OFFICERS

R. R. BARTELSMEYER, Chairman  C. D. CURTISS, First Vice Chairman
WILBUR S. SMITH, Second Vice Chairman
FRED BURGGRAF, Director  WILLIAM N. CAREY, JR., Assistant Director

Executive Committee

R. R. BARTELSMEYER, Chief Highway Engineer, Illinois Division of Highways
E. W. BAUMAN, Director, National Slag Association, Washington, D. C.
DONALD S. BERRY, Professor of Civil Engineering, Northwestern University
MASON A. BUTCHER, County Manager, Montgomery County, Md.
J. DOUGLAS CARROLL, JR., Director, Chicago Area Transportation Study
C. D. CURTISS, Special Assistant to the Executive Vice President, American Road Builders' Association
HARMER E. DAVIS, Director, Institute of Transportation and Traffic Engineering, University of California
DUKE W. DUNBAR, Attorney General of Colorado
MICHAEL FERENCE, JR., Executive Director, Scientific Laboratory, Ford Motor Company
D. C. GREER, State Highway Engineer, Texas State Highway Department
JOHN T. HOWARD, Head, Department of City and Regional Planning, Massachusetts Institute of Technology
BURTON W. MARSH, Director, Traffic Engineering and Safety Department, American Automobile Association
OSCAR T. MARZKE, Vice President, Fundamental Research, U. S. Steel Corporation
J. B. McMorran, Superintendent of Public Works, New York State Department of Public Works
CLIFFORD F. RASSWEILER, Vice President for Research and Development, Johns-Manville Corporation
GLENN C. RICHARDS, Commissioner, Detroit Department of Public Works
C. H. SCHOLER, Applied Mechanics Department, Kansas State University
WILBUR S. SMITH, Wilbur Smith and Associates, New Haven, Conn.
K. B. WOODS, Head, School of Civil Engineering, and Director, Joint Highway Research Project, Purdue University

Editorial Staff

FRED BURGGRAF  2101 Constitution Avenue

HERBERT P. ORLAND  Washington 25, D. C.

The opinions and conclusions expressed in this publication are those of the authors and not necessarily those of the Highway Research Board.
Limited Access Controls
And Their Administration

Presented at the
41st ANNUAL MEETING
January 8-12, 1962

National Academy of Sciences—
National Research Council
Washington, D.C.
1962
Committee on Highway Laws

J. H. Beuscher, Chairman
School of Law
University of Wisconsin, Madison

David R. Levin, Secretary
Chief, Highway and Land Administration Division
Bureau of Public Roads
U.S. Department of Commerce, Washington, D.C.

W. A. Bugge, Director, Washington Department of Highways, Olympia
Saul C. Corwin, Department Counsel, New York State Department of Public Works, Albany
Allison Dunham, Professor of Law, University of Chicago Law School, Chicago, Illinois
Clifton W. Enfield, Minority Counsel for the House Public Works Committee, House Office Building, Washington, D.C.
Patrick Healy, Jr., Executive Director, American Municipal Association, Washington, D.C.
Bernard F. Hillenbrand, Executive Director, National Association of County Officials, Washington, D.C.
Robert L. Hyder, Chief Counsel, Missouri State Highway Department, Jefferson City
Corwin W. Johnson, Professor of Law, University of Texas, Law School, Austin
Leonard I. Lindas, Chief Counsel, Oregon State Highway Commission, Salem
Mason J. Mahin, Assistant Director, Laws Division, Automotive Safety Foundation, Washington, D.C.
Louis R. Morony, Director, Laws Division, Automotive Safety Foundation, Washington, D.C.
LeRoy A. Powers, Stagner, Alpern, Powers and Tapp, Oklahoma City, Oklahoma
Robert E. Reed, Chief, Division of Contracts and Rights-of-Way, Department of Public Works, State of California, Sacramento
John R. Rezzolla, Jr., Chief Highway Counsel, Pennsylvania Department of Highways, Harrisburg
Kermit B. Rykken, Director, Highway and Legislative Department, American Automobile Association, Washington, D.C.
John A. Shaneman, Engineer of Planning and Programming, Illinois Division of Highways, Springfield
Archie Smith, Legislative Council Legal Director, Providence, Rhode Island
Joseph A. Sullivan, Judge, Detroit, Michigan
W. F. Tempest, Portland Cement Association, Chicago, Illinois (Secretary, Section of Local Government Law, American Bar Association)
Contents

A SUMMARY AND REAPPRAISAL OF ACCESS CONTROL
Ross D. Netherton ................................................. 1

SYMPOSIUM ON EMERGING PROBLEMS
IN THE LAW OF ACCESS CONTROL ................................. 15

The Changing Nature of Abutters' Rights
Daniel R. Mandelker .............................................. 15

Judicial Review of Administrative Decisions
In Highway Access Control
A. J. Feifarek ..................................................... 21

Conveyancing Techniques for
Acquisition of Access Rights
Leonard I. Lindas ............................................... 26

Valuation of Access Rights
James Munro ...................................................... 33
A Summary and Reappraisal of Access Control

ROSS D. NETHERTON, Counsel for Legal Research, Highway Research Board

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

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

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

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

**ASPECTS OF ACCESS CONTROL**

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

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

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

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

---

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

The landowner, whose chief interest is in achieving the highest and best use of his land, is likely to view control of access with mixed feelings. He recognizes that land use and land value is basically dependent on accessibility. He is accustomed to equating accessibility with direct access; a driveway from his land onto the adjacent main highway is easy for him to see and understand. He is not so sure what will happen to his accessibility when the highway designers finish rearranging his access to harmonize it with their plan for the new expressway. In this spirit he approaches the problem of adjusting his own plans to the presence of the express highway. To the extent that construction of a controlled-access highway alters accessibility of a site, the highest and best use of that site may change. As these changes occur, the arrangement of access which is necessary or suitable for the development of that site in its new use may change. Thus the landowner asks how the means of access should be arranged to maximize the advantages of accessibility that the new highway confers.

He is likely to find different answers for farm land, suburban residential areas, urban multiple-unit dwellings, industrial sites, institutional sites, commercial districts, and roadside business, because in each of these cases, the optimum arrangements of access tend to reflect the differing characteristics of these uses. As experience is acquired in development of suburban residential housing, industrial parks, shopping centers, motorist services, and other specialized land uses adjacent to controlled-access highways, judgments regarding suitable arrangement of access have changed and will continue to change.

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

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

---

3 This is not to suggest that planners work entirely in isolation from those who design and program highway construction. Modern highway agencies provide for the planning function as an integral part of their operations. At most, therefore, planners may claim that the long-range view is their special (rather than "exclusive") concern and contribution to the highway program. Further comment on this distinction between planning and programming may be found in the HRB Special Report on "Highway Programming, An Analysis of State Legislation," to be published in 1962.
4 See discussion in Owen, W., "Cities In The Motor Age" New York, 1959.
In the American system of government, responsibility for determination of public policy resides preponderantly in the legislative branch. Therefore, when the lawmaker views access control his field of vision must be wide enough to take into account all the viewpoints just mentioned, striving to reconcile them where their demands compete, and anticipating future needs where present tendencies have not yet attained full growth. Also, because means can never entirely be divorced from ends, he must ultimately formulate highway policy in the light of currently controlling financial policy. Because expressways are costly and functionally specialized structures, the balance of costs and benefits, both direct and indirect, is relevant. Once this balance has been struck, it is pertinent to ask how and among whom the costs of expressways are to be allocated. The answer to this question will be felt throughout the entire framework of law surrounding construction and operation of controlled-access highways, from the basic decisions on route location and design standards to the technical rules of evidence governing determination of value for public acquisition of access rights. The suggestion that the access control concept has these many aspects is, of course, not new or novel. With any thought about this matter it is clear that access control means different things to various segments of the public who are involved in or affected by highway construction and use. What is important is that these viewpoints continue to be considered together in balanced perspective when policy decisions are made regarding the law relating to controlled-access highways. The posture of the law and its particular provisions should, if they are to be sound, reflect the best possible accommodation and reconciliation of all these interests. As expressway law moves from its task of providing a framework for applying the access control concept in the construction and operation of the highway system, the success with which these various aspects and viewpoints are reflected in the law may decisively affect the quality of its doctrine.

RELATIONSHIP OF ROADSIDE AND ROADWAY

Reappraisal of the present body of access-control law in the light of the tasks that it is now being called on to perform should start with some reference to its historical roots. History is important because in the Anglo-American legal tradition precedents tend to be at least as persuasive as principles in legitimizing the use of power in the name of the public interest. Accordingly, the historic legal relationship between private use of roadside land and public use of the road itself becomes a primary reference point for courts and legislators when considering the policy at the basis of access control. The English Statute of Winchester in 1285, which required landowners to clear a strip 200 feet wide along the margins of market roads, and the subdivision control ordinances enacted by many American local governments within the past decade have a common rationale in the policy that private interest in the use of roadside land should defer to public interest in the use of the roadway. This policy rests on three factors—public safety, promotion of the efficiency and convenience of transportation within the community and between communities, and the benefits that the highway confers on the roadside land. Controlled-access highway design is a relatively new form of expressing this servitude, but its rationale is essentially the same as various other forms that the historic servitude has taken. Other expressions of this servitude (such as modern building codes, set-back requirements, urban zoning, and community planning) can all be traced to municipal ordinances in the American colonial period, and thence to the English common law.

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

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

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

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

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

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

---

6 Lexington & Ohio RR Co. v. Applegate, 8 Dana(Ky) 289 (1839); Crawford v Village of Delaware, 7 Ohio St 469 (1857).
7 Lewis, J., "Eminent Domain" 5100 Chicago (1886).
claim compensation under the constitutional guarantee of private property. "Reason-
ableness and suitability" are matters of fact, to be proved by the evidence in each
instance.

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

ACCESS CONTROL POWERS AND THEIR USES

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

Police Power

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

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

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

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

10 Beuscher, J., "Roadside Protection Through Nuisance and Property Law." HRB Bull. 113,
66-77 (1956).
11 For example, Fuller v Piedler, No. 107570, Cir. Ct., Dane County, Wis., May 2, 1961.
L Rev., 440 (1955); Kurtz, M., "The Effect of Land Use Legislation in the Common Law of
Nuisance in Urban Areas." Dicta 36: lui (1959); Casper, E., "Judicial Regulation of
On principle, excessive use of private access to an adjacent public highway qualifies as a nuisance equally as much as any discordant or obnoxious land use. Yet the relationship of access controls and nuisance doctrine has never been as clearly articulated by the courts as has the relationship of land-use controls and nuisance. As a result, the present body nuisance law offers the basis for a simple, flexible, and effective method of controlling access, but fails to offer the highway counsel a body of precedents directly applicable to the cases where vehicular access demands are the point of contention.

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

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

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

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

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

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

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

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

This problem may be illustrated by the case of a roadside owner who sells part of his land after control has been imposed on access to the adjacent highway.\(^{16}\) This landowner may remain satisfied with the controlled arrangement of access as originally established, but the buyer to whom he sells part of his tract may urgently desire to open his own direct access to the highway. Yet when this buyer applies to the state highway agency for permission to open a new driveway, his request may summarily

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

Judicial review of administrative decisions is as familiar and accepted as judicial review of legislative actions. It must, however, be used with great discrimination if it is to avoid destroying much of the effectiveness of the administrative process. If, for example, the owner of a tract of land subdivides so that 20 lots front on a controlled-access highway, is it appropriate or necessary that the law should recognize a right of action for each of the 20 purchasers of lots to demand judicial review of the highway agency's refusal to issue a driveway permit? Is it even practical to suggest that each landowner abutting a controlled-access highway has a right to take the highway agency into court at his pleasure by repeated unsuccessful applications for permission to add to or change the access that the agency has allowed in its original plan. If it is not, what is the alternative? Is it to vest the power to modify the arrangement of access exclusively in the highway agency with no recourse from the agency's ruling? Current state access control laws do not clearly provide the mechanism for access control arrangements to be self-adjusting; yet, as the patterns of land use and highway use change, the need for periodic adjustments and modifications will surely become apparent. When this time comes, the law must have an answer for the landowner who claims, in good faith, that the prevailing arrangement of controlled access has become obsolete and unrealistic, and thus constitutes a "taking" of property without due process of law.

The Power of Eminent Domain

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

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

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

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

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

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

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

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

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

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

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

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

The Power to Purchase

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

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

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

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

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

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

---

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

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

SUMMARY AND CONCLUSIONS

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

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

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

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

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

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

The Changing Nature of Abutters' Rights

DANIEL R. MANDELKER, Associate Professor of Law, Indiana University

Four aspects of access control that have emerged as major areas in which legal doctrine and practice are undergoing change are (a) the concept of private rights of access to the public highway, (b) application of the power of judicial review to administrative decisions relating to access control, (c) the structure and content of legal instruments for voluntary transfer of access rights from private to public control, and (d) development of standards and techniques for valuation of access rights when they are publicly acquired.

The papers in this symposium review the current state of legal doctrine and administrative practice regarding these matters, and suggest various points of comparison in the varying methods currently used which appear to be essential to efforts aimed at achieving either improvement or uniformity.

• AMERICANS have been spoiled by luxuries. Not the least of these is the luxury of space. They have been so caught up with the exploitation of a vast continent that they have failed to place proper limits on the space demands of their growing urban agglomerations. Waste is one of the byproducts of this neglect.

Certainly one of the most striking examples of land wastage can be found in the trunk highway choked to the point of uselessness by improper development along its right-of-way and by improper control of points of access. Lewis Mumford has recently written of the fundamental change in land management which was wrought by the capitalist revolution. Medieval concepts of public or feudal management of relatively large areas as an integral unit have given way to the concept of private ownership of individual parcels subject to little in the way of outside restraint—at least in the preplanning days. Surely one consequence of the new emphasis is the so-called easement of access, which guarantees to the abutting owner the relatively untrammeled right of access to the contiguous street, unless he is compensated. The right of access has been one of those factors that has impeded not only the adequate restriction of ribbon development but the proper separation of dependent and nondependent uses along highway rights-of-way.

A society that has not been able to permit itself the luxury of land wastage presents a different approach to the development rights of the highway abutter. England, as a moderately-sized country about as large as the state of Wisconsin, has been faced with an absolute shortage of space, and under this discipline it has had to develop more stringent controls on all forms of land use. An examination of English controls on

---

1 The use of property terms to describe what is, after all, a judicially-created concept, is most revealing.
the highway abutter may have something to teach the American highway planner. English policy will be examined in the area of access controls, particularly in connection with filling stations, and in the area of advertisement controls, with passing reference to the English scheme for compensating those who are restricted in the use of their land.

ACCESS AND TRAFFIC CONSIDERATIONS IN PLANNING CONTROL

Physical Background

England presents a different physical pattern and with a fundamentally different legal structure. If English city street systems still follow a medieval pattern, the English highway still follows the path of the ancient Saxon. Not without reason did Chesterton write of the "rolling English drunkard" and his "rolling English road." Outside the towns and villages, the road system is intricate and finely woven, the road surfaces a marvel, and the traffic unbelievably dense. English automobile density per mile of road is many times higher than it is in America, even though the incidence of car ownership is lower. Also, the English have as yet done relatively little with the limited access expressway, although they have many miles of excellent divided highways, which they call dual carriageways.

Even imposing on this road pattern a dense settlement structure, with higher and lower order villages at distances from one to three miles from each other, and with regional urban centers liberally sprinkled in between, at least in southern England, the English traffic pattern is far from complete. The English have not been able to permit that strip and ribbon development which defaces the fringes of so many American towns and cities. A rigid separation of town and country has always been one of the earmarks of English planning. To this observation is added the comment that the English simply do not have the drive-in business so common in America. Even permission to build a motel was recently refused in a semi-rural section, on the grounds that this kind of use was not "appropriate" in such an area. Undoubtedly the first application for a drive-in movie will lead to a parliamentary debate and a ministerial regulation, if not to new legislation. Large-scale, space-eating development would be out of place in the intimate English landscape, and even the traditional American cloverleaf will probably be substantially modified before it is adopted. Also, the Englishman still depends primarily on his feet and on public transport to carry him where he wants to go, and he will find his shopping facilities nicely centralized on the nearest High Street, which probably will not be too far away.

Legal Structure

Effective English planning actually dates from 1947, which marks the passage of the principal post-World War II planning act. In the interwar period, planning was not particularly successful, and this comment holds for the well-advertised Restriction of Ribbon Development Act of 1935. The reason lay in a deficient administrative structure, and in the interwar statutory requirement that full compensation had to be paid at market value for all planning restrictions. Although the English do not have a constitution, and therefore do not have a constitutional just compensation clause, they have always recognized through legislation that the landowner is entitled to compensation for loss of value flowing from planning restrictions. They have not yet worked out a completely successful system to take care of the compensation problem, and though compensation is now payable for planning restrictions it is substantially hedged about and, as a practical matter, is paid at less than market value.

---

2Town and Country Planning Act, 1947, 10 & 11 Geo. 6, c. 51.
325 & 26 Geo. 5, c. 47.
The 1947 planning act has substituted a flexible and more effective administrative mechanism for the unwieldy interwar planning schemes. In the process, the planning provisions of the 1935 Restriction of Ribbon Development Act have been repealed, and roadside planning has been brought into the larger planning process. This is a distinct advantage. If one turns to the control of roadside development, the first comment to be made on administrative apparatus is that the English do not have the multi-pronged American techniques which combine official maps, subdivision ordinances, zoning ordinances, and master plans to achieve what is hoped to be a unified approach. Instead, land use intentions are shown in one comprehensive document, the development plan, which embodies all of the familiar American techniques, but which at the same time does not bind the local authority.4

Unlike a zoning ordinance, which can be said to confer a right to build in conformance with the designated land use, the development plan is only persuasive evidence of the appropriate use of a parcel of land. Indeed, the plan itself will only show land uses in the most general way, and there is nothing in England resembling the intricate details of a typical American zoning ordinance. However, any developer who wants to make anything but a very minor change in the use or development of his land must apply to the planning authority for what is called planning permission. It is at this point that the English planner has a decisive role in the protection of highway and roadside frontages. There is no real court review of the planning decision as such. The local planner may be reversed in an administrative appeal to the Ministry of Housing which supervises the administration of the planning acts. Otherwise the planning decision will stand whatever the outcome insofar as compensation is involved.

Highway Considerations in Planning Cases

The dominant idea behind the control of highway development is the restriction of ribbon development and new points of access.6 This is true not only of such highway-dependent uses as filling stations but of residential uses as well. In appeal after appeal in residential cases, the effect of the new development on highway use was a prime consideration. Should access be allowed to the highway at this point? If so, should it be direct or should a service road be provided? Is this road the right place for new residential development? What is the accident record in the vicinity? Is the site on a bend or a curve? (It usually is.) What kind of traffic does the road carry? That the English have been successful in preventing new ribbon development along their highways should be obvious to any sensitive observer from behind the wheel.

What should be stressed is that highway considerations such as these enter routinely into the consideration of any planning application. This is partly a result of administrative practice rather than official command, although consultation with the highway department is required in the case of any application involving highway access.7 In the case of development affecting trunk roads, the application to develop land must be referred to the Ministry of Transport, and he may give a direction that will bind the planning authority in its disposition of the case. Perhaps the most significant aspect of this procedure is that the planning authority need not refer to the Ministry of Transport or to the highway department any planning application which it is prepared to

---

4For example, the English are just now developing explicit off-street parking requirements outside the general planning structure.

6Ministry of Town and Country Planning, Circular 88 (1950) Appendix, para. 1: "The presumption in dealing with ... land [along main traffic routes] will normally be against permitting development of the land" unless other than direct access can be provided.


7General Development Order, Art. 7, adopted under authority of 1947 Act, § 14(3)(a). See also the new directive governing expressways, which severely restricts frontage development except for special services on sites to be provided. These restrictions are made applicable to connecting roads "at or near motorway [expressway] junctions." Ministry of Housing and Local Government, Circular 25 (1958), Appendix B.
refuse. Also, the English do not indulge in the assumption that new development cannot be prohibited along established roads, an enforced attitude that often limits planners, at least in any state.

Filling Station Controls

Attention to highway consequences is most marked in the area of filling station controls. Filling stations are probably the only major "drive-in" use on the English highway. Official policy took explicit notice of its problems and imposed regulations that are sharply restrictive. The Ministry of Housing and the Ministry of Transport have collaborated on an explicit filling station directive which should be read by all American planners interested in highway development. When allowances are made for English scale, this document will be seen to be quite remarkable. For example, the filling station policy circular makes it clear that on "fast open stretches of road" all filling stations are open to objection, and should not be allowed "unless there is a very good reason," such as a genuine need.

Perhaps the guiding thought behind the filling station directive is that the number of stations must be limited quantitatively. This has always been a thorny subject in American land-use regulation, and certainly zoning limitations which take account of need pose difficult problems. Indeed, the English regulations make it clear that need should be considered only if the planning considerations are persuasive but not determinative. In this case, the lack of need can be considered and might indicate a rejection.

However, the official language does not tell all the story. Again, the dominant idea behind filling station placement is that filling stations should not run riot, and should not be placed so as to interfere with the use of the highway for highway purposes. In one small county in East Anglia, which has an excellent planning department, the possible sites for filling stations had been carefully explored and had been mapped in advance. This county is yet to be overturned in a case in which it has refused a filling station application on the ground that it is out of harmony with the county's plan.

The English regulations also make sense in terms of the placement of new stations. The directive encourages placement of stations on both sides of the road at the same point. It also advises that new stations be placed away from intersections, not at intersections. Nor is the stringency of these directives defeated in practice. The planning authorities have been more than strict in enforcing them, and they have been upheld by the planning ministry. In one recent year, out of 427 appeals from refusals in filling station cases, only 53 were allowed, a loss ratio much higher than in other planning appeals.

ADVERTISEMENT CONTROL

Advertising control occupies a special place in English planning. It dates from the time, early in the 1900's, when some enterprising Americans erected a mammoth sign on the white cliffs of Dover, facing and visible from France. It advertised a breakfast cereal. In any event, the statute now explicitly authorizes advertisement controls, and provides that they may be exercised only in the interests of "public safety and

9Circular 88 (1950), Appendix, para. 3: The general principles which govern roadside development should not be departed from simply because the "land alongside a trunk or classified road is in multiple ownership."
10Id., para. 2.
11Id., para. 9.
12The filling station circular was preceded by an intensive study of filling stations which resulted in the Waleran Report. Ministry of Transport, Petrol Stations: Report of the Technical Committee (1949). This County has used the Waleran Report in planning its filling station sites, although the Ministry circular is not as restrictive as some of the Waleran recommendations.
14Ibid.
amenity." 16 This last word reflects a dominant strain in English planning. Although it has never really been defined, it clearly encompasses what would be called aesthetic control, and for this reason the English planner has broad powers in the regulation of advertising signs. The relationship to safety on the highways is also explicit.

Ministry regulations have been issued. 17 They enact the procedures for regulation and also specify several classes of advertisements for which planning consent is not required. Advertisements on business premises are an exempted class under certain limitations, and their control has proved troublesome. But the point is, once again, that the planner relies not on specific ordinances governing location, size, and height. Instead, he works directly from a statutory delegation that permits the wide exercise of an informed judgment. A fairly large sign is proposed for the front of a country inn. Do they need it? If they do, how big should it be? Should it be lighted? If it isn't lighted, what should it say? And what kind of lettering should they use? And what colors? In one case, in which a sign was proposed for seashore development, the planning officer redesigned and relettered the sign and the planning authority then approved it.

Perhaps Americans would balk at stringent controls on this order. Again, a crowded island demands policing. And the word "police" is more than adequate, too. In one rural area, the planning officer reported that they had had no difficulty with signs for years, ever since they had tramped the area, noted all the offending signs, and secured the voluntary cooperation of their owners in tearing them down. 18 This is not to say that English advertising controls have been an unqualified success, for the townscape retains a cluttered look that some might find charming and others might find just messy. However, outside the town or village, there are few billboards along the highway. In rural areas, furthermore, which have high landscape value, the planner may designate areas of special control and if the ministry approves his choice he can be even tougher than he usually is.

COMPENSATION AND PLANNING

Compensation for planning restrictions remains a difficult subject bristling with technicalities, described elsewhere. 19 They have devised a method paying compensation which at the same time permits the landowner to retain title and occupation of his property. 20 This refers to the compensation provisions of the 1954 planning act. 21

The key to a claim for compensation under this act is a planning refusal which prevents one from carrying out "new development" on his own land. 22 Attempts at exceptions to this general rule are worked out on a common sense rule of thumb which bears a pragmatic resemblance to the American police power-eminent domain dichotomy. However, a refusal of permission to erect an advertising sign is simply not compensable. The reason appears to be the abiding English interest in aesthetics (amenity), and that an advertising sign is not a substantial structure requiring a heavy capital investment in its development. American laws are tending in the same direction, as some important recent cases attest. 23

16 1947 Act, § 31(1).
18 This area was in East Sussex, but the author was also privileged to observe the excellent program of enforcement that has been carried out in Worcestershire.
20 American statutes that provide for the acquisition of "development rights" in land are attempting a similar solution. As applied in rural areas, the idea is that a farmer in an area zoned restrictively for agriculture uses will keep title to his land and then sell the right to develop it for urban uses to the county or municipality.
22 Id. at §16.
23 For example, Grant v. Mayor and City Council of Baltimore, 212 Md. 301, 129 A.2d 363 (1957) (upholds amortization of nonconforming billboards).
When limitations on access to highways are considered, the picture is more complicated. Planning conditions relating to "the location or design of any means of access" are not compensable.24 (American subdivision ordinances have largely accomplished the same result.) Ordinarily, a planning refusal that has the effect of prohibiting access will prohibit the building of a new structure, so that compensation for the denial of access is seldom independently considered. However, an independent denial of access, without more, would be compensable under the provisions of the 1954 status.25

However, although the denial of access is compensable under the 1954 Act, the payment of compensation is considerably hedged about. A claim must have been made under the 1947 law, and because development possibilities could not always be estimated at that time, a claim might not have been filed. Even more important, the compensation payable will not begin to reflect the loss of value flowing from the refusal to permit development. The reason is that compensation is pegged back to 1947 values and does not reflect the substantial inflation in land value that has occurred since. In spite of these seeming deficiencies, however, the English may have worked an intermediate solution to the compensation problem which Americans might well adopt. Instead of forcing a mutually exclusive choice in which the restriction is either wholly compensable (eminent domain) or wholly free from compensation (police power) the English system recognizes a need for partial compensation, no little part of which is the landowner's right to remain in possession of his property and to continue uninterrupted the existing use of his land.

CONCLUSION

There is not an absolute shortage of space in this country, but there is a relative shortage of the right kind of space in the right places. As the increasing outward expansion of cities forces consideration of location and distance factors in relation to transportation and travel, America will probably move toward the English restrictions on roadside highway development. A case in point is the new state of Hawaii, which like England must handle a relatively dense population on a small island with limited building space, and which has recently adopted restrictive State legislation to deal with this problem.26

The American constitutional system is flexible enough to permit highway access and roadside development controls of an appropriate stringency. One may, indeed, seek a legislative solution on an intermediate plane which seeks to work out a better accommodation of the public and the private interest than the courts have achieved under an either-or police power approach. In this light it is encouraging to see a recent New York case upholding the constitutionality of billboard restrictions along the New York Thruway. As the opinion in the intermediate court pointed out, the highway created the opportunity for exploitation by billboard, which the state in turn has the right to regulate.27 If Americans can recapture a sense of the public interest in the regulation of the highway abutter, they will have gone a long way toward a solution of the access problem.

241954 Act, § 20(2)(e).
25The refusal of new "development" is compensable under the 1954 provisions. The definitions of the 1947 law are applicable to the 1954 Act. See § 69 (2). Development is defined by the 1947 Act to include "engineering operations," § 12(2), which are in turn defined to include "the formation or laying out of means of access to highways." § 119(1).
Judicial Review of Administrative Decisions

In Highway Access Control

A. J. FEIFAREK, Assistant Attorney General, State of Wisconsin

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 reports, reports of the Commission staff to the Commission, and anything else that the Commission considers in making its decision. The Commission, in making its decision, 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 requirements 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 resolving 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 condemnation 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 follow-

(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 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

LEONARD I. LINDAS, Assistant Attorney General and Chief Counsel, Oregon State Highway Department

- 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 statute 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 declared 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, 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.

ORS 37U.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."

ORS 374.005 "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."

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 as much 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 provision 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.

*The 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 used 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. 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.

It has been found necessary to include a suspension clause 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 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

\[ \text{It is understood and agreed that the access provisions of ORS 374.405 are applicable to this transaction and access is restricted to the Highway. (Between Highway Engineer's Station } \_\_\_\_\_\_\_\_\_\_\_\_.) \]

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 insomuch 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 conveying 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 450+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
31

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 1421, 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 Granter, 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.
Valuation of Access Rights

JAMES MUNRO, Ohio Northern University

- 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 thoroughfare 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.

---


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, 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. 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.

With this background, Riddle v. State Highway Commission 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 1 1/2 miles west of the motel.

---

7 Winn v. United States, 272 F. 2d 282 (CA 9th 1959).
8 Supra n. 5.
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 circuit 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.\(^9\)

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,
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.\textsuperscript{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.\textsuperscript{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\textsuperscript{14} and other cited decisions—because there is

\textbf{Figure 2. Arizona: State vs. Thelberg, 344 P. 2d 1015, 1959.}

\textsuperscript{12}Ibid.
\textsuperscript{13}State v. Thelberg, 87 Ariz. 318, 350 P. 2d 988(1960).
\textsuperscript{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 redesigned highway, so that both Thelberg and his south-side counterpart should be paid for whatever they can show within the ambit of legal damages. 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 redesigned 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?

---

18In 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. 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.

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.

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 regulations such as for one-way streets, no U-turns, no left turns, divider strips along the median line, safety islands, and "jiggle" bars 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 condemning 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.

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. 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

18269 Wis. 593, 71 N.W. 2d 276(1955).
17269 Wis. 593, 71 N.W. 2d 276(1955).
11Jones 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.
power and so compensable. 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. 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 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. Thus, 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.

24McMoran v. State, supra n. 21.
26Supra, 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. 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. 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.

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) 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. 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. 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

---

28Petition of Burnquist v. Cook, 220 Minn. 48, 19 N.W. 2d 394 (1945).
29See notes 5 and 13, supra.
30In 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).
32See 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

Thus 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

34In Re Appropriation of Highway Easements, 169 Ohio St. 291, 159 N.E. 2d 612, at 618 (1959).
36In 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.
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 (½ to 2 miles) increased relatively little. 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.

37Belleville Study, supra n. 34.
THE NATIONAL ACADEMY OF SCIENCES—NATIONAL RESEARCH COUNCIL is a private, nonprofit organization of scientists, dedicated to the furtherance of science and to its use for the general welfare. The ACADEMY itself was established in 1863 under a congressional charter signed by President Lincoln. Empowered to provide for all activities appropriate to academies of science, it was also required by its charter to act as an adviser to the federal government in scientific matters. This provision accounts for the close ties that have always existed between the ACADEMY and the government, although the ACADEMY is not a governmental agency.

The NATIONAL RESEARCH COUNCIL was established by the ACADEMY in 1916, at the request of President Wilson, to enable scientists generally to associate their efforts with those of the limited membership of the ACADEMY in service to the nation, to society, and to science at home and abroad. Members of the NATIONAL RESEARCH COUNCIL receive their appointments from the president of the ACADEMY. They include representatives nominated by the major scientific and technical societies, representatives of the federal government, and a number of members at large. In addition, several thousand scientists and engineers take part in the activities of the research council through membership on its various boards and committees.

Receiving funds from both public and private sources, by contribution, grant, or contract, the ACADEMY and its RESEARCH COUNCIL thus work to stimulate research and its applications, to survey the broad possibilities of science, to promote effective utilization of the scientific and technical resources of the country, to serve the government, and to further the general interests of science.

The HIGHWAY RESEARCH BOARD was organized November 11, 1920, as an agency of the Division of Engineering and Industrial Research, one of the eight functional divisions of the NATIONAL RESEARCH COUNCIL. The BOARD is a cooperative organization of the highway technologists of America operating under the auspices of the ACADEMY—COUNCIL and with the support of the several highway departments, the Bureau of Public Roads, and many other organizations interested in the development of highway transportation. The purposes of the BOARD are to encourage research and to provide a national clearinghouse and correlation service for research activities and information on highway administration and technology.