

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 summarily 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.

The statutory provisions of the individual State usually provides the authority for the purchasing of these rights. The statute¹ in Oregon, for instance, provides that the highway commission may acquire by agreement, donation or the exercise of the power of eminent domain, ". . . fee title to or any interest in any real property, including easements of . . . access."

The Oregon legislature in 1951 also defined those situations where the purchasing of access rights was not necessary when they statutorily declared² that no rights of access shall accrue to any real property abutting on any portion or any State highway constructed, relocated or reconstructed after May 12, 1951, on right-of-way no part of the width of which was acquired before that date.

This same statute further provides that the State highway commission shall prescribe and define the location, width, nature, and extent of any right of access that they may wish to permit to any property coming within the purview of the enactment.

Additionally, in the leading Oregon case of *State Highway Commission v. Burk*,³ the Supreme Court, in 1954, clearly recognized the common law right of access when it said:

When a conventional highway is established there is attached to the abutting land an easement of access in and to the highway. Such easement is a property right which cannot be extinguished without compensation.

Although the court recognized the common law right of access, it also recognized that the throughway or non-access type of highway was of a different breed. The court went on to state that when a new highway is built where one had not existed before, and the resolution of the highway commission designated the new highway as a non-access highway, the abutting property owners did not acquire a common law easement of access.

Based on the ruling in the *Burk* case and the statutory law of the State, there are two situations existing in Oregon.

In the first situation, if an existing highway, any part of the width of which was acquired before 1951, is to be in any way converted into a controlled-access highway, it is necessary for the State to acquire the common law rights of access by purchase or condemnation.

In the second situation, if a new highway is to be constructed, no part of the width of which was acquired before 1951, no easement of access arises by virtue of the construction of the new highway.

¹ORS 374.035 "(1) The State Highway Commission may, in the name of the state, acquire by agreement, donation or exercise of the power of eminent domain, fee title to or any interest in any real property, including easements of air, view, light and access, which in the opinion or judgment of the commission is deemed necessary for the construction of any throughway, the establishment of any section of an existing state road or highway as a throughway or the construction of a service road. The commission may accomplish such acquisition in the same manner and by the same procedure as real property is acquired for state highway purposes, except that in case the acquisition is by proceedings in eminent domain the resolution required under such procedure shall specify, in addition to other provisions and requirements of law, that the real property is required and is being appropriated for the purpose of establishing, constructing and maintaining a throughway.

(2) A resolution adopted by the commission stating and setting forth that a proposed highway is to be constructed as a throughway is conclusive evidence that the highway when constructed is a throughway with all the characteristics and incidents prescribed by and provided for in ORS 374.005 to 374.095."

²ORS 374.405 "No rights in or to any state highway, including what is known as right of access, shall accrue to any real property abutting upon any portion of any state highway constructed, relocated or reconstructed after May 12, 1951, upon right of way, no part of the width of which was acquired prior to May 12, 1951, for public use as a highway, by reason of the real property abutting upon the state highway."

³*State Highway Commission v. Burk, et al.*, 200 Or. 211, 265 P.2d 783.

An interesting corollary of the authority to acquire access rights is the method used in the conveyancing of these rights.

Where the sale is voluntary, and the grantor, by warranty deed, bargains, sells, conveys, releases, and relinquishes his access, or the sale is involuntary, and the transfer is perfected by judgment, the general language used states:

As a part of the consideration hereinabove stated, there is also bargained, sold, conveyed and relinquished to the Grantee all existing, future, or potential common law or statutory abutter's easements of access between the parcels herein described and all of the Grantor's remaining real property.

In those situations where the control of access desired is to extend beyond the area of the property acquired, a more comprehensive provision is necessary, to include

All the existing, future, or potential common law or statutory abutter's easements of access between the right of way of the _____ Highway and all of the Grantor's remaining property.

In those cases where, after the conveyance by the grantor of all of his access rights, it is desirable to allow him certain rights of access, the language used provides for

Reserving for service of the said remaining property the right of access from the Grantor's remaining property to the highway right of way at the following places and for the following widths.

It is of extreme importance that the language describing the rights of access being allowed the property owner be exact, complete, and unambiguous. There is a cogent reason for this—there are many and varied types of "rights of access" that can be granted; such as

1. Unrestricted. — This includes industrial, commercial, and all lesser uses.
2. Commercial. — Generally "unrestricted" could be used here inasmuch as the greater includes the lesser.
3. Residential. — This includes ingress and egress to a place of residence, which would not include motels where one does not, as a general rule, reside.
4. Agricultural. — Width may become a point of concern here because the width of farm machinery dictates large approaches. In wheat country, for instance, a width of 75 to 100 ft is not uncommon to accommodate large harvesting equipment.
5. Harvesting of Timber Products. — This is a common purpose in Oregon where access will be allowed only for the purpose of hauling out timber.
6. Farm Crossings. — These are granted to provide the farmer with a grade crossing for animals and equipment in ordinary husbandry where the farm has been severed by construction of the highway. Ordinarily granted in lieu of providing an undercrossing via a tunnel or tube.

To safeguard the use of the crossing for the purpose for which it was granted, and to prevent it being converted into two points of access, a provision⁴ has been adopted which states that such a farm crossing will remain in existence only so long as any portions of the remaining property on both sides of the highway are held in common ownership.

⁴The right to establish, maintain and use a crossing of a width of _____ feet at Highway Engineer's center line Station _____. Such right is to continue only so long as the crossing shall be used for farm purposes exclusively, and such right is to continue only so long as any portions of the remaining property on both sides of the said relocated _____ Highway served by such crossing are held by a common ownership.

There are many instances, where there is a complete restriction of access, when the highway department wishes to mitigate the element of damage by constructing a frontage road to serve the remaining property. In such an event, the language used⁵ states that the grantee shall construct a public frontage road to be connected to the main highway, or other public ways, at such places as the grantee may select. It further provides that the grantors shall be entitled to reasonable access to the frontage road, on application filed with the state pursuant to statutes and regulations.

In all cases where access has been reserved to the highway, the department, as a possible future benefit, inserts into the conveyance a provision for a future frontage road.⁶ This clause provides that in the event the department constructs such frontage road, all access reserved to and from the highway shall cease, but that the grantors shall have access to the frontage road, which will connect to the main highway or other public ways at points selected by the grantee.

The retained right to connect the frontage road to the main highway or other public ways at points selected by the grantee has caused difficulty, especially in commercial areas. In such cases it is now the State's policy to include in the frontage road clause language accurately defining the limits within which the frontage road will connect to the main highway.⁷

It has been found necessary to include a suspension clause⁸ in the conveyance where access has been allowed but restricted as to width, use, or purpose. This clause simply provides that the grantee shall have the right to close the reserved point of access if it is used for a purpose not authorized.

Because it has been ruled that the restrictions have affected the abutter's rights of access, it is felt necessary to include in the conveyance a provision stating it is expressly intended that these covenants, burdens, restrictions, and reservations shall run with the land and shall forever bind the grantors, their heirs (successors), and assigns.

⁵"Grantee shall either construct a public frontage road or provide some other access road on the _____ side _____ of the highway, and the Grantors, their heirs (successors) and assigns, shall be entitled to reasonable access to the said road for any purpose, upon application filed with the State pursuant to applicable statutes and regulations. Said road shall be connected to the main highway or to other public ways only at such places as the Grantee may select."

⁶"Grantee has the right to construct or otherwise provide at any future time a public frontage road or roads; whereupon all rights of access hereinabove reserved to and from the highway that are on or adjacent to any such frontage road or roads shall cease, but the Grantors, their heirs (successors) and assigns, shall have access to the frontage road or roads for any purpose upon obtaining a permit from the State under the applicable statutes and regulations governing the same. Said road or roads shall be connected to the main highway or to other public ways only at such places as the Grantee may select."

⁷"Said frontage road or roads shall be connected to the relocated _____ Highway not a greater distance to the West of the Grantor's remaining property than a point approximately opposite Highway Engineer's centerline Station _____, and not a greater distance to the East of the Grantor's remaining property than a point approximately opposite Highway Engineer's centerline Station _____."

⁸"If, after written notice to desist, the Grantors, or any person holding under them, shall use any of said rights of access or farm crossing for any purpose not stated for that particular place, or shall use said access or farm crossing in a width greater than above stated, or shall permit or suffer any person to do so, such right of access or farm crossing shall automatically be suspended. The Grantee shall thereupon have the right to close such place of access or farm crossing for all purposes. The suspension shall terminate when satisfactory assurance has been furnished the Grantee that the place of access or farm crossing will be used only for the purpose hereinabove stated. The Grantee's right to close such place of access or farm crossing shall be continuing as to each succeeding use for a purpose not herein stated."

The foregoing covers the conveyancing techniques employed where an existing highway is used and abutter's access rights must be eliminated. There are numerous special situations requiring specific provisions, which are outlined in the Appendix.

Next, there are the instances where an entirely new alignment is acquired with no access rights accruing to abutting real property. Can the conveyance remain silent where no access is to be allowed? In the past the feeling has been that there is a need to incorporate into the conveyance a provision such as previously mentioned. The clause used basically provides that there shall be no rights of access between the property conveyed and the grantor's remaining land. This feeling no doubt comes from the overcautious desire to place into the record a statement as to the nature of the access, even though the same is controlled by statute. The State is now seriously considering the use of language that provides

It is understood and agreed that the access provisions of ORS 374.405 are applicable to this transaction and access is restricted to the _____ Highway. (Between Highway Engineer's Station _____ and Station _____.)

An even greater problem arises in which the highway commission decides to allow access to a new route, where the right-of-way was acquired after 1951. If, as the statute provides, no rights of access accrue to the abutting property, must the highway commission grant them inasmuch as there are no rights to reserve? Would this mean the commission members must sign all deeds so that the granting would be effective? Would the acceptance of delivery of the deed by commission constitute a grant, much as the acceptance of delivery of a deed may constitute a promise by the grantee to pay the mortgage as provided in the deed? Would a clause in the conveyance stating that the grantee, by acceptance of the deed, acknowledges that it has granted certain rights of access to the highway be sufficient?

These are questions as yet unanswered. It is for this reason, therefore, that Oregon uses much the same technique in conveyancing in this latter situation as in the former. This seems to be the safer procedure and, so far no one has raised any insurmountable legal barriers to cause a change in these adopted methods.

Appendix

Although the Department strives to handle each case on an individual basis and to draft language that will portray the full intent of the parties, nevertheless, there are many situations that tend to fall into a pattern. Some of these which bear consideration are listed with a brief word of explanation.

1. Access is to be relinquished only along a part of the frontage because of traffic safety.

As a part of the consideration hereinabove stated, there is also bargained, sold, conveyed and relinquished to the Grantee all existing, future, or potential common law or statutory abutter's easements of access between the right of way of the public way identified as the relocated Richardson-Eugene Highway from Highway Engineer's Station 480+90 to Highway Engineer's Station 460+00 and the Grantor's remaining abutting real property.

2. Access is to be relinquished to the highway and also a connecting interchange leg on which the remaining property abuts.

As a part of the consideration hereinabove stated, there is also bargained, sold, conveyed and relinquished to the Grantee all existing, future or potential common law or

statutory abutter's easements of access between the right of way of the public way identified as the relocated Pacific Highway and its connecting interchange legs, and all of the Grantors' remaining real property consisting of all parcels contiguous one to another, whether acquired by separate conveyances or otherwise, all of which parcels either adjoin the real property conveyed by this instrument, or are connected thereto by other parcels owned by Grantors.

3. Where because of the owner's insistency or other reasons, the description of the owner's remaining property to which the restriction relates must be set out, the following provision is applicable. Many times, this is preferred by title companies because they then have a basis for posting their tract indexes.

As an essential part of this transaction, we, the undersigned, as the owners in fee simple of the tract of land abutting on the Boeckman County Road connection to the West Portland-Hubbard Highway, as described in that certain deed wherein Fred Jensen and L. Helen Jensen, husband and wife, were grantees, recorded in Volume 421, Deed Records of Clackamas County, Oregon, at Page 236, of which the real property covered by this deed is a part, do, for ourselves, our heirs and assigns, sell, transfer, convey and relinquish to the State of Oregon, by and through its State Highway Commission, its successors and assigns, forever, all existing, future or potential easement of access and all rights of ingress, egress and regress to, from and between the real property described in said recorded deed and the real property above described including the highway constructed or to be constructed thereon or along.

4. Occasionally, it becomes necessary to make a second acquisition without change of access.

This deed is not intended to alter any rights of the grantors, their heirs and assigns, as set out in that certain deed from the grantors herein to the grantee herein, dated _____, recorded in Book _____, Page _____, Deed Records of _____ County, Oregon.

5. Excess property is sold by the State Highway Department at auction. If direct access to the highway is to be restricted, the following is typical.

Provided, however, there is reserved to the Grantor, and waived by the Grantee, all rights of access between the above described real property and the right of way of the Pacific Highway abutting on the Westerly side of said parcel.

6. No additional right-of-way is required, but a relinquishment of access is necessary, a separate document is executed by the owner, in which the following is a part:

bargain, sell and relinquish to State of Oregon, all easements of access and all rights of ingress and egress which may exist or may in the future accrue to, from or between their remaining abutting real property as hereinafter described and the right of way of the Pacific Highway.

7. If access points were previously allowed by a prior conveyance but now need to be relinquished, a document is obtained which in part reads as follows:

convey, release and relinquish to State of Oregon, all those certain rights of access to the Pacific Highway at Highway

Engineering Station 506+30 as excepted and reserved to the above grantors (or predecessor in title to the above grantors) in that certain deed from _____ to the State of _____, dated _____, recorded _____, in Volume _____, at Page _____, Deed Records of _____, County, _____.

8. Many times points of access are to be used jointly with others, such as in the case of a common driveway, or the existence of an easement across the abutting property in favor of other owners. In such case, the reservation includes one of the following:

Reserving for service of the said remaining property, a right of access of a width of twenty-five (25) feet, in common with others, from Grantor's remaining property to said highway at the following place and for the following purpose only: It is specifically understood that the right of access at Highway Engineer's Station _____ is to be used and enjoyed in common with the adjacent property owners on the _____.

9. If the service road as provided is to give access to both lanes of traffic, one via an under or overpass, and the owner insists that this be incorporated into the conveyance, the following provision has been used:

Rights of access to a frontage road to be constructed by the Grantee, at its sole cost, on the Northerly side of the widened and relocated Pacific Highway, said frontage road to be connected at Highway Engineer's center line Station 778+35.25 for westbound traffic via Rock Point Traffic Interchange, and for eastbound traffic at Highway Engineer's center line Station 802+57.25 via a structure at Highway Engineer's center line Station 791+40.20 of the Rock Point Traffic Interchange. Exit from the widened and relocated Pacific Highway for eastbound traffic at Highway Engineer's center line Station 779+02.14 via an off-leg and structure of the Rock Point Traffic Interchange and westbound traffic at Highway Engineer's center line Station 803+07.10 via an off-leg of said interchange.

10. If the abutting owner desires to use one side of the farm crossing as an access to the highway, then he must reserve this additional use; otherwise, all rights will be lost on sale of the property on one side of the highway, creating separate ownerships.

11. All those having a lien against the property should be requested to subordinate their lien to the access restrictions. Such a provision used is as follows:

AND DO HEREBY FURTHER subordinate the remainder of the property covered by the lien of said mortgage to the terms, conditions, and restrictions contained in that certain deed from _____ to the State of Oregon, by and through its State Highway Commission, as follows, to-wit...

12. In the same respect, all those having an interest in the property should be requested to release the access rights between the highway and the property in which they have an interest using the following:

As a part of the consideration hereinabove stated, there is also remised, released and relinquished to the Grantee all existing, future or potential common law or statutory abutter's easements of access between the parcel herein described and all of the remaining real property, in which the Grantors have an interest.