendency to merge those instances where a highway agency voluntarily chooses to compensate an abutter for his restriction of access with other instances where the highway agency must compensate. It is natural for an abutter to build up his expectations to the composite level of both these categories of cases instead of distinguishing between what the highway agency does because it must and what it does because it chooses to as a matter of policy.

These tendencies to narrow the highway agency's discretion in the matter of deciding when and how it will implement its authority to establish control of access can have serious consequences both to the practical success of highway program administration and to the orderly development of a legal doctrine that reflects the evident intention of the legislation on which access control is based. Here, as has been already been noted in speaking of the police power, the troubled spirit of People v Ricciardi may still be felt in the background of many eminent domain decisions. Before legal doctrine can be expected to furnish better guidance for administrative choice as between police power and eminent domain methods of access control, the functional relationship that exists between the roadway and the roadside must be given a more realistic expression in the courts' definition of the legal relationship of these two types of land use. It is not reassuring to read decisions in which the courts have required highway agencies to use eminent domain on the premise that their proposed control of access will destroy or substantially impair the usefulness of roadside land, and then return a year or two later to find by study of the economic history of this land that its usefulness and value are greater than ever before notwithstanding access control. The key to better legal doctrine may therefore be more and better economic data regarding the role that access plays in the various major types of land use, and the relentless and forceful use of these data as the factual foundation of administrative decisions regarding the methods of access control.

Valuation of Access Rights.—A better documentation of the functional relationship between the arrangement of highway access and the usefulness of land for various purposes would also go far toward improving the second major area of uncertainty relating to the use of eminent domain; namely, the standards for valuation of access rights. The principles governing valuation of property became settled in the law before the present era of expressways, and during their formative period it was not in regard to highway acquisitions that these principles reached their highest point of sophistication. Before the 1940's valuation in highway acquisition was chiefly concerned with such tangible elements as land that had been appropriated or buildings that had been destroyed. When highway agencies began to acquire the intangible and incidental rights of access, it was natural that courts should use the same approach (market value before and after) that they were accustomed to use in the valuation of the land itself.

It is not suggested that this original inclination of the courts was bad. Properly used, the "market value before and after" formula is, as one court has said, "sufficiently accurate for the practical affairs of life." The important question is: what is the proper way to use market data in determining the value of highway access? This is not an easy question when it is noted that the valuation of land itself is far from being an exact science, that access rights are but one of several closely interrelated factors that enter into the calculations of willing buyers and sellers, and that it is possible only in theory to imagine situations in which the factor of access is the sole difference in the circumstances before and after. These practical difficulties go far toward explaining the situation described by Bonner at the 40th Annual Meeting when he reported instances in which differences of as much as 800 percent existed between the testimony of expert witnesses evaluating the same parcel of land for expressway condemnation. Obviously, it is easy to go wrong in interpreting market data for valuation of access under the methods currently in use.

18 For example, State ex rel Morrison v. Thelberg, 87 Ariz 318, 350 P(2d) 988 (1960); Mississippi State Highway Commission v Muse, 233 Miss 694, 103 So(2d) 839 (1959).
20 See comments relating to People v Ricciardi in 3 Stanford L Rev at 306 (1951).
21 Esch v Chicago, M & StP RR, 72 Wis 229, 39 NW 129 (1888).
Inasmuch as access finds its usefulness and value only as it serves and benefits the land to which it pertains, it may be that the starting point for improving the valuation of access is in a better understanding of the particular way that access relates to particular land uses. All land uses have some flexibility regarding the arrangement of access, and for some land uses it is possible to make extensive rearrangements of access without significantly impairing the owner's opportunity to develop the land to its highest and best use. This is apparent when one compares the access needs and use characteristics of such major types as farm land, suburban residences, urban multiple-unit dwellings, industrial and institutional sites, commercial areas, and roadside business. It seems only reasonable to expect that when the valuation of access rights is based on market data, the selection of these data should be sufficiently discriminating to reflect these differences.

This is, of course, easier said than done, for it implies that a vastly larger amount of analyzed data on the economic effects of access control will be available for use by the appraisal witness. Actually, the impact of access control on a scale sufficient to provide data has only quite recently begun to be analyzed. In the case of some types of land use, it may never be possible to accumulate data on comparable market transactions in sufficient quantity and of sufficient quality to support precise valuation analysis. In such event, serious consideration should be given to using other approaches. Income data are considered an important index of value for some types of land use, but income is affected by many variable factors that often are so well disguised that they are not revealed in the fact-finding process of the normal condemnation. Replacement cost, on the other hand, offers more promise as a standard for measuring the value of access. For highly specialized land uses, such as institutional sites, it is almost the only method likely to yield evidence that is relevant. Its successful use in these instances suggests that it could be similarly used either in lieu of market data or as a means of verifying the apparent results of market data study.

The need for using great discrimination in matching the valuation of access to the particular needs and characteristics of the land use being served by such access is also apparent when the role of access in severance damage is considered. One of the most obvious dangers of undiscriminating valuation is that the highway agency may be compelled to pay twice for the same thing, or to pay where it is not on principle called for. A recent case illustrating this involved the highway agency's condemnation of the back half of a lot for use as expressway right-of-way. This taking did not disturb the motel and dwelling house located on the front part of the lot, nor the access of the motel to an existing highway adjacent thereto. As might be expected, the court held that there was no obligation to compensate the landowner for the taking of access rights to the new expressway to be constructed on the back half of the lot. But, when instructing the jury as to severance damage, the court said, "The owner is entitled to compensation for injury to and depreciation, if any, of the remainder of the tract resulting from the appropriation of the land and rights of access in question."²³

How is such an instruction to be understood? Is it an invitation to receive through the backdoor what cannot by law be handed out openly through the front? Is it a sign of gradual movement by the courts to extend the concept of just compensation so that it includes elements of injury not heretofore regarded as compensable? Whatever its long range implications, it has the immediate result of letting the landowner who has lost both access and land recover for injury to his accessibility, while it denies it to his neighbor who happens to have had no land taken and hence no basis to recover for loss of accessibility as part of his severance damages.²⁴ Happily, the instruction noted does not reflect the majority opinion of the State courts, but even its occasional appearance causes uneasiness over the handling of access as an element of severance damage.

Much more could be said about the problems of valuation where access is rearranged to achieve a more harmonious co-existence between express highways and roadside land uses, but it would most probably only serve to demonstrate how much more is necessary to learn before a basically better method of valuation can be found. It would

²³Riddle v State Highway Commission, 184 Kan 603, 339 P(2d) 301 (1959).
²⁴Compare Riddle v State Highway Commission, 184 Kan 603, 339 P(2d) 301 (1959) and Winn v United States, 272 F(2d) 289 (1959).
lead, for example, to a deeper analysis of the prevailing doctrine governing offset of benefits against damages which is an implicit premise of the "before and after" approach. Also, it might possibly lead to a deeper study of the British experience in compensating landowners adversely affected by the so-called "positive planning" done under their Town and Country Planning Acts. It will at least continue to tax the skill of trial counsel for the highway condemnor for many years to come.

The Power to Purchase

To study only the cases in which control of access has been the cause of controversy may lead to a false impression that landowners and highway agencies always occupy the roles of antagonists. The truth is that only a small fraction of the total number of land acquisitions for controlled-access highways are disputed; the rest are accomplished amicably by the mechanism of negotiated purchase. Here valuation is not a disputed issue because compensation is determined by a meeting of the minds. Nor is the legal authority to acquire access rights either by outright purchase or reservation a matter that has proved controversial under the prevailing state laws.

More interesting to consider are the various aspects of conveyancing which are involved in acquisition of access by contractual arrangements. Among these aspects are (a) selection of proper parties to the transfer of access rights, (b) selection of the proper legal instrument for effecting the transfer, (c) selection of suitable language to describe fully and accurately the abutters' rights that are the subject of the transaction, (d) specification of arrangements desired for reservation of certain access to the abutter, (e) specification of covenants running with the land, waiving consequential damages or other rights or claims possibly arising out of the contemplated highway construction, and (f) the formalities and provisions for recording the transfer.

Practical problems confront the legal draftsman in all of these aspects of contractual acquisition of access rights, and a survey of existing state law and practice suggests that each highway counsel has proceeded along lines most familiar to his locality. There is no suggestion that this variety of language is necessarily bad, for it is evident that it has not impeded the successful initial establishment of access control. If any question can now be raised regarding the relative merits of the various draftsmens' choice of words, it is in connection with the durability of the arrangements that they have created when they are faced with the pressures that inevitably will result from future changes in highway and roadside land uses.

For example, if what is involved in describing the right of access which is being conveyed is considered, one highway agency may describe this as the "abutter's right of access between the right-of-way of the highway and the grantor's remaining land"; and another may describe this as "all rights of access between highway No. . . . and grantor's remaining property adjacent thereto"; a third may speak of "any and all abutters' rights appurtenant to grantors' remaining property in and to the controlled-access facility." How will these be construed when and if the highway agency at some future date builds a frontage road parallel to the express lanes? Can the abutter at such time claim an unlimited right of access to the frontage road so that any control of access thereto results in compensable damage? This is one test that the language of the conveyances surely will face in the future.

Also, the relative significance of "reserving" certain existing access to an abutter-grantor, or of specifically providing that certain access shall be permitted notwithstanding the grantor's conveyance to the state may be considered. In the event that future changes in land or highway use make it desirable to rearrange access to this road, will the highway agency have to pay for extinguishing or changing the means of access allowed under this original conveyance? Here is another test of how well the draftsman did his work so as to reflect the complete intention of the parties.

Finally, one may consider the choice of words used in describing a reservation of access as it relates to the problem of enforcement. If this reservation is intended to

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accommodate some special activity (such as movement of farm vehicles and implemen-
tments in and out of fields, residential approaches, maintenance of utility or other
special facilities), does the language give the highway agency an adequate basis to pre-
vent other or greater use of this means of access against the grantor and his suc-
cessors in title?

Conveyancing is one of the lawyer's most ancient arts; so ancient in fact that one
may sometimes be tempted to think of it as more a part of the past than of the present.
Such a temptation will be dangerous if it takes the lawyer's eye off the constant ob-
jective of expressing the complete terms and intentions of an arrangement of highway
access with clearness and brevity. The business of preparing conveyances of property
for highway purposes is not less simple nor less important merely because other types
of instruments (such as those dealing with labor agreements, corporate mergers, or
credit transactions) have been made to seem more glamorous or vital to the functioning
of this complex mid-20th century economy. The truth is that conveyancing of abutters'
rights in connection with the construction of controlled-access highways is a subject
worthy of the deepest thought and best efforts that the bar can give, and is as fresh and
as unexplored as any matter which the second half of the 20th century will present to
the legal profession.

SUMMARY AND CONCLUSIONS

In this limited summary and reappraisal of American law relating to control of ac-
cess several potentially important matters are obviously missing. These include the
entire areas of the planning function, in which access control is becoming both a familiar
and influential factor, and the entire area of possible devices based on the power to tax
and license. There are, of course, many other problems involved in implementing
access control policy through the police power and eminent domain that have not been
mentioned. For these omissions there is no excuse except that some other aspects
seem closer to the real root of the problem that must be faced in preparing to live
harmoniously with controlled-access highways.

The controlled-access highway concept was not developed for a static economy. It
is based on the premise that both transportation and land use will continue to change.
Inevitably, competing demands will be made by both the traveling public and the road-
side land owner, and, equally inevitable, the legal system will be used as a positive
force for creating the kind of circumstances that will favor those demands which are
most consistent with the public interest. The law has never been able to avoid this
role, and it is unlikely that lawmakers would avoid it even if they could. Therefore,
the law must be prepared, by the efforts of legislators, counsel, and the courts, and
by the efforts of others who work in the related disciplines of engineering and eco-
nomics, to carry out effectively an active role of arbitrator between these competing
demands.

Part of this process of preparation must involve a redefinition of the historic servi-
tude that the highway has always cast on the adjacent land. Another step of the most
fundamental importance must be clarification of the legal basis of abutters' rights to
access. If it is indeed the abutter's "reliance interest" in reasonable expectations that
is being protected by the doctrine, some measurable standard needs to be laid down
for these expectations in the present era of express highway transportation. To ele-
vate access to the status of a constitutionally guaranteed property right without this
is clearly to court chaos.

The impact of these decisions should set in motion a wide range of inventive activity
in the field of access control laws. And landowners should not look on this as neces-
sarily a promise of more oppressive restrictions, for in the matter of police power
restrictions one of the most urgent needs is for some self-adjusting mechanism in
access control regulations to assure the continued validity of the arrangements for
access established by the administrative agency.

In the field of eminent domain law, a vast amount of work is needed to sharpen the
fact-finding processes used in valuation of access. This would probably come in the
natural programming of legal evolution, but the tremendous stakes that are involved
in modern expressway construction makes it mandatory that its coming be accelerated with all speed. There is also urgent need for inventiveness in the development of legal devices capable of assuring protection of the public's future interest in highways short of an outright purchase of the fee simple.

In approaching these tasks, highway law makers should not hesitate to borrow from whatever sources offer aid. British law felt essentially the impact of industrialization and urbanization before American law did. The lessons to be learned from a study of British experience in reconciling roads and roadsides should not be overlooked. In America, the same pattern of pressures now felt in connection with highways may also be found in connection with water resources, densely developed areas, and open space. Parallel problems may suggest parallel solutions. At least it is worth looking into, for the business of shaping through law a successful accommodation of the roadside and the roadway is one of the most important parts of living with the controlled-access highway concept.