Valuation of Access Rights

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• THIS PAPER concentrates on a few areas in the valuation of access rights which have received attention from the courts. It does not attempt to cover the entire field. Some of these areas, though important, have not received much attention. In this latter category consideration can be given to economic studies on the effect of freeway and other similar construction on property values. It has not been possible to digest any important part of these studies herein, but they appear to constitute an excellent body of source material on which the administrator or lawyer may draw.

The following are a number of tentative conclusions, the bases for which is suggested in the course of the paper:

1. The paper is concerned with legally compensable rights. Therefore, in any one situation, the inquiry is concerned with damages flowing from the loss of these rights, not other damages associated with the taking, no matter how burdensome.
2. Adherence to the previous proposition is made difficult by the frequent occurrence of heavy losses under circumstances in which there is loss of access (or its impairment). That difficulty is attributable to the natural tendency of judges (if not administrators) to find a way to compensate a landowner in some adequate fashion.
3. Formulas for determining "fair market value" in eminent domain cannot be applied with precision, either in the administrative or the judicial phase. This should be recognized not only as generally true of legal damage concepts but especially true where in a rapidly expanding community land presently classifiable as rural or vacant is suitable for a higher (i.e., more profitable) use.
4. Substitutes for direct access to arterial highways are not necessarily cure-alls, but the fact-finder (whether lawyer, judge, appraiser, or engineer) must take cognizance of the general nature of the property (urban, rural, suburban, wild) and of the particular way in which it is being used. In doing so, he will likely find that alternate means of access to a particular highway or into a particular highway system will not always serve the landowner's purpose.
5. Restrictions on land use, whether imposed by a remote grantor or a public body (zoning or planning commission) should be regarded as nonexistent in arriving at valuations, for the reason that the purpose for the restriction, if placed by a remote grantor, is no longer relevant, and if placed by a public body, is no longer realistic.
6. Judges (here particularly appellate judges) have by no means arrived at a full appreciation of the difference between the separate and complementary roles of police power and eminent domain. This failure is in part excusable in that under the present system of taking of property for public purposes, the courts largely determine the ground rules. That being so, it is not surprising that courts will seek some means of justifying compensation where spectacular inroads have been made on a going business largely, if not solely, dependent on traffic flow for its continued health.
7. Damages are, of course, payable in cash. Those concerned with highway planning, at any stage, must be cognizant of the danger that large awards or settlements will necessarily delay the completion of the Interstate and other programs. This has a competitive aspect. For example, States that lag behind in their highway programs will find themselves by-passed by private and public forms of transportation.

A few years ago, a citizen of Sheridan, Wyo., purchased a 10-acre tract in Douglas County, Ore. It was partially timbered, located in the foothills of the Cascades. It had a permanent stream. For a man who loved the wild things, this was the place to build a cabin, a snug all-weather one to which he could retire and to which his friends could be invited. This tract was a sort of "retirement fund." But one day he received in the mail a letter from the Bonneville Power Administration. . .

This is not a story of tragedy, of forced separation from the old home place so dear to childhood memories. It is simply a story of 20th Century America, illustrating several things. For example, it portrays the constant pressure of the public on private

affairs—the need for roads, power lines, government hospitals, parks, open areas near cities, wildlife restoration areas. It also demonstrates the frequent fallacy of attempting to classify land-taking in terms of economic benefits and losses. What, for instance, happens to this man when he pleads on the grounds of the choice of this spot for its aesthetic perfection, the difficulty of finding another, and the nagging fear that if he does find such another, it, too, will fall to the needs of the public?

Much more could be said about this man in Wyoming. One deal today with limitation of access on arterial highways, specifically with the valuation of "access rights." This is actually one phase of the law of damages. In that area, it is commonplace to note that not all injuries flowing from a given act or omission are compensable. For example, the heart patient who suffers a severe setback on witnessing a shooting in the street before her house cannot recover from the party responsible. The consequences, the courts say, are too remote. They mean, of course, that regardless of cause and effect, this is not a compensable injury. They mean, actually, that the protection of the courts, of government, does not extend that far. Thus, the person who finds that his motel no longer fronts on US 65, or that if it does, the normal tourist traffic on this arterial has been diverted to Interstate 90, a quarter of a mile away, has no injury legally compensable. He loses his business, perhaps, but he is not to be compensated, and simply because the protection afforded to the citizen by his government does not go that far. Sometimes, it is phrased in other language—the needs of the community outweigh those of the individual. One has no vested right in any particular traffic pattern.[1]

Access has been defined by one expert as "the right which a property owner has to get into the street in front of his property, and thereafter, in some reasonable manner, to the general system of streets."[2] Severance damages are those elements of loss occasioned to the remaining parcel after some portion of the original land has been taken. So defined, severance has nothing to do with loss of access because severance recovery may be allowable where land is taken for an expanded arterial road, with no access restrictions, or for the splitting into fragments of a tract through which a new roadway is to be constructed. Consequential damages, Orgel says, arise "by reason of the use to which the condemnor intends to put the part taken."[3] In other words, they flow as a consequence from activity off the abutter's land, whether or not any part has been taken. Thus, if Highway 30 is designated as limited access, the abutter is prohibited, usually by a fence, curb, or other obstruction, from getting on and off the highway in front of his property. His right to get on and off an existing highway is said to be an incorporeal right in the nature of an easement. It inheres in the land, is not alienable, but may be extinguished or reduced, in whole or in part, by action of a public body.[4]

It follows, from the nature of access rights, that they inhere only in the abutter on an established highway. Thus, typically, claims for compensation (i.e., consequential damages) said to arise from loss of access, arise, or should arise, only where the abutter can show such loss on an existing highway. If, for example, a new highway is constructed through his land, designated ab initio as a "freeway," "thru-way," parkway, or other throughfare having limited-access characteristics, then no compensation for loss of access is allowable. Although this seems obvious in the light of the definition previously mentioned, the point is worthy of emphasis because the effort, by one means or another, to work out compensation in such a situation has at times been successful.

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[1] New Way Family Laundry, Inc. v. City of Toledo, 171 Ohio St. 242, 168 N.E. 2d 885 (1960); Heil v. Allegheny Cty, 330 Pa. 449, 199 A. 341(1938); Nelson v. State Highway Bd, 110 Vt. 44, 1 A. 2d 689(1938).

[2] Robert W. Mattson, Deputy Attorney General, Minnesota, in "Access Control—Eminent Domain or Police Power?" (Mimeo).

[3] 1 Orgel: Valuation under Eminent Domain 253(1953).

[4] It could also be extinguished by release or merger. For statutory authority vested in a public body, see e.g., Franks v. State Highway Comm., 182 Kan. 131, 319 P. 2d 535(1957).

RIDDLE, CARAZALLA, AND THELBERG CASES

It is the purpose of this paper to examine certain decided cases in different jurisdictions. This is done without apology. It is done in the tradition of law teaching, in which cases of significance are explored. The result of this method is not to endow the student with a pervasive knowledge of the "law." It does not equip him with the power to whip out, at any given moment, a formalized "black-letter" statement of any legal principle, together with a brief run-down of the various exceptions and modifications of such rule. On the contrary, it is apt to provide him with something even more useful—an appreciation of the methodology of courts in handling certain areas of the law, an appreciation of the various rivulets and creeks whose confluence has brought about a river or lake now identifiable as demonstrating an important phase of legal thinking in a particular area. This sounds difficult. It is. The human mind craves order. It craves the proved and provable rule. To say that a case might go one way or the other depending on the emphasis to be given to certain factors deemed important in deciding it, is repugnant to those who cling to the ideal (in indeed it is an ideal) of some permanent and immutable body of law. In other words, in this process everyone takes part, from the rowdy in the saloon insisting "there oughta be a law" to the scholar in his cloister or the statesman in some legislative hall.

As a quick background to Riddle v. State Highway Commission,[5] it has been stated that compensation for loss of access is payable where a presently unrestricted arterial highway has been designated by appropriate authority as limited access, thus making it legally (and usually physically) impossible for the abutter to use the redesignated facility. In such case the before-and-after test is applicable.[6] Under such circumstances, loss of business is not regarded per se as a compensable item. The expression "per se" indicates here that there is no reason why, if relevant, business income cannot be shown in evidence as bearing on fair market value. The hotdog stand netting $100 per week is obviously worth more than the one netting $25 per week, and such income potential is naturally a factor that bears on the amount a willing buyer would pay for this operation, including land and buildings. Therefore, if business loss is noncompensable to the abutter on a redesignated highway, a fortiori, seemingly, it is not cognizable where the highway is completely new. In fact, in the latter case, no award of any kind for loss of access is allowable. For example, the owner of a rock shop on US 30 in Idaho loses 2.3 acres of his land through condemnation of the rear end of his property for the construction of US Interstate 90. The effect is the destruction of the rock business. What does the owner receive? The fair market value of the 2.3 acres of sagebrush land actually taken. Severance damages? None. Loss of access? None. His access rights remain in full vigor on his remaining land. He can claim none on the Interstate.[7]

With this background, Riddle v. State Highway Commission[8] can be examined. The case involves a typical relocation (Fig. 1)—a rectangular plot abutting US 24 on the south; six-unit motel on south end of lot; the State condemned 4.32 acres of north end of lot for relocated US 24, leaving 2.5 acres containing the motel units and other buildings; the acreage taken served no direct purpose to the motel operation except that it formed a wooded background. The 4.32 acres were appraised at $4,000, but the jury made an award of $23,887, this figure including the land taken plus damages to the remainder. It should be mentioned that the new highway would be raised as it passed the Riddle motel, so that highway travelers would receive only a quick glimpse of the roof as they sped past. Also, there was, of course, no direct access to the new highway, but it could be reached by interchanges located 600 feet east and 1½ miles west of the motel.

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[5] 184 Kan. 603, 339 P. 2d 301(1959).
[6] United States v. Miller, 317 U.S. 369(1942); United States v. Petty Motor Co., 327 U.S. 372(1946).
[7] Winn v. United States, 272 F. 2d 282(CA 9th 1959).
[8] Supra n. 5.

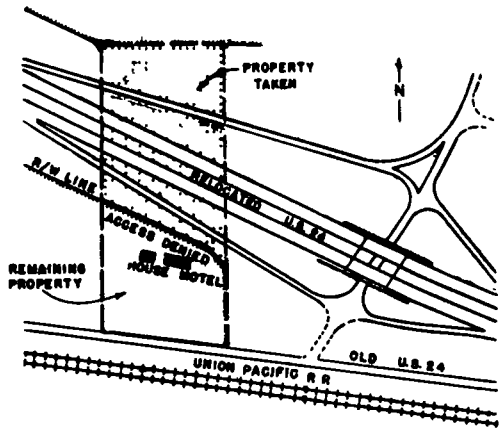

Figure 1. Kansas: Riddle v. State Highway Commission, 339 P (2d) 301.

Under Kansas practice, the court appointed appraisers who valued the land taken at $3,025 and considered the severance damages (i.e., difference in value of remaining land) between $4,961 to $6,250. Each of these appraisers testified that he had been instructed to omit damages for denial of access to the relocated highway, and that any business loss so traceable was not to be included. They testified that they had reduced their original estimate of damages by approximately $9,000. Riddle's experts placed the market value of the 4.32 acres at $4,320, but claimed that the remaining land had been depreciated by some $25,000 due to several factors: denial of access, great loss of income and profits, noise, unsightliness of the grade, inconvenience and circuity of travel occasioned by deprivation of access, and replacement costs of buying the same type of ground and building the same building on another transcontinental highway. However, on redirect examination, these experts admitted that the $25,000 loss in value was "practically all due to lack of access to the new highway and that such lack of access constituted 95 percent of the remainder damages."[9]

On appeal by the commission, the attack centered on two related aspects of the lower court trial: (a) the introduction of evidence based on improper elements of damage (i.e., loss of access, loss of business and profits), and (b) instruction No. 10 which, so the State asserted, permitted the jury to include such unacceptable items in the damage award. The manner in which the court met these attacks indicates an ambivalent approach. On the one hand the court made it clear that under familiar principles of the exercise of police power, the creation of a new highway cannot be the basis of a claim for damages for access loss. Furthermore, if the disputed instruction did indeed allow damages for such loss, it would be objectionable and the verdict tainted. But this it did not do, for it contained these words:

> You are instructed that where, for the purpose of establishing, widening, or improving a public highway, a strip of land is taken from a tract and the owner's right of access from a public highway is taken, 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 rights of access in question.[10]

This instruction permits the jury to assess compensation for loss of access, but the court, though readily conceding that no right of access inhered in the new highway, insisted that this conclusion was "not decisive of the further question whether the controlled access character of the new highway was relevant to the issue of damages to the land remaining,"[11] adding:

> The effect that the controlled access feature might have on the market value of the land remaining presents a question which is not dependent upon the existence of a right of access. Again, emphasizing that the lack of access to the new highway cannot be considered as a factor, because that right was non-existent,

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[9] 184 Kan. at 607-8, 339 P. 2d at 306.
[10] 339 P. 2d at 308.
[11] Id. at 310.

> nevertheless, the market value of the land remaining may be affected by the nature and extent of the taking, which might affect the reasonable probable uses to which the remaining land may be put, and that fact was a proper element for the jury to consider in determining damages to the land remaining.[12]

Before examining the fallacies in the preceding reasoning, a somewhat parallel situation in Arizona is considered. Thelberg and his wife had a motel on the Tucson-Benson Highway, a conventional arterial designated, however, in 1957, as a controlled-access highway. To provide frontage roads for abutters, it was necessary to acquire 0.24 acres along the 185 feet of Thelberg's frontage (Fig. 2). On trial, allowance of $18,500 was made for the improved land taken. The State conceded the reasonableness of this figure, but contested a further allowance of $10,750, allowed as severance damages to the remaining acreage. The opinion is silent as to the area of the remaining land, but it appears that the reduced tract was over 250 feet deep, obviously sufficient base for construction of a new motel. The Court held that the allowance was appropriate compensation for the impairment of access. In doing so, the Court aligned itself with a body of opinion allowing compensation for destruction or impairment, in any degree, of access.[13]

Again, the discussion is informative. The State contended, on appeal, that had the new highway been constructed on the south, instead of the north, side of the old Tucson-Benson road, Thelberg would not have recovered anything for impairment of access—this under the rule of State v. Peterson[14] and other cited decisions—because there is

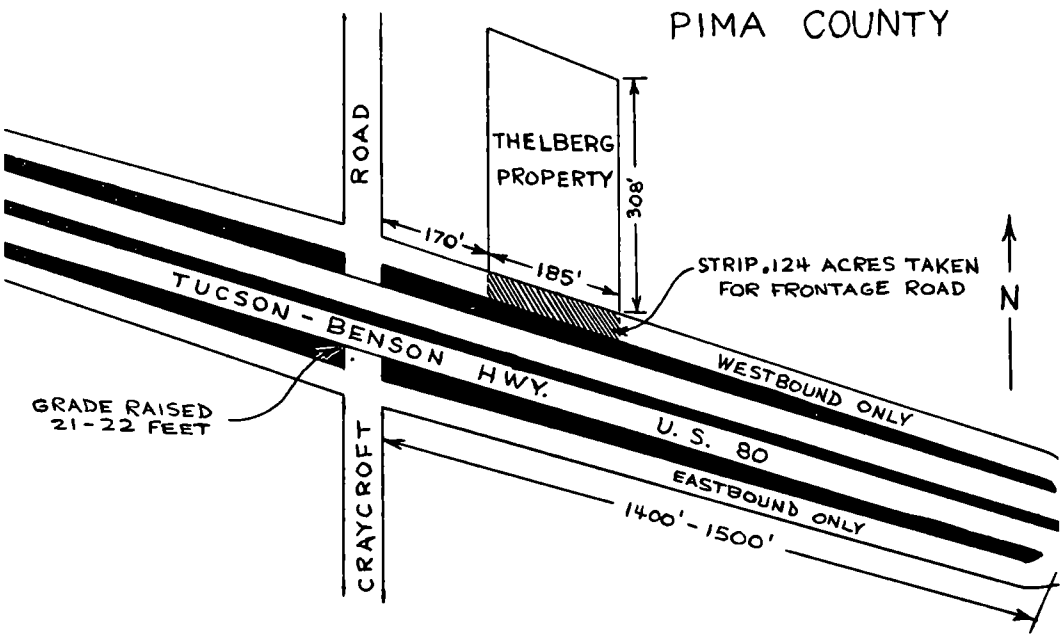

Figure 2. Arizona: State vs. Thelberg, 344 P. 2d 1015, 1959.

[12] Ibid.
[13] State v. Thelberg, 87 Ariz. 318, 350 P. 2d 988(1960).
[14] 134 Mont. 52, 328 P. 2d 617(1958).

no right of access in a new highway. To make this clear, the Court specified that if the old Tucson highway had been retained as a service road for Thelberg and others abutting it, he could have had no basis for recovery of damages for loss of access, or anything else. Yet his actual losses would be the same in either event.

Looking at it another way, the results of building a controlled-access highway, as between two motel owners situated on opposite sides of an arterial, can be vastly different from the standpoint of compensation, depending on how the facility is built, where it is built, and whether or not land is taken from one or both.

If the Riddle and Thelberg cases are compared, it would be readily apparent that the normal operation of the rule on police power would render the former suspect, whereas Thelberg would conform, albeit by virtue of some nice distinctions, to the prevailing theories of determining the existence of compensable access rights. Beyond this surface dissimilarity, it can be said:

1. Both courts agree heartily that a new highway or a relocated highway is well within the protection of the police power. If land is taken, it must be paid for. Beyond that, there is no recovery, however onerous the losses.
2. The Riddle decision, stanchly adhering to this rule in the case of a relocated highway, insists that damages to the remainder may be predicated not only on usual severance principles but on the effect of loss of access on business, profits, etc.
3. The Thelberg decision, stanchly adhering to the same principles, permits recovery for impairment of access simply on the fortuitous circumstance that someone, probably a highway engineer or right-of-way man, had decided to build a frontage road on the north, not on the south, side of the old highway.

Of course, it may be interjected that the Thelberg case is concerned not with a redesignated highway but with an entirely new one. Or, on the contrary, it may be insisted that the Thelberg case is bad because it is concerned entirely with a redesignated highway, so that both Thelberg and his south-side counterpart should be paid for whatever they can show within the ambit of legal damages.[15] The Riddle case, on the other hand, may be condemned as an example of a court indulging in rationalization to reach what seems a predetermined result.

It must be conceded, of course, that, using lawyer's techniques, one could easily explain, clarify, and neatly pigeon-hole these cases. Backed up by a lawyer's argument, one would be forced to yield ground. But what kind of ground, though? It is contended here that courts indulging in what may be called wrong or at least dubious reasoning may be operating under pressures, doubts, and uncertainties that they can never permit to reach the surface:

1. If it be conceded that roadside business can be hurt at all by the diversions of traffic, what essential difference exists between a diversion accomplished by a new highway a quarter-mile away and redesignated highway within 50 feet? Revenue lost in the former may be just as tangible as that consequent on the latter acts.
2. Under an administrative system designed to compensate those directly affected in their businesses by the construction of a freeway, would the kind of decision seen in the Thelberg case be countenanced?
3. In net effect, is the Riddle case, which apparently defies the rationale of the police power cases, so different from that of Thelberg, which, though paying lip service to those mandates, nevertheless lays the foundation for an extraordinary discrimination as between neighboring abutters?

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[15] In the Thelberg-type situation, there could well be a serious question as to whether the new highway was in substance the old highway redesignated. In a somewhat similar fact situation (the construction of an interstate unit parallel to an existing arterial in South Dakota), a dissenting judge took exactly this position, asserting that the abutter's rights of access had attached to the Interstate as being in effect merely an expansion of the existing arterial. See Darnall v. State, 108 N.W. 2d 201, at 210(S.D. 1961).

It is submitted that despite the ease with which lawyers could work their way out of this maze, the overtones of both these cases carry a sense of dissatisfaction either with the whole idea of access rights or in the manner in which compensation may be paid or not for their loss. Somewhat analogous is the differing positions taken by the Supreme Court of Wisconsin in Carazalla v. State (Fig. 3). In the first decision, the court upheld an award based on claims for severance damage which included the loss in value of land containing business or commercial potential due to the relocation of US 51 through another part of the Carazalla farm.[16] On rehearing the Court reversed its earlier holding, acknowledging that through exercise of the police power, the State could adversely affect land values without providing for compensation.[17] Similarly, the Supreme Court of Wisconsin has within the past year upheld as a valid exercise of the police power the designation of US 30 as limited access, as against the claim of one who acquired a small portion of a larger tract after the original designation. The subgrantee (Nick) found himself without access to US 30 or any other road, the Court noting that his grantor (Reinders) had at all times adequate access to a secondary road intersecting US 30.[18]

Another pressure point is the necessity that the courts labor under to draw the line between valid exercise of police power and confiscation. Long since disposed of were objections based on various regulation such as for one-way streets, no U-turns, no left turns, divider strips along the median line,[19] safety islands,[20] and "jiggle" bars[21] inhibiting cross-overs to an opposite lane. The courts have had no hesitancy, though most of the landowners depended on two-way tourist traffic, in finding that the interests of preserving safety, maintaining flow of traffic, and attaining greater use of the highways justified the restrictions. Nevertheless, courts customarily hold, as has been noted, that the loss of access, however fortified by arguments for safety and public welfare, must be compensated. Although one may not cavil at this—certainly one who has had the advantage of a land-service road should not be put to the expense of buying (seldom could he make use of the doctrine of easement by necessity) a right-of-way to the street system. But what of the partial taking? What of the situation in which the condemining body furnishes a service road, or where there exists means of getting to the general traffic grid? Several courts have taken the unequivocal stand that any impairment of access is to be compensated, even though such compensation may be nominal.[22]

It appears that the courts may, at times, be guilty of a somewhat doctrinaire approach. As already noted they will not hesitate to uphold as well within the police power all manner of restrictions on traffic, even to the extent in the one instance of compelling the landowner to drive 10 miles just to arrive back at his own property line, headed towards the city.[23] On the other hand, where access directly in front of owner's property was shut off, but a service road provided, which led to an opening direct on the main highway only 30 feet from owner's property line, the Supreme Court of Washington held this to be an obstruction not within the protection of the police

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[16] 269 Wis. 593, 70 N.W. 2d 208(1955).

[17] 269 Wis. 593, 71 N.W. 2d 276(1955).

[18] Nick v. State Highway Comm., 13 Wis. 2d 511, 109 N.W. 2d 71(1961), rehearing den. 111 N.W. 2d 95(1961).

[19] State v. Ensley, (Ind. 1960), 164 N.E. 2d 342; Darnall v. State, (S.D. 1961), 108 N.W. 2d 201.

[20] Springville Banking Co. v. Burton, 10 Utah 2d 100, 349 P. 2d 157 (1960).

[21] Iowa State Highway Comm. v. Smith, 248 Iowa 869, 82 N.W. 2d 755(1957).

[22] See State v. Thelberg, supra, n. 13; Florida State Turnpike Auth. v. Anhoco Corp., 116 So. 2d 8(Fla. 1959); Franks v. State Highway Comm., 182 Kan. 131, 319 P. 2d 535(1957); McMoran v. State, 55 Wash. 2d 37, 345 P. 2d 598(1959).

[23] Jones Beach Blvd. Estate, Inc. v. Robert Moses, 268 N.Y. 362, 197 N.E. 313(1935). Occupants of the estate had to drive to Jones Beach, five miles away, then turn around, in order to get to New York City.

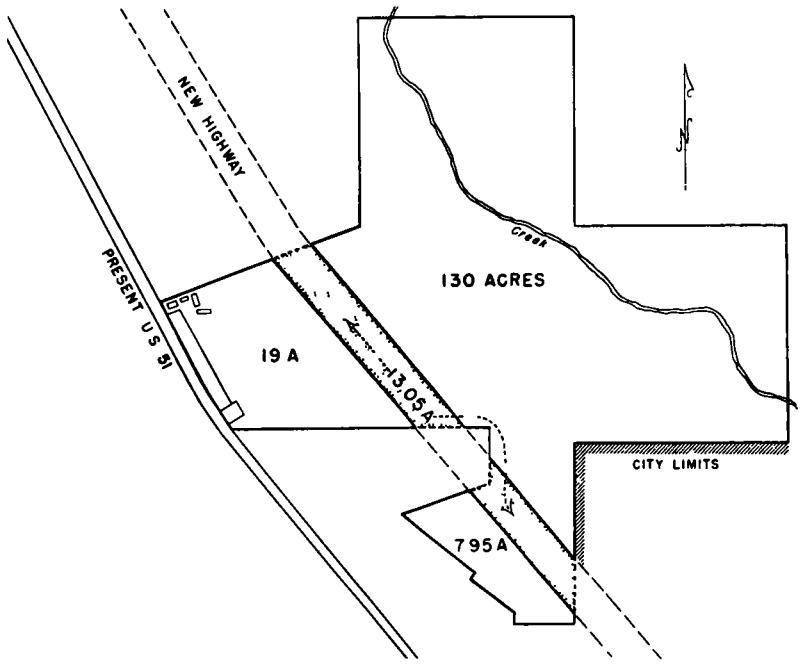

Figure 3. Wisconsin: Carazalla v. State, 71 N.W. (2d) 276, June 28, 1955.

power and so compensable.[24] This same court had earlier held that rerouting and diversion of traffic were well within the scope of police power and so any losses from such actions were not compensable.[25] Courts taking this view apparently pay little heed to the possibility that an owner might well sustain much greater loss from diversion of traffic or median separations than from merely a requirement that he drive a few feet beyond his own property line to reach a highway on which he may readily reach either traffic lane. It seems obvious that a roadside business catering to the traveling public would be far better off with this mild access restriction than with the highly complicated situation in the Thelberg case[26] where eastbound travelers desiring to stop at the motel were compelled to proceed one mile past the motel, enter an interchange, and backtrack west.

Here again, the lawyer would explain that it is one thing to control traffic by speed regulations, designation of lanes, installing of lights, restricting or abolishing U-turns and left turns. All such regulations operate on the driver once he is on the highway. But when access is shut off or regulated, it interferes with a property right. It becomes in a sense a trespass, as indeed the strong language used by some courts would seem to bear witness. This, perhaps, is regrettable because one would suppose that it would lead to a quite natural tendency on the part of highway planners to avoid entirely, where it is feasible to do so, the designation of an existing highway as controlled access. Thus they would not only avoid all question of access loss but leave the roadside proprietor, whose interests are so zealously guarded when any effort is made to regulate his direct access, far removed from the hubbub of traffic on which his livelihood so recently depended.

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[24] McMoran v. State, supra n. 21.
[25] Walker v. State, 48 Wash. 2d 587, 295 P. 2d 328(1958).
[26] Supra, n. 13.

It is not intended to suggest that a possible solution would be to place access regulation on a par with all traffic regulations. This would lead to landlocking many abutters who would have no possible way, even through litigation, to reach the existing secondary grid of roads. In this connection, certain cases are suggestive. For example, where the controlled designation of US 25 (the Dixie Highway) in Ohio seriously restricted a subdivision's access, the owners were allowed compensation for the construction of their own frontage road.[27] In somewhat similar fashion, it was ruled in Minnesota that where a farm, located at an intersection, had been deprived of all its access along a highway newly converted to limited access, the cost of a private road to the rear part, some 900 feet from the intersecting secondary road, now the sole means of access, was an appropriate item to be considered in arriving at compensation.[28] The cases indicate willingness on the part of two courts at least to require in effect that the State pay the cost of adequate frontage or service roads. It would seem a not illogical step to provide by legislation either for construction of such roads by the State or by making suitable allowance to cover such costs mandatory. The possibility exists, of course, that in some States the courts would find a constitutional barrier but, aside from that very real danger, such legislation might go far to remove the uncertainties and patent unfairness that are manifest in the Kansas (Riddle) and Arizona (Thelberg) rationales.[29]

APPRAISAL OF TRANSITIONAL PROPERTY

In the fast-growing industrial State, it is hardly an exaggeration to observe that almost all rural land is potentially residential, commercial, or even industrial. If that statement has any validity (and certainly copious statistics can be cited to show the tremendous growth in suburban areas in the decade ending in 1960)[30] then the highway commission must labor under the harsh necessity of coping constantly with farmers and other rural landowners asserting that their land should be valued on some higher basis. Some methods, such as a discount approach, have been suggested.[31] Perhaps some such rule of thumb would be workable as a practical matter. The criticism of it would be that it takes no heed of the rate of growth in the area. A better plan, it seems, might be one that would attempt to project the growth in a particular area or along a particular stretch of road for a period of years, and then allocate to the particular tract to be taken a percentage of this growth. Case law would seem to favor placing considerable responsibility on the trier of fact by permitting evidence of future appreciation, provided it is close enough in the future to enter into present market value.[32] This seems to relate the matter to the basic idea of the willing-buyer, willing-seller formula. Perhaps that is the best that can be done, though admittedly, it would open the way for fairly large recoveries under circumstances in which no one could predict with anything but a rough approximation the date when the amounts claimed could be realized.

RESTRICTIONS ON LAND USE

Land-use restrictions consist of three general types: those placed in deeds; court decrees, typically in nuisance cases; and zoning regulations and ordinances of various kinds. If a remote grantor (though remoteness is not necessary) sees fit to place covenants or clauses in a deed stipulating that in the event the property ceases to be

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[27] In Re Appropriation of Easements, 93 Ohio App. 179, 112 N.E. 2d 411(1952).
[28] Petition of Burnquist v. Cook, 220 Minn. 48, 19 N.W. 2d 394(1945).
[29] See notes 5 and 13, supra.
[30] In the decade ending in 1960, the Nation gained 28,000,000 in population. Two-thirds of this growth took place in the suburbs (figures based on the 1960 census).
[31] Randall, W., "Measure of Damages Because of Loss of Access," 25 The Appraisal Journal, 182, 186(1957).
[32] See e.g., Carazalla v. State, 269 Wis. 593, 70 N.W. 2d 208, at 211 (1955).

used for church, school, or other specified purposes, it shall revert to him or his heirs, does the existence of such a restriction preclude the landowner in eminent domain proceedings from showing the highest and best use of those premises? If the evidence may go in and be considered by the trier of fact, then, of course the owner will realize an amount substantially in excess of what it might be worth, subject to the restriction. The owner would then enjoy, so the argument runs, a windfall. On the other hand, it is argued that, if the restriction operates to exclude such evidence, the condemnor receives a windfall. The prevalent view seems to be, at least among American courts, that the restriction should remain operative. An English case decided in 1850 would have permitted consideration of value freed of restrictions. The owner, said the court, "voluntarily sacrifices the pecuniary value of property when he devotes it to spiritual uses," adding:

> (The owner) makes that sacrifice to obtain an object which he estimates of greater value than pecuniary value. But, when the object is entirely withdrawn from him, by the application of the property, against his will, to secular uses, and those uses connected with pecuniary profit,—it does not seem consistent with justice to estimate the value to the owner upon the footing of its irrevocable appropriation to those spiritual purposes from which it has been already withdrawn.[33]

This reasoning seems eminently sound. Is it not ridiculous to hold the owner to a smaller recovery when the act of taking itself destroys the restriction? Looked on in this light, the use of the term "windfall" appears highly questionable. The rationale of the willing buyer and seller is not to the contrary, for can it not be said that, if the landowner would be permitted to sell, he would obviously sell willingly only for a price predicated on the highest and best use? Indeed, if the owner were a charity of some kind, it would be obliged to obtain the highest available price in order that it might carry on similar charitable work at some other location. At least one American court (Ohio) has, in recent years, considered the matter with care and decided in accordance with the English doctrine.[34]

Where the matter concerns zoning restrictions, of course, the same rationale could apply, but perhaps for a somewhat different reason. Zoning has been enacted on the assumption of a certain amount of stability in the area concerned. But, lacking that stability, zoning ordinances are readily amendable. The running of a freeway through a farm section is perhaps a sufficient change of circumstances to warrant the inference that zoning authorities might see fit to change the classification. Certainly this is true of land in the immediate vicinity of interchanges.[35] If, however, the evidence indicates small likelihood of a substantial change in land-use patterns in the near future, then the jury might well be permitted to consider matters of value in the context of present uses. This is not to say, or intimate that the enhancement occasioned by the proximity of the new highway should enter in the jury's consideration. In any event, the purpose of zoning is not to place any particular land-use pattern into a permanent mold but rather to promote orderly growth by keeping certain activities separated from others with which they could not be compatible. The tendency, however, is to insist on a showing either of actual plans for a zoning change or some other definite action showing a disposition on the part of the zoning authority to bring about a change.[36]

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[33]Wilde, C.J., in Hilcoat v. Bird, Archbishop of Canterbury, 10 C.B. 327, 138 Eng.Rep. 132(1850).

[34]In Re Appropriation of Highway Easements, 169 Ohio St. 291, 159 N.E. 2d 612, at 618 (1959).

[35]See Michigan Studies on Interchanges, especially that dealing with the Belleville Complex. Mich. State Highway Dept., Land Economic Study No. 1, Interstate 94, Belleville Area.

[36]In Re Mackie's Petition, 108 N.W. 2d 755(Mich 1961). The court directed that the jury consider a pending modification of the present zoning (residential) to a commercial classification.

CRITIQUE OF VALUATION THEORY

It has been previously noted that the traditional method of arriving at "fair market value" involved a determination of a hypothetical sale between a "willing seller" and an equally "willing buyer." This formula means, as is familiar to appraisers, the use of various factual data that may have a bearing on the particular case—for rural land, for example, recent sales of similar land in the vicinity. In situations where no sales of similar properties can be found, courts may well look into matters such as original cost depreciated, or reproduction cost. Certainly, as previously indicated, income can be used as a criterion for various businesses.

Criterion of the formula could proceed along the lines of the unreality of the method. How does one find a basis for a "willing buyer" of a 50- or 100-foot wide strip through the middle of a farm? Such a tract has no relevance to normal farming operations, certainly none to residential needs. No one would willingly buy it except the specialized agency or corporation interested in building a railroad, highway, or ditch. The best that can be done is to arrive at a fair value per acre, or per square foot of that type of land as it may be useful in the particular area, and then add to this figure the detriment, if any, accruing to the rest of the land by reason of the taking. Thus, the concept of severance damage plays a key role in the process, because its function is to take up the slack between what may be an adequate amount for the actual land taken and the very substantial injury that may accrue to the particular type of operation.

In this operation, there may be a tendency to categorize certain types of land. For example, "farm land" may be placed in the familiar mold of the half-section, quarter-section typical of the midwest farmer engaged in hog-raising, cattle-feeding, corn-growing, soybean-growing, or any combination of these. But how much care is bestowed on a study of the vast differences in farm operations? If a midwest half-section farm alternating between corn and beans, and having little else , is compared with a Polled Hereford breeding ranch in Wyoming, the latter type of operation appears to require a fairly complex system of barns, special pastures, irrigation facilities, bench land (not irrigated), and machinery. A year or so ago one such complex near Sheridan, Wyo., was subjected to the threat of loss of a 300-foot right-of-way for a controlled-access highway. The original proposal was to run the new road between the upper barns, where the calving operations are carried on, and the lower farm. The owner, in relating this story, insisted that this would very substantially impair the delicate mechanisms involved in the process of breeding, calving, weaning, etc., of these valuable animals. Yet the representatives of the highway department were not impressed. This was, to them, a routine ranch operation. After much toil and sweat, not to mention use of political connections, the new route was placed west of the upper barn, on higher land of the ranch. The point is that operations such as this may be as finely balanced as an industrial complex. Running a highway through them in the wrong place might be compared to running a steam line through the middle of a power lathe in a machine shop.

In this connection, it might be mentioned that, because lawyers and judges naturally think of compensation in the sense of indemnity, it is not contemplated that this can be satisfactorily done in all cases. There are those who, regardless of the compensation, do not want a through highway cutting their land into pieces. Call it aesthetic or sentimental, it is a factor that cannot be expected to weigh heavily in the appraisal process. Also, even where monetary compensation is fully adequate, the transaction takes on the character of a forced sale. Thus, suppose a businessman with a good location is realizing a return of some 15 percent on his investment. Suddenly he is deprived of that business but given the full cash equivalent. How can be invest the proceeds? Can he find an investment that will yield 15 percent? Ten percent? Should he set up in the same kind of business in a new location and take his chances on the continuation of the previous rate of return? Obviously, many questions must be answered before he embarks on such an enterprise. He may conclude to put his money in "safe" investments and retire on a reduced income.

This is not to suggest that there is a better valuation method than those currently used. It is merely to suggest that, try as one may, the concept of fair market value,

the willing buyer and seller formula, cannot be expected to do more than furnish an approximate rule of compensation.

HIGHWAYS AND PLANNING

It would probably not be much of an exaggeration, if any, to state that every one of Ohio's 88 counties, aside from those already urbanized and industrialized (e.g., Cuyahoga and Hamilton, dominated by Cleveland and Cincinnati, respectively) is actively seeking to attract new industry, to encourage new housing developments, with all the subordinate type of construction (schools, shopping centers, pipe lines, telephone lines, water facilities, parks) that such development entails. Many of these counties—and all the larger ones, probably—have planning bodies of one kind or another. Zoning ordinances are in effect or in a planning stage. Yet with all this activity, how much time and effort are being devoted to area planning having in mind the tremendous impact on so many communities that the new Interstate system is making and will make? The answer, in Ohio at least, is "very little." Yet will not these new facilities, bisecting the State in both directions, have a profound influence on growth patterns, on living patterns in the local areas through which they pass? This is a problem, of course, which is not directly linked to the subject of this paper. But in a larger sense, it seems the price the community is going to pay for transportation facilities cannot be discussed without paying some heed to the vast social and economic changes that may be brought about by those facilities. Every little town (for example, Ada) wants an interchange or some facility that, so it is argued, will funnel increased traffic through its borders. Ada has, indeed, been successful recently in obtaining an interchange on the new Interstate highway that intersects Ohio 69 (Ada's main street) about 10 miles to the north. Was this a sound decision? What studies were made? What impact will it have on the purposes of the new Interstate highway? Will it inspire commercial or industrial growth in an area that would be better served if it remained largely suburban or rural?

It is doubted that sufficient studies have been made to arrive at the answers. On the other hand are such considerations as recreational needs. No one would want a major highway bisecting a small State park, and yet almost as much damage might be done by running it along one edge of such a facility.

CONCLUSION

The tentative conclusions stated at the beginning of this paper still remain tentative. The growth of great Interstate systems of highways is bound, however rules for compensation are framed, to work profound changes—to the benefit of some, to the detriment of others.

Studies of economic effects of this construction typically deal with spectacular gains in lands contiguous to the new highways, such as the California studies in the Sacramento region. Some of these studies also show, perhaps more typical than the California experience, that, though values in the immediate interchange area are likely to undergo spectacular appreciation, those at a little distance (¼ to 2 miles) increased relatively little.[37] For this reason, care should be exercised by those who argue that large "special benefits" accrue to landowners simply because a major facility has been built near or through their properties.

[37] Belleville Study, supra n. 34.