Judicial Review of Administrative Decisions

In Highway Access Control

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TO DISCUSS this field of law, it is necessary to determine what review is provided by statute and what reviews are necessary under common law, or under constitutional requirements to satisfy equal protection and due process.

Because there are undoubtedly many different statutes in the various states, the Wisconsin law is used as a basis for this paper. Although there are statutes involved, the scope of review necessary to satisfy constitutional requirements may well be the same, whether or not statutory provisions exist. The access control statute, under which the State Highway Commission declares controlled access, has interwoven in it both police power and the use of eminent domain to accomplish controlled access. For the sake of better understanding, the controlled-access law in the State of Wisconsin is given in the Appendix. In reading through the controlled-access statute, it is apparent that in certain instances the Highway Commission may exercise the authority given it under this statute in such a way that the "administrative decisions," as made by the Highway Commission, may go beyond the legitimate exercise of police power. However, in subsection (8), the Commission may acquire the necessary property rights under eminent domain.

The statutes concerning the scope of the review under the Wisconsin law are given in the Appendix (sec. 227.20, Wis. Stats., which provides the scope of review of administrative decisions). Although it is possible that administrative decisions may be reviewed by certiorari, the Wisconsin court in the case of State ex rel. Ball v. McPhee, 6 Wis. 2d 190, 94 N.W. (2d) 711, indicated that even in certiorari, the court would go into the merits. The scope of review, as outlined in sec. 227.20, Wis. Stats., is the scope of review that the Wisconsin Court will use in all cases. It may well be that the substantial evidence rule set forth in sec. 227.20 (d), Wis. Stats., may differ in specific cases; nevertheless, the scope of review would be the same; that is to say, if the question is one of a legislative determination that involves the discretion of the Commission, the application of the substantial evidence rule may be different than its application in a contested case attempting to make a judicial determination.

Under the Wisconsin law, there are actually two separate decisions that the Highway Commission makes: (a) the finding that the designation of the highway, as a controlled access highway, is necessary in the interest of public safety, convenience, and the general welfare; and (b) a decision as to how individual properties will be affected.

Under the administrative procedure act, administrative decisions must be appealed within 30 days after service of notice of the order or decision.

To attack the order declaring a controlled-access highway, it must be done within 30 days after the order is published. If there was no appeal for judicial review within 30 days from the date of publication, the order would no longer be reviewable. It appears that it would be extremely difficult for anyone to upset the controlled-access highway designation with all of the material available concerning the safety studies on controlled-access highways. All that is necessary is that the designation be in the interest of public safety, convenience, and the general welfare. However, this does not get to the question of how the individual property owner is affected or how he may obtain a review of the effect of controlled access as it actually affects his property.

When the control access order becomes effective, the Highway Commission makes studies to determine the access to individual properties. The Highway Commission may determine that in certain cases the public welfare, safety, and convenience may require the landlocking of certain parcels. In those cases, the Highway Commission may decide to use subsection (8), and to acquire those interests under eminent domain.
There seems to be no dispute that if a parcel is completely landlocked, this would render any order under the police power as it affects individual property void, and to control the access effectively, it would be necessary to purchase those rights. The Wisconsin law on access appears to be that the effect on the parcel as a whole should be considered, and if there is reasonable access to the controlled-access highway, no taking requiring compensation has occurred (Nick v. State Highway Comm., (1961) 13 Wis. (2d) 511).

The Highway Commission studies the various properties, how and what access they presently have, the use to which the properties are being put, the general development in the area, and the extent of the controls necessary to protect the highway adequately for the use for which it is intended. Some highways, of course, will demand greater control than others. Also, the design of the highway may influence the extent of the desired control. After studies have been made on each individual parcel, the property owner is notified by mail of the Commission's decision as to how his property will be affected by the controlled-access order. In other words, at this point he is presented with the document that discloses the number of access points he will be allowed, and the use limitations on those access points, if there are any.

It is the position of the Highway Commission that, if a property owner desires to have this decision reviewed, he must make this request within 30 days from the receipt of this decision, or he must make a request for a rehearing, and then request judicial review within 30 days from the time of the decision on this rehearing. The type of review now being discussed is a judicial review of an administrative decision.

This is the time when all of the questions involving the order, as it affects the property of the abutter, must be resolved. Subsequent to this time, should any property owner request an additional point of access, or should he desire to change his access and he makes a request for a driveway, the only issue before the Commission, in consideration of such request, should be whether this change of access would be in the public interest. This is pursuant to sec. 84.25 (4), Wis. Stats.

At this stage, it would appear that how the access control affects the individual property is not a question that must be considered. In other words, if the property owner desires to develop his property in such a manner that additional access points are needed, this need would not be relevant or material, even if he could show damages as a result of the lack of additional access. As an example, if a property owner originally was given one driveway for a property with 600 feet of frontage, and some years later he desired to make two additional lots, each with 200 feet of frontage, and requested a driveway for each of those lots, alleging that he was entitled to a driveway for each division (or if the property owner actually conveyed to three different property owners and two of them came in with requests for driveways on the basis of being landlocked), the Highway Commission should not have to take into consideration the fact that the original parcel was divided into three different parcels and that, if each parcel were given a driveway, more value would accrue. The only evidence that would be material would be whether the public interest would be served by giving two additional points of access.

One public interest question that must be taken into consideration is the manner in which the highway fits into the pattern of state trunk highways as well as the local roads. Certainly, the State Highway Commission in review, must consider the local planning and development, because the planning of highways and streets must accommodate the traffic and it is impossible to plan highways without taking into consideration local planning, where the traffic will generate, the type of traffic, etc. Therefore, there may be cases where, because of the change of design, additional highways, etc., the public interest would be served by allowing additional driveways to aid proper development of an area.

To satisfy the constitutional and common law requirements, certain procedures must be followed at the administrative level.

A hearing is not necessary to satisfy due process or a prerequisite to judicial review. Whenever the Commission makes the decision on its own investigation as to the access rights of a property owner, it must document its decision. This documentation does not consist of sworn testimony and the making of a record as in a
contested case before an agency or before a court. It will consist of engineer’s re-
ports, reports of the Commission staff to the Commission, and anything else that the
Commission considers in making its decision. The Commission, in making its de-
cision, should make findings of fact and conclusions, which should consist of a concise
and separate statement of the ultimate conclusions on each issue.

Not only will the court require the findings of fact and conclusions for all decisions,
but it is the only sound procedure to follow. This procedure serves to protect against
careless or arbitrary action, in that it requires a consideration of each issue; it keeps
the agencies within their jurisdictional limits by requiring it to exercise its discretion
on each issue; it helps in preparing and planning cases for rehearings and for judicial
review; it facilitates judicial review by making it much easier to review the record;
and it also helps clarify the functions of the judiciary and administration, inasmuch
as the court, in judicial review, will not make its own findings but rather review those
of the administrative body.

On this decision, the property owner may either ask for a judicial review or may
ask the Commission for an administrative hearing on this decision. The Commission
then may deny the hearing or afford an opportunity to be heard, should his request be
timely and should it appear that a hearing is necessary. The Commission should
adopt rules of procedure so that parties would have a guide. In the absence of those
rules, the Commission would be obligated to set ground rules and inform the applicant
of those ground rules at the time of his application.

To have an orderly judicial review and to inform the Commission of the issues the
application will raise, it is desirable to have pleadings. The pleadings will also serve
to allow the Commission to deny a hearing, should it be obvious that the applicant is
not entitled to one.

The actual procedure and type of hearing is a matter that is within the discretion of
the Commission. Because the Wisconsin statute does not provide for a hearing, it is
the constitutional and the common law requirements that must be met. Those require-
ments would be met by having the opportunity to be heard, or by having the opportunity
to present material in writing and to present arguments before the Commission. A
jury trial type of hearing is not always necessary to satisfy due process. The process
of trial with cross-examination and a determination on the record is designed for re-
solving issues of fact, and is not adapted to the determination of issues of law and
policy, except when such issues turn on disputes of fact. In an ordinary law suit in
court, when the only issue is one of law, the court does not conduct a trial but receives
argument, either written or oral, and decides on that basis. In the majority of the
cases involving access control, the facts are not in dispute and can be agreed on by
stipulation. It is only the application of the law and policy to those facts that creates
the problem.

The most recent access case in Wisconsin was Nick v. State of Wisconsin, (1961) 13
Wis. (2d) 511 (Fig. 1). Reinders owned a tract of farm land abutting Calhoun Road (on
the west) and Wis 30 (on the south). In 1951, the State Highway Commission declared
Wis 30 a controlled-access facility and prohibited direct access thereto from Reinders'
tract. Reinders had previously entered his land via Calhoun Road and continues to do
so at the present time. In 1955, Reinders sold the southeast corner of his tract to
Nick, who subsequently applied to the State Highway Commission for a permit to open
a driveway directly onto Wis 30. On being refused a permit, Nick petitioned the circuit
court for a judgment of inverse condemnation, and assignment of the matter to con-
demnation commissioners to determine just compensation. The circuit court denied
this petition and Nick appealed to the State Supreme Court.

It went up to the Supreme Court on stipulation of the facts and was completely tried
on briefs and argument. In these cases, a trial-type hearing is without merit.

The Commission may in its rules provide, and the law probably requires, that
should there be a question of fact to be determined, and, should the applicant request
a trial-type hearing, it will be given. An examiner may conduct the hearing, but the
decision must be made on the record. However, in all other cases, hearings will be
of the other type.
There is the problem of the property owner making frequent requests for additional access to the abutting property after the 30-day time limit within which he may contest the administrative decision designating access to his abutting property. On these requests, the Commission does not have to entertain the application if it appears that the property owner wishes to test the reasonableness of the administrative decision. Furthermore, the Commission's refusal to grant a hearing on this basis, would not seem subject to judicial review.

However, when a request is made after this 30-day period, the issue of public interest will always remain open. This is similar to zoning law, and with growing communities and the developments surrounding those communities, the public interest may drastically change. Of course, the doctrine of res judicata will apply to any finally reviewed administrative decision.

This paper has not been confined to the question of judicial review, but it appeared that the problem of judicial review cannot be determined until the administrative procedures and policies are decided.

There are many other questions that must be answered, such as official notice of administrative records, methods of challenging facts outside of the record, and findings without evidence. However, these are questions that need not be dealt with in each case.

The Supreme Court of Wisconsin, in the Nick case, has held that judicial review of an administrative decision is the exclusive way to review controlled-access decisions; therefore, the questions of administrative policies and procedures and the scope of judicial review becomes most important in the controlled-access cases.

Appendix

STATE OF WISCONSIN CONTROLLED-ACCESS LAW

84. 25 Controlled-access highways. (1) AUTHORITY OF COMMISSION; PROCEDURE. The legislature declares that the effective control of traffic entering upon or leaving intensively traveled highways is necessary in the interest of public safety, convenience and the general welfare. The commission is authorized to designate as controlled-access highways the rural portions of the state trunk system on which, after traffic engineering surveys, investigations and studies, it shall find, determine and declare that the average traffic potential is in excess of 2,000 vehicles per 24-hour day. Such designation of a portion of any state trunk highway in any county as a controlled-access highway shall not be effected until after a public hearing in the matter shall have been...
held in the county courthouse or other convenient public place within the county following notice by publication once each week for 3 successive weeks in a newspaper published in the county, or if there be none, in a newspaper having general circulation in the county. If the commission shall then find that the average traffic potential is as provided by this subsection, and that the designation of the highway as a controlled-access highway is necessary in the interest of public safety, convenience and the general welfare, it shall make its finding, determination and declaration to that effect, specifying the character of the controls to be exercised. Copies of the finding, determination and declaration shall be recorded with the register of deeds, and filed with the county clerk, and published in the newspaper in which the notice of hearing was published, and the order shall be effective on such publication. Not more than 1,500 miles of highway shall be designated as controlled-access highways under authority of this section.

(2) CONTROLLED-ACCESS HIGHWAY DEFINED. For the purposes of this section, a controlled-access highway is a highway on which the traffic is such that the highway commission has found, determined and declared it to be necessary, in the interest of the public safety, convenience and the general welfare to prohibit entrance upon and departure from the highway or street except at places specially designated and provided for such purposes, and to exercise special controls over traffic on such highway or street.

(3) CONSTRUCTION; OTHER POWERS OF COMMISSION. In order to provide for the public safety, convenience and the general welfare, the commission may use an existing highway or provide new and additional facilities for a controlled-access highway and so design the same and its appurtenances, and so regulate, restrict or prohibit access to or departure from it as the commission may deem necessary or desirable. The commission may eliminate intersections at grade of controlled-access highways with existing highways, or streets, by grade separation or service road, or by closing off such roads and streets at the right-of-way boundary line of such controlled-access highway and may divide and separate any controlled-access highway into separate roadways or lanes by raised curbings, dividing sections or other physical separations or by signs, markers, stripes or other suitable devices, and may execute any construction necessary in the development of a controlled-access highway including service roads or separation of grade structures.

(4) CONNECTIONS BY OTHER HIGHWAYS. After the establishment of any controlled-access highway, no street or highway or private driveway, shall be opened into or connected with any controlled-access highway without the previous consent and approval of the commission in writing, which shall be given only if the public interest shall be served thereby and shall specify the terms and conditions on which such consent and approval is given.

(5) USE OF HIGHWAY. No person shall have any right of entrance upon or departure from or travel across any controlled-access highway, or to or from abutting lands except at places designated and provided for such purposes, and on such terms and conditions as may be specified from time to time by the commission.

(6) ABUTTING OWNERS. After the designation of a controlled-access highway, the owners or occupants of abutting lands shall have no right or easement of access, by reason of the fact that their property abuts on the controlled-access highway or for other reason, except only the controlled-right of access and of light, air or view.

(7) SPECIAL CROSSING PERMITS. Whenever property held under one ownership is severed by a controlled-access highway, the commission may permit a crossing at a designated location, to be used solely for travel between the severed parcels, and such use shall cease if such parcels pass into separate ownership.

(8) RIGHT OF WAY. Any lands or other private or public property or interest in such property needed to carry out the purposes of this section may be acquired by the highway commission in the manner provided in section 84.09.

(9) CO-OPERATIVE AGREEMENTS. To facilitate the purposes of this section, the commission and the governing bodies of a city, county, town or village are authorized to enter into agreements with each other or with the federal government respecting the financing, planning, establishment, improvement, maintenance, use, regulation
or vacation of controlled-access highways or other public ways in their respective jurisdictions.

(10) LOCAL SERVICE ROADS. In connection with the development of any controlled-access highway, the commission and county, city, town or village highway authorities are authorized to plan, designate, establish, use, regulate, alter, improve, maintain, or vacate local service roads and streets or to designate as local service roads and streets any existing roads or streets, and to exercise jurisdiction over local service roads in the same manner as is authorized over controlled-access highways under the provisions of this section, if, in their opinion, such local service roads or streets shall serve the necessary purposes.

(11) COMMERCIAL ENTERPRISES. No commercial enterprise shall be authorized or conducted within or on property acquired for or designated as a controlled-access highway.

(12) UNLAWFUL USE OF HIGHWAY; PENALTIES. It shall be unlawful for any person to drive any vehicle into or from a controlled-access highway except through an opening provided for that purpose. Any person who violates this provision shall be punished by a fine of not more than $100 or by imprisonment for not more than 30 days, or by both such fine and imprisonment.

(13) VACATING. A controlled-access highway shall remain such until vacated by order of the State highway commission except that the discontinuance of all State trunk highway routings over a highway established as a controlled-access highway shall summarize vacate the controlled-access status of such section of highway. The State highway commission shall record formal notice of any vacation of a controlled-access highway with the register of deeds of the county wherein such highway lies.

227. 20 Scope of review. (1) The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency, testimony thereon may be taken in the court. The court may affirm the decision of the agency, or may reverse or modify it if the substantial rights of the appellant have been prejudiced as a result of the administrative findings, inferences, conclusions or decisions being:

(a) Contrary to constitutional rights or privileges; or

(b) In excess of the statutory authority or jurisdiction of the agency, or affected by other error of law; or

(c) Made or promulgated upon unlawful procedure; or

(d) Unsupported by substantial evidence in view of the entire record as submitted; or

(e) Arbitrary or capricious.

(2) Upon such review due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it. The right of the appellant to challenge the constitutionality of any act or of its application to him shall not be foreclosed or impaired by the fact that he has applied for or holds a license, permit or privilege under such act.

Conveyancing Techniques for Acquisition of Access Rights

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• IN THE DEVELOPMENT of the modern highway system, where throughways might well be labeled the "Queen of the Highways," the problem of acquiring access rights becoming inextricably and intricately entangled with the acquisition of rights-of-way. The need for acquiring access rights has mushroomed into rather grandiose proportions since 1945, creating a field that is relatively new and continually changing.