REPORT OF COMMITTEE ON LAND ACQUISITION AND CONTROL OF HIGHWAY ACCESS AND ADJACENT AREAS

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Progress in the fields of activity with which this committee concerns itself has been reasonably satisfactory in the year 1950. Projects undertaken by the committee in past years were pushed nearer conclusion and a new project was undertaken. This new project envisions a study of existing means of reserving right-of-way for future improvement of highways. A more detailed description of the project is included in the body of this report.

A fair amount of desirable legislation dealing with land acquisition, roadside control, parking, etc., was enacted by the states during the year, in spite of the fact that most State legislatures did not meet in regular session during 1950, an off year for legislative sessions. Numerous decisions were handed down by the courts, the majority of which might be classified as progressive in scope.

The 1949 annual report of the committee and special papers were published in January 1951 as Bulletin No. 30, entitled "Progress in Roadside Protection", largely because that subject dominated the activities of the committee in that year.

LAND ACQUISITION

Relocation of Highways - In attempting to improve the main arteries of travel in the various States, to provide adequate service for the traveling public, and to take care of increased traffic volumes, many State Highway departments have found it expedient to relocate certain sections of their State highway systems rather than attempt to improve existing locations to adequate standards. This is in large part due to the fact that the land required for widening existing highways has been developed to the point where the cost of land which must be acquired for right-of-way purposes is so exhorbitant that construction of the facility on a new location is actually a less expensive expedient.

In at least two cases during the year, courts upheld the right of highway authorities to relocate portions of State highways, which authority was contested in each case by owners of property abutting on the old highways, who held that legislative designation of the State highway systems precluded change by such administrative authorities.

1. California: In affirming a decision of a lower court, holding that a proposed relocation of State Highway 3 between Roseville and Sacramento was within the statutory and constitutional authority of the State Highway Commission, the State Supreme Court of California established the highway commission's authority not only to relocate the highway but to construct the highway at the new location as a freeway. The case (Holloway et al. v. Purcell, Director of Department of Public Works et al., 217 P. (2d) 665, April 25, 1950) came before the courts, when a group of taxpayers, some of whom were owners of motels located along the old route, sought to enjoin the State from proceeding with the proposed relocation.

Several points were raised by the taxpayers bringing action in this case. First it was claimed that neither the Director of Public Works nor the Highway Commission had authority to relocate the highway, but the court called attention to statutory provisions authorizing the State Highway Commission to alter or change the location of any State highway if, in the opinion of the commission, such alteration or change was for the best interest of the State. Only the control points of State Route 3 and

one intermediary point are designated in the description of the route included in the statutes. This did not prohibit relocation of a section thereof.

The taxpayers, however, claimed that the authority given to the State Department of Engineering by legislative act of 1907 to acquire land and rights-of-way for the construction and relocation of "roads which have been declared state highways" was revoked by an act of 1909 giving the department authority to construct and maintain a State highway system, the roads included in which to be permanent in character and finished with oil or macadam or a combination of both. Such roads were also to be permanently maintained and controlled by the State. Although the taxpayers interpreted the word "permanent" to preclude changes from established routes, the court found no support for so narrow a construction. Permanent in character, applied to construction, merely meant that the roads were to be constructed of durable materials. Permanent maintenance was specified in order that the State rather than the counties, would assume the burden of maintenance, particularly when read in connection with the preceding sentence of the act to the effect that the counties were to be responsible for interest on bonds issued by the State to finance the highways in the first place. After the relocation of Route 3, the State would still be responsible for controlling and maintaining the highway specified as part of the system described in the 1909 act, namely "a continuous and connected State highway system, running north and south . . . traversing the Sacramento and San Joaquin valleys . . . by the most direct and practicable routes."

The taxpayers also contended that the provision of the State constitution authorizing the legislature to establish a system of State highways and to pass all laws necessary and proper to construct and maintain the same precluded the legislature from authorizing the relocation of any highway once established thereunder. In the court's opinion this provision could not be construed as including an unwritten provision that the highways once established could never be relocated even though changing conditions required relocation. The provision was designed solely to authorize establishment of a State highway system.

The State Highway Commission's plan to construct the relocated highway as a freeway also met with objection from the taxpayers, who claimed that such action was invalid because it provided for a new and different type of State highway than was intended by the constitutional provision discussed above. The only type of highway which might be built under this provision, it was urged, was one providing unlimited right of access, light, view and ingress and egress inherent in a public State highway or any public highway common to the use of all the people of a free government, as public highways were understood and used prior to and at the time the constitutional provision was adopted. Such a construction, said the court, attributed to the State constitution a rigidity that would freeze the highway system into routes that in time might bear no relation to traffic. The constitution authorized establishment of a system of adequate highways. The type of highway adequate to meet traffic needs necessarily varies with the character and extent of those needs, Highways adequate for the horse and buggy traffic of 1902 are not adequate for the high-speed motor traffic of 1950. The construction of a freeway was not constitutionally prohibited by a provision authorizing establishment of a State highway system merely because there was no need for them when the provision was adopted. The court concluded that the construction of this type of highway was necessary and proper to "construct and maintain a modern State highway system."

The court stated that the matter of whether or not the construction of a freeway constituted a taking of private property rights of access without due process of law need not be discussed in connection with this case. The State statutes expressly provided that access rights must be acquired in a manner

provided by law. Rights of access restricted by the construction of freeways were taken or damaged by the State under its power of eminent domain and their taking was compensable under Article I, Section 14 of the State constitution. The court had repeatedly held that it was permissible for the State Highway Commission to take such rights for which compensation was paid.

Still another point raised by the plaintiffs concerned the loss of business which those operating business establishments along original Route 3 would sustain. The court stated that construction of the highway past their places of business gave them no vested right to insist that it remain there, and quoted from the Virginia case of McMinn v. Anderson, (52 S.E. (2d), 67) to the effect that the landowners protesting relocation of a State highway had for 25 years enjoyed the benefits of a greater volume of traffic by their lands than might travel thereby after the new road was opened, but were now insisting upon an extension and perpetuation of those rights and advantages, that they might have a changeless road in a changing world.

Finally, plaintiffs claimed that the statutory provision giving the highway commission authority to designate and construct freeways on "such terms and conditions as in its opinion will best subserve the public interest, "was an improper delegation of legislative power to an administrative agency. It was the court's opinion, however, that the lesislature might establish a broad statutory rule and delegate to an administrative agency the duty of specifically applying that statute within the framework of a sufficiently definite primary standard. Courts in California and in other States had consistently approved the delegation to administrative officers or boards of powers originally performed by the legislature. An administrative agency might properly be given authority to construct and maintain or to abandon and relocate highways, to build freeways or limited-access highways, and to do anything else necessary to the maintenance of a State highway system. The California statute in question required the commission to exercise its authority only on "such terms and conditions as in its opinion will best subserve the public interest." This requirement provided an adequate standard to guide the commission.[1]

2. *Virginia:* A somewhat similar decision has been handed down by the Supreme Court of Appeals of Virginia, (McMinn et al. v. Anderson et al., 52 S.E. (2d) 67, March 7, 1949) when a group of landowners in the vicinity of State Route 3 in Lancaster County attempted to restrain the State Highway Commission from locating and constructing a cut-off which was to be added to the State highway system. The court held that the State's action was not contrary to existing law, and affirmed the judgment of a lower court which had refused to restrain the State Highway Commission from constructing and adding this section of road to the State highway system.

The original State highway system of the State of Virginia was designated by an act of the legislature in 1918 (Acts 1918, Ch. 10) which act also provided for location and establishment by the State Highway Commissioner of the exact routes to be followed between the points named in the act. An act of 1919 (Acts 1919, Ch. 31) contained the provision that "where the route has already been located and established by the commissioner . . . no change shall be made in such route by the commission."

State Route 3, as originally located and established, followed a somewhat circuitous course from a point on the eastern boundary of Richmond County through the towns of Litwalton, Nuttsville, and Lively, between Warsaw and Westland. The cut-off undertaken by the State Highway Commission provided a more direct and shorter route in this area and in so doing by-passed

[1]See Memorandum No. 39, September 1950, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular No. 117.

the towns of Litwalton and Nuttsville. Many of the landowners protesting the construction of the new road were residents of this area.

The protesting landowners contended that State Route 3, as originally laid out and constructed through those villages, constituted a permanent State highway over and along that course between Warsaw and Lancaster, the controlling points named in a 1922 Act (Acts 1922, Ch. 316) which provided for this route, and that these several miles could not be changed and relocated.

The State contended, however, that the provision of the 1919 act forbidding the State Highway Commission to make any changes in routes already located by the commissioner referred only to State highways actually established prior to the Act of 1919. The State also contended that no intention of abandoning or closing the present portions of State Route 3, passing through Litwalton and Nuttsville was indicated. The new highway would merely constitute a supplemental, shorter and more direct road.

The court stated that although the Act of 1919 allowed an appeal from the decision of the State Highway Commissioner as to the location of State highway routes, in the ultimate selection and location of the routes the "interests of the State" was the controlling feature. There was nothing in the act to prevent alteration or relocation at a later date of any route except those which had been located and established by the commissioner prior to September 5, 1919, its effective date, or which forbade construction of new roads serving the same or nearby territory. This same act, to prevent the commission from disturbing roads theretofore actually located and established, which had, in many instances been built at local expense, provided that, where the route had already been located and established by the commissioner, under the authority conferred upon him by the Act of 1918, no change was to be made in such route by the commission. In the opinion of the court, the words "where the route has already been located and established by the commissioner" referred to those routes actually laid out and located prior to the effective date of the 1919 act and not to those located thereafter.

Although this particular provision was reenacted at subsequent times, its reenactment did not cause it to perambulate and move forward and so bring within its influence highways established and located at any time previous to each reenactment.

The protesting landowners claimed that the fact that in several instances changes in the State highway system had been made by the State legislature was convincing proof that no substantial change was authorized without legislative approval. However, the court found that State statutes did provide for changes by the commission. A law enacted in 1926, (Acts 1926, Ch. 212) expressly allowed the location of parts of existing highways to be altered and even permitted sections of the old road to be abandoned as a part of the State highway system. Unless the Act of 1919 referred only to primary roads constructed prior to its enactment, the two statutes would be in hopeless confusion.

The court observed that the protesting landowners had for 25 years enjoyed the benefits of a greater volume of traffic by their lands and business establishments than might travel thereby after the new road was opened, but were now insisting upon an extension and perpetuation of those rights and advantages, that they might have a changeless road in a changing world. The provision of the Act of 1919 upon which they based their protest did not suffice to prevent the construction and inclusion in the State highway system of another nearby road which the State Highway Commission deemed to be in the interest of the State and for the public weal.

Even had State Route 3 been located and established prior to the effective date of the 1919 act, the court was of the opinion that the prohibition against changing of existing routes would not preclude the construction and inclusion of another section of highway in the system which might shorten the distance

between existing points, whereas in this case, no intention or purpose to abandon any part of the route now in use was disclosed.[2]

Immediate Possession of Land - Many a State has encountered lengthy delays in placing important highway projects under construction because of the time consumed by long drawn out condemnation proceedings which must be undertaken when property necessary for right-of-way cannot be obtained by negotiation. To offset this delay, a number of States have enacted legislation permitting the State highway department to take possession of the needed land at some point prior to completion (or in some States prior to instigation of) court proceedings. An active project of the Right-of-Way Committee of the American Association of State Highway Officials is the preparation of a report on this phase of the right-of-way problem, based on returns to a questionnaire on State land acquisition procedure, also a project of that committee, from which a policy on immediate possession of land will be formulated by the committee.

Although the Delaware State Highway Department, strictly speaking, does not have the right of immediate possession of land needed for highway purposes, State statutes do provide a method under which it is not necessary to wait until condemnation proceedings are completed and compensation is paid. Under Section 5730 of the Delaware Revised Code, 1935, the State Highway Department must first attempt to negotiate a settlement with the property owner. If unsuccessful, the department may apply to the resident judge of the county in which the property is located for condemnation of the land needed. Such application must be preceded by at least five days' notice of the intended application to the landowner, in writing. When the application is made, the judge appoints five "judicious and impartial" freeholders to view the premises and determine the amount of damage thereto.

Upon appointment of the commission, the State Highway Department may enter upon and take possession of the premises. No payment or deposit is required at this time, but after the condemnation commission appointed by the court has ascertained the amount of damages, the State must either pay the amount set to the owner or deposit such amount to his credit in a specified depository within ten days. Both property owners and the State have the right to a jury trial if not satisfied with the decision of the condemnation commission, but must file a request therefor within fifteen days after findings of the commission are filed. The decision resulting from this jury trial is final, and no appeal may be taken either by the property owner or by the State Highway Department.

The constitutionality of this statute was attacked on two main counts in a recent case (Carpenter et al. v. Dupont et al., 66A (2d) 602, June 7, 1949.): the first cause of complaint being that no time limit was specified for the commissioners appointed by the resident judge to submit their findings; the second that the statute provided for taking of private property without just compensation having been made.

In the Carpenter case, the State was unable to agree with the landowners as to fair compensation for a strip of land needed for highway purposes. After due notice to said landowners, the State filed application for condemnation proceedings, and after appointment of condemnation commissioners occupied the land in question. Subsequently, the landowners asked for an injunction to prevent the department from interfering with their property.

After considering the landowners' contention that the statute was unconstitutional because it did not set out a definite period of time within which the commissioners appointed by the resident judge should meet to ascertain damages for the land taken, the court was of the opinion that, considering the fact that such proceedings must be

[2]See Memorandum No. 33, February 1950, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular No. 100.

commenced before the land was actually taken, it was implicit in the statute that the commissioners were under a legal duty to discharge their function within a reasonable time after their appointment. However, a certain flexibility in the time schedule was desirable because of the nature of the proceedings. The State Highway Department in its brief commented on the fact that in a great many cases it was more desirable from the landowner's standpoint to delay determination of the amount of damages until completion of the project when such damages could be more accurately determined. Customary practice had been for the department to join with the owners in calling the commission whenever the owners desired, and to consult the owners as to an agreeable time when the State Highway Department was ready to proceed. In this particular case, there was no evidence that the landowners had requested the commissioners to meet.

The judge was of the opinion that either the landowner or the State Highway Department could institute appropriate proceedings at law to compel the commissioners to perform their legal duties, if they delayed unreasonably in performing them. Furthermore, regarding the landowner's argument that, although the statute gave the resident judge power to appoint the commissioners it did not give him the power to order them to act, the court felt it sufficient to say that the creation of the power to appoint fairly implied the power to order the commissioners to act if necessary.

The court referred to a somewhat similar case in the State of West Virginia (McGibson v. Roane County Court, 121 SE 99, 104) in which it was held that a State statute which required the condemnor to petition for the appointment of commissioners to assess damages within 60 days after entry on the land was not unconstitutional, even though it did not fix a time for the commissioners to assess such damages. It was pointed out that the Delaware statute requiring the State to make application for appointment of commissioners prior to taking possession of the land was certainly more protective of the landowners' rights than the West Virginia statute.

In reply to the landowners' assertion that the statute was unconstitutional because it permitted the State to take property before the payment of damages, the court mentioned the fact that it had been held in many States that the legislature might, without constitutional objection, enact a statute permitting a State, its agent or political subdivision to take property by eminent domain without first paying for or securing payment for the property so taken, provided definite provision was made whereby the owner would certainly obtain compensation. The Delaware State Constitution, Article I, Section 8, provides that no man's property should be taken or applied to public use without the consent of his representatives, and without compensation being made. The Court was of the opinion that since there was no language in this constitutional provision which purported to qualify the right of the State, it followed that the statute under consideration was not rendered invalid because it authorized a taking prior to making payment therefor. The proper functioning of a State and its agencies, said the court, would seem to render the existence of such a power desirable when ample safeguards were provided to secure just compensation for the landowner whose property was taken.

The court concluded that the landowners' constitutional objections to the condemnation statutes were not sound. The landowners had an adequate remedy at law and consequently the request for an injunction was denied.[3]

Another decision, in which the right of immediate possession of land was incidentally involved, was handed down on January 16, 1950, by the Virginia Supreme Court of Appeals, in a case in which the right of the City of Richmond to acquire land for off-street parking

[3]See Memorandum No. 34, February 1950, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular No. 102.

facilities was the main issue. (City of Richmond et al. v. Dervishian et al., 57 S. E. (2d) 120.) In this case, the court upheld the constitutionality of a section of the city's charter, providing for a so-called "quick-taking" method of acquiring land for public purposes, as authorized by State statute. [4]

Removal of Buildings - A recent decision handed down by the North Carolina State Supreme Court makes it clear that in that State the highway department may not, in taking land for highway purposes, on which buildings are located, pay the owner for the land and propose that said owner remove the buildings. (Proctor v. State Highway and Public Works Commission, 55 S. E. (2d) 479, October 12, 1949). Of importance also was the ruling that the superior court of the State might either increase or decrease the award of condemnation commissioners regardless of whether the landowner or the condemnor took the appeal therefrom.

In this case the North Carolina Highway and Public Works Commission took possession of a portion of the land belonging to Mrs. Alda Proctor, without payment of compensation and without bringing proceedings for condemnation against her, which procedure is sanctioned by State statutes, either the condemnor or the property owner being entitled to institute condemnation proceedings. (See Chapter 40 of the North Carolina Statutes, G. S. Sec. 136-19). There were buildings located on Mrs. Proctor's land, a frame dwelling and a brick store, and parts of both of these extended into the portion of her land which the State needed for the highway right-of-way.

In accordance with accepted procedure, the owner of the land instituted condemnation proceedings in the superior court of the State. Commissioners were thereupon appointed by the court to appraise the property and assess damages sustained by her. The commissioners awarded the owner $7,150, which was apparently acceptable to her but the highway department excepted to the report on the ground that the amount was "grossly excessive." The clerk of court, however, entered the judgment, overruling the State's exception, and the State appealed to the superior court, demanding a jury trial. Only one issue was involved in the jury trial - the amount of damages - and the jury awarded the landowner $7,508. Then the State, contending that the amount awarded to Mrs. Proctor could not exceed that assessed by the condemnation commissioners in the first place because the owner had not excepted to their award, moved the court to set aside the jury verdict and to sign judgment fixing the owner's compensation at the original amount of $7,150. The State also insisted at this point that the owner should be required to remove the dwelling and store from the right-of-way and asked the court to have a portion of the compensation awarded impounded until such time as removal of the buildings was effected. The court entered judgment in the amount of $7,508, with the stipulation that this amount was to include the cost of clearing the right-of-way.

Both parties then filed appeals, the owner because the cost of moving the buildings from the right-of-way was included in the judgment, and the State highway department because the amount of the judgment was in excess of that awarded by the condemnation commissioners in the first place, which the State declared was not possible because the landowners had not protested the original award.

The State Supreme Court modified the judgment, holding the lower court in error in including the cost of moving the buildings off the right-of-way in the amount awarded to the landowner, but found nothing wrong in the award of a greater amount of compensation than the condemnation commissioners had assessed.

In discussing the State's insistence that the cost of removing the buildings from the right-of-way be included in the judgment awarded the landowner, the

[4] See Section on Parking, Subsection entitled "Provision of Off-street Parking Facilities," for a more comprehensive discussion of this case.

Supreme Court called attention to the fact that in North Carolina the State takes only an easement when land is condemned for highway purposes. The owner retains the fee and may use the land for any purpose not inconsistent with its use for highway purposes. The State Highway and Public Works Commission on the other hand has the right to occupy the land taken for right-of-way and may remove any obstructions to free passage of the traveling public. When private property is taken for public purposes, compensation for the loss sustained by the owner is necessary. Where only part of the owner's property is taken, compensation is the difference between the fair market value of the entire tract immediately before the taking and the fair market value of what is left after taking, including compensation for the part taken and for the damage to the remainder. The damage to the remainder must be offset by both general and special benefits resulting to the landowner.

Answers to the questions here raised by the State and by the landowner could not be found in the State statutes. The court therefore based its decision on general principles of the law of eminent domain. Since buildings are regarded as part of the real estate upon which they stand, the condemnor must either take the land with the buildings thereon or not at all. Buildings must be taken into account when compensation is made. The condemnor cannot pay for the land and propose that the owner remove the buildings. The court quoted from the case of State (of Texas) v. Miller, 92 S. W. (2d) 1073, 1074, to the effect that a condemnor cannot strip improvements from land taken and compel the owner to provide other land therefor and then insist that the owner is fully compensated by payment for the value of naked land so appropriated. Otherwise the condemnor might insist on buildings being moved from condemned land onto vacant lots acquired by the owner for entirely different purposes, thus upsetting the owner's plan for improvement of his private property.

The State in this case had the right to determine whether the presence of the dwelling and store on the right-of-way interfered with the free exercise of the easement condemned, but the owner was entitled to decide whether she should accept the State's proposal that she remove the buildings from the right-of-way to her remaining lands at her own expense. Thus, the court held that the trial court rightly refused to coerce removal by the owner by impounding a portion of the compensation. However, the lower court transgressed its province in decreeing that the compensation awarded by the trial court included the cost of removal of the buildings.

Considering the State's contention that the amount of compensation awarded the landowner could not exceed the award of the commissioners because she did not appeal from this award, the Supreme Court stated that it could not accept the suggestion that the award could be lessened because the State appealed, but that it could not be increased because the owner did not appeal.

The State statutes provided that parties to a condemnation suit were entitled to have the decision of the condemnation appraisers heard and determined by a jury of the State Superior Court, if in the appeal from the award of the commissioners a jury trial was demanded. But the jury trial must then proceed as if the condemnation commissioners had never been appointed. And so the superior court might enter judgment for the landowner for the amount fixed by the jury regardless of whether it was greater or smaller than the sum originally awarded by the commissioners, and regardless of whether the landowner or the condemnor took the appeal. The lower court thus acted properly in rendering judgment for the larger amount found by the jury.[5]

[5]See Memorandum No. 35, April 1950, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular No. 104.

Compensation for Damages Resulting from Highway Improvements - Just what items of damage to abutting property occuring as a result of highway improvements are eligible for compensation, and what factors may be taken into consideration in the determination of the amount of compensation, have always been matters of controversy. There is no hard and fast rule for guidance. Courts in the various States have based their decisions on the laws of the State in which the case arises, which laws of course differ from State to State.

1. Mississippi: The Mississippi Supreme Court has held that two pieces of land, located a quarter of a mile apart, but connected by a 50-ft. strip of land, must be considered as a unit in awarding compensation for damages resulting from the construction of a highway,

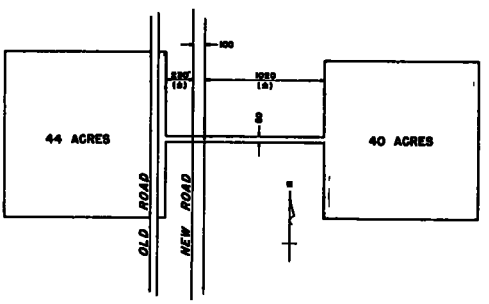

Figure 1.

and that admission of evidence bearing on present inconvenience to landowner does not constitute reversible error. (Mississippi State Highway Commission v. Dodson et al., 42 So. (2d) 179, October 10, 1949).

In relocating a portion of a highway in Scott County, the State Highway Commission found it necessary to condemn a small piece of land included in a 50-ft. strip belonging to one D. J. Dodson, ostensibly used by him as a means of operating his two parcels of land, located some 1,450 ft. distant from one another, as a farm unit. The road before relocation bisected one parcel of land belonging to Dodson, but the new road was located between the two parcels. The land actually taken consisted of 100 ft. across the connecting strip (see Fig. 1). The State Highway Commission claimed that compensation should be based solely on damage to the connecting strip, since the two main parcels of land were not involved in the transaction. Damages were estimated by the State at not over $50.

In the original condemnation proceedings, damages were awarded by the jury in the amount of $500. In an appeal to the Circuit Court, judgment was rendered in the amount of $750. The highway commission appealed to the State Supreme Court, where the decision of the lower court was reversed and the case returned for retrial, because witnesses for the property owner had been allowed to base their testimony as to damages on inconveniences that would result to the present owner of the land instead of confining themselves to those that would be taken into consideration by a would-be purchaser. However, when retried in the Circuit Court, a verdict was returned in the amount of $850, and the case was again appealed to the Supreme Court by the highway commission.

The State in its appeal claimed that the strip of land in question had never been used as a passageway between the two parcels of land and could not reasonably be adapted for such use within the foreseeable future, due to certain obstructions observed thereon. Therefore the two tracts should not be considered as a unit. The State also claimed that had the strip not been purchased, the landowner would not be entitled to any damages at all to his property, although he would be subject to the same inconvenience. In addition, the State claimed that witnesses had again been allowed to introduce testimony as to damages, based on personal inconvenience to the landowner, rather than confining their testimony to the market value before and after taking to a prospective buyer. Compensation should be based only on damages to the strip of land crossed by the new road. Such a taking would in no way cause a change in the market value of Dodson's two tracts of land.

The Supreme Court in its second

decision quoted from American Jurisprudence (18 Am. Jur., page 910. Sec. 270) to the effect that unity of use was the principal test as to whether the two parcels should be considered as one. If a tract of land, no part of which is taken, is used in connection with the same farm, it is not considered a separate and independent parcel merely because it was bought at a different time even if the two tracts are separated. According to another authority, (Corpus Juris Secundum, Eminent Domain, Sec. 140, page 982) "To constitute a unity of property within the rule, there must be such a connection or relation of adaptation, convenience, and actual and permanent use as to make the enjoyment of the parcel taken reasonably and substantially necessary to the enjoyment of the parcels left, in the most advantageous and profitable manner in the business for which they are used". The court found that the two tracts here involved constituted one unit for agricultural, dairying and cattle-raising purposes. Both tracts were used for those objects and the strip in question was bought for the purpose of doing that. The connecting approach was of great convenience and value for such use.

As to whether or not damages found by the jury were greatly in excess of the actual damage, the court did not consider that it was so excessive as to call for a reduction, or a reversal and remand for another jury to pass upon the question. The State's only witness testified that the damage should not be over fifty dollars, which was for the land actually taken. He said the remaining lands had suffered no damage whatever in his judgment.

All of the landowner's witnesses, however, testified that damages due to inconvenience caused by construction of the new road amounted to more than the $850 awarded in the jury trial. It had been possible for the owner to cross over the old road in going from one parcel to the other without difficulty, since the road-bed was flat to the natural ground. However, the new road was some six feet high, and it would be impossible to cross that road with cattle, stock, farming equipment and machinery. In going from his home, located on the west tract, to the east tract, the owner had first to travel south some half mile to get to a crossing of the new road, and then come back north the same distance to get to the east tract. In so doing it would be necessary to go over the land of other persons. Considering the fact that three juries had passed upon the question of damages, the court could not say that the $850 verdict of the jury was the result of bias or prejudice or against the overwhelming weight of the evidence. The decision of the lower court was confirmed. [6]

2. Oregon The Oregon Supreme Court recently reversed a judgment of a lower court, awarding damages to owners of a tract of land, a part of which was acquired for construction of the New Columbia River Highway, ruling that testimony relating to profits derived from adjacent lands and those to be derived from speculative profits had no bearing on the question of market value and were not admissible. (State v. Cerruti et al., 214 P. (2d) 346, January 30, 1950.)

In the course of the trial in the circuit court, it was brought out that other land in the vicinity was planted with celery and lettuce. Several witnesses for the landowners testified as to the profits derived therefrom. The Cerruti land, on the other hand, was planted at the present time in corn. This, according to the owner, was because of the fact that when he purchased the land in 1946, it was mostly covered with weeds and Johnson grass, and the intervening time had been given over to reconditioning the land by planting crops which could be cultivated by tractor. This was impossible to do with lettuce and celery but corn served the purpose admirably. Various witnesses for the Cerrutis

[6]See Memorandum No. 36, May 1950, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular No. 106.

gave testimony, over objections of the State Highway Commission, as to actual profits made from lettuce and celery crops on neighboring parcels of land, and as to profits that could be made by cultivating similar land for the production of these crops.

The Supreme Court found that although the question of whether or not such testimony was admissible in a trial seeking to establish market value of land to be condemned had never arisen in the State of Oregon, the general rule was that evidence of profits derived from a business conducted on property was too speculative, uncertain and remote to be considered as a basis of computing such value. An exception to this rule should be made whenever such profits would be an indication of value. Thus, according to a well-known authority (Lewis on Eminent Domain, Sec. 727) if a city lot was devoted to gardening purposes, profits therefrom might be no indication of value. But if improved to correspond to its locality and surroundings, rents derived from it would be an important factor in determining its worth. Income over a period of years from a toll bridge would be proper evidence. Profits derived from farming have a bearing on the value of the farm. Several decisions were cited where the courts had rendered opinions following this line of reasoning.

However, although the weight of authority seemed to support the view that evidence of profits derived from the use of agricultural lands was relevant to the question of market value and therefore admissible, this question was not here involved. No evidence as to profits which the Cerrutis made from the cultivation of corn and other crops was ever introduced. Even if such evidence were admissible, it did not follow that the lower court should have admitted evidence as to profits made by the owners of other lands or probable profits from the Cerruti land if planted in lettuce and celery.

The Supreme Court was of the opinion that the admission of such evidence was in error, since the question for decision by the jury was the reasonable market value of the property at the time of taking. In the determination of market value, any use to which the property might be applied and all the uses to which it might be adapted would be considered, but not profits which might be realized in the event that the property in the future should be put to a particular use. An undetermined amount of time and money must be expended before the Cerruti property could be cultivated in celery and lettuce. Possible future use and profits in this particular case were too hypothetical and speculative to be proper evidence.

The court also found that evidence as to profits made on adjoining land should not have been admitted, for the same reasons. A previous decision (Idaho Farm Development Co. v. Brackett, 213 P. 696, 699) was quoted to the effect that although evidence as to revenue ordinarily derived from land in the vicinity when used for the same purpose, i. e., cattle raising, as the land being taken was admissible, "under no circumstances would it be proper to introduce evidence as to income from other ranches, this being altogether too remote."

The judgment of the lower court was reversed and the case returned thereto for further proceedings.[7]

3. California. In a recent California case, Holman et al. v. State et al., 217 P. (2d) 448, April 27, 1950, the District Court of Appeal, Fourth District, held that the construction of a dividing strip in a highway, to increase the safety of the traveling public, was a proper exercise of the police power, and that damages to abutters resulting therefrom were not compensable.

The complaint in this case was brought by co-partners in the Industrial Power and Equipment Company, located on the southwest corner of the intersection of U. S. Highway 99 and First Street, near Bakersfield, (see Fig. 2). The business carried on by

[7]See Memorandum No. 37, July 1950, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular No. 113.

the owners consisted largely of the servicing and repair of heavy trucks and equipment, which business, the owners declared, was seriously damaged by the construction of a dividing strip on U. S. Highway 99. Construction of the dividing strip made it impossible for vehicles traveling in a northerly direction on U. S. 99 to make a left turn to enter the property at First Street since there was no opening at this point. Owners claimed that they were entitled to compensation for damage occasioned by the construction of a public work or improvement in the highway interfering with the access from their property to the next intersecting street in either direction.

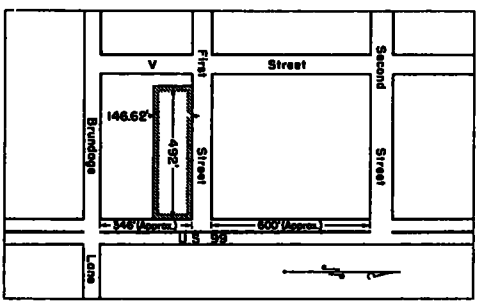

Figure 2.

The State claimed that only "circuity of travel" or "diversion of traffic" was involved and that this was not compensable because no violation of property rights was involved. Depreciation in value, if any, resulted solely from traffic regulations under the police power.

To support their plea for damages, the landowners cited a number of previous decisions in which damages had been awarded under what they considered similar circumstances. However, the court pointed out that in each of these previous cases there was either physical injury to an owner's property itself, or a physical impairment of access from the property to the street. In one of these cases, Reardon v. City and County of San Francisco, 6 P. 317, (1885) for example, the complaint alleged that the city, in improving an adjoining street, deposited certain heavy material in a street, and in consequence the adjoining lot of plaintiffs was forced upwards, with the result that the foundations of certain houses located on plaintiff's lot were injured.

In another case cited by the complainants, People v. Ricciardi, 144 P. (2d) 799, (1943) the property owner, who originally had direct access to the through traffic on the highway, found himself abutting on a frontage road after completion of the improvement. Additional travel was required to go from the property in question by means of the frontage road to the through traffic lane of the highway.

In the case of Bacich v. Board of Control, 144 P. (2d) 818, (1943) the creation of a "cul-de-sac" resulted from the highway construction and the property owner found himself with access at one end only. The court in that case held that reasonable modes of egress and ingress embrace access to the next intersecting street in both directions. This rule, the present court held, was not applicable in the Holman case, since the property owners still had access to Brundage Lane, the next intersection to the south and to First Street on the north, adjoining their property.

Several previous cases were cited by the court in holding that the complainants in the present case were not entitled to compensation for alleged damages. In Beckham v. City of Stockton, 149 P. (2d) 296, (1944) for example, the court had held that mere inconvenience and circuity of travel constituted no grounds for the recovery of damages; plaintiffs' easement could not be held to embrace a right to pursue the most convenient course from their properties to such destination as they might seek to reach.

In Rose v. State of California, 123 P. (2d) 505, (1942) the court stated that "the damage suffered by plaintiffs is, as we have seen, an interference with their right of access. The diversion of traffic is not a proper element to be considered in computing those damages inasmuch as a landowner has no property right in the continuation or

maintenance of the flow of traffic past his property."

In City of Los Angeles v. Geiger, 210 P. (2d) 717, (1949) it was held that "injury to business is a detriment to its owner but it is not a damage to the property on which it is conducted, hence a property owner is not entitled to damages for loss of business caused by improvement or by diversion of traffic."

None of the cases cited involved construction of a dividing strip in a highway, but the principles involved were equally applicable. As to the dividing strip, the court found that the construction of such was authorized by State statutes for the purpose of increasing the safety of the traveling public (California Streets and Highways Code, Sec. 144.) An exercise of the police power by the State was here involved, therefore. Since damages resulting from the exercise of the police power are not compensable, the plaintiffs in this case were not entitled to damages.

In the Bacich case, cited above, the court said: "But the traveling of additional distances occasioned by modern traffic engineering to make travel more safe and to adapt the highway system to the adequate disposal of the increasingly heavy burden of automobile traffic as, for example, by the construction of divided highways for various types of traffic, or the re-routing of traffic by one-way regulations or the prohibitions of left-hand turns - is an element of damage for which the property owner may not complain in the absence of arbitrary action . . ."

In the present case, plaintiffs have free access to the highway, and are in the same position and subject to the same police power regulations as every other member of the traveling public. Because of a police power regulation for the safety of traffic they are, like all other travelers, subject to traffic regulations. Although they are liable to some circuity of travel in going from the property in a northerly direction, they are not inconvenienced whatever when traveling in a southerly direction from their property. As stated in the Ricciardi case cited above, the re-routing or diversion of traffic is a police power regulation and the incidental result of a lawful act, and not the taking or damaging of a property right.

The right of the State to control traffic as a safety regulation would be definitely curtailed if arguments such as those advanced in the present case were sustained.[8]

Reservation of Highway Right-of-Way Prior to Acquisition - A new project was initiated by the committee at the annual meeting of the Board, dealing with the reservation of highway right-of-way prior to acquisition. The object of the project is to formulate a device or devices that will assure the availability when necessary of lands for highway right-of-way at reasonable cost, after detailed review of some seven different practices now used with varying degrees of success. A plan of execution for this project was formulated by the committee as follows:

> *The Need* - Circumstances have led highway departments to seek ways and means of reserving lands for highway purposes prior to their acquisition in the customary manner. One such circumstance is the lack of available funds for the advance acquirement of highway right-of-way because of the absence of enabling statutory authority. A corollary to this element is the present high cost of the outright acquisition of needed lands.
>
> Legal limitations on right-of-way widths are another restricting influence. The vast amount of effort and expense incident to the advance planning of highway improvements will have been wasted, if, when land acquirement begins, it is prohibitive in cost to acquire the right-of-way originally thought feasible. The vast amount of building construction of all kinds that is taking place in the areas that are being contemplated for right-of-way is distressing highway management

[8] See Memorandum No. 41, December 1950, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular No. 123.

because of the obviously adverse effects it will have on the highway modernization program. These factors compounded as they are today, spell the need for using some device that will assure the availability when necessary of lands for highway rights-of-way, at reasonable cost

Because of the critical character of this problem, and because the present defense emergency probably means still further deferment of needed highway improvements, it is important for the Committee on Land Acquisition and Control of Highway Access and Adjacent Areas of the Highway Research Board to consider this matter as a subject for inquiry and research.

There are a number of techniques that have been used or proposed in the past to achieve the objective sought Among these are the following:

1. *Highway Development Rights* - These easements, when conveyed to the State for a price paid the owner, eliminate the right of the abutter to improve road margins in specified ways inconsistent with present or future requirements of the highway. They involve the acquisition by the State of the right to limit the use of strips of land adjacent to the highway.

2. *Ohio Reservation Agreements* - This mechanism, successfully used in Ohio, involves a species of control of the type mentioned above. By means of a highway reservation agreement, the Ohio Department of Highways acquires specified rights in designated reserved areas, for a nominal consideration At some future time, the customary title for highway purposes will be acquired

3. *Maryland Easements* - In Maryland, easements may be acquired under statutory authority restricting or controlling any right of the owner or other person (1) to erect buildings or other structures; (2) to construct any private drive or road; (3) to remove or destroy shrubbery or trees; (4) to place thereon trash or unsightly or offensive material; and (5) to display thereon signs, billboards or advertisements.

4. *Ultimate Right-of-Way Widths* - Highway development rights, the Ohio reservation agreements, and the Maryland easements referred to above, all involve the purchase or condemnation, for a just compensation, of designated property rights. There is, however, a type of reservation of future highway right-of-way that is sanctioned under the police power, namely the establishment of ultimate right-of-way widths.

Such authority, of a limited character, is lodged with the State highway departments of California and Pennsylvania, though neither department is especially enthusiastic in its application. The technique involves the establishment of ultimate rights-of-way and the prohibition of the erection of structures and detrimental uses within the eventual right-of-way. The essential features of this plan are as follows: first, the location and design characteristics of the proposed highway improvement must have advanced so that right-of-way needs can be clearly defined; second, adequate public notice of the advance reservation plans must be given; and third, the proposal must be reasonable.

In other States, as in Connecticut, Illinois, and Wisconsin, for example, similar authority is lodged with local units of government.

5. *Official Map Procedure* - This mechanism, available to local units in a number of States, may also assist in the reservation of needed lands for highway purposes After a master plan for a locality or an essential portion of it has been perfected, the local planning agency may prepare and the city council may adopt an official map for the whole or any portion of the municipality, showing accurately at least the locations of existing public streets. The official map may also show the lines of streets on plats or subdivisions that have been approved by the planning agency, as well as the lines of officially approved planned streets. After hearings are held on the proposed official map and its approval by the city council, it becomes binding both upon the public authority and the private property owners. Additions and modifications may be made as necessary, according to an established legal procedure.

6. *Subdivision Regulation* - State laws generally authorize municipalities and other local units of government to provide for the regulation of lot sizes, street layouts, the installation of utilities of all sorts, and the provision of open spaces and other facilities. Through the power to approve proposed subdivision plats, public authority may seek to provide for the reasonable reservation of needed streets of appropriate width and design.

The State of Wisconsin has recently obtained legal sanction for the regulation of subdivision plats along State trunk highways at the State, rather than at the local level.

7. *Zoning* - Still another planning device used to assist in the reservation of rights-of-way ultimately needed for highway purposes is zoning This involves the adoption of regulations governing various kinds of permitted uses of land and buildings adjacent to the highway, setback regulations, minimum size of yards, etc., and the height, bulk, size and other characteristics of structure. Setback authority may be distinguished from the designation of ultimate right-of-way widths though both may be authorized under the police power.

Administrative Measures - Sometimes it is possible, pursuant to negotiated understandings, to effect a degree of desirable control through administrative measures of highway departments under their broad authority to construct, improve and maintain highways in the public interest. Some of these may involve the application of standards for private driveways or entrances to highways, by means of a permit system. Setbacks of limited extent obtained by voluntary negotiation with property owners have been made possible in some such instances.

The Project - These, briefly, are some of many tools that are now known to be at least partially helpful in facilitating the reservation of highway rights-of-way ultimately needed The effectiveness of each is circumscribed by statutory and judicial limitations, and by the customs and mores of the localities where they may be applied.

The purpose of this project is to examine closely the essential and associated elements of each of these measures, particularly with reference to the reservation of future highway rights-of-way, their advantages and their shortcomings in terms of cost, ease of application, effectiveness of result, extent of present usage, etc It could be the final objective of this project to select a single measure or combination of measures, which, from the standpoint of all the varying criteria, appear to fulfill the present need If an entirely new device seems indicated, its dimensions will be outlined.

It is hoped that substantial progress can be made on this project during the year 1951. A progress report will be submitted for consideration of the committee at the 1951 annual meeting of the Board.

The use of one of the techniques mentioned above, the official map procedure, resulted in a rather significant court decision in recent months, when a New York court denied a motion by the City of New York to dismiss a suit filed by a landowner, who claimed that refusal to permit building on her property, included in the city master plan as a part of a proposed parkway, prevented her customers from buying the property.

The State Supreme Court ruled only on the question of whether or not a cause of action existed, (Platt v. City of New York, N. Y. S. (2d) 138, September 26, 1949). Indirectly raised, however, was the question of the constitutionality of the statute involved.

Section 28-a of Article 3 of the General City Law of New York State provides that:

> The planning board (of a city) may prepare and change, a comprehensive master plan for the development of the entire area of the city, which master plan shall show existing and proposed streets, bridges and tunnels and the approaches thereto, viaducts, parks, public reservations, roadways in parks, sites for public buildings and structures, zoning districts . . . and such other features existing and proposed as will provide for the improvement of the city and its future growth, protection and development, and will afford adequate facilities for the public housing, transportation, distribution, comfort, convenience, public health, safety and general welfare of its population.

Section 35 of the same article provides that:

> For the purpose of preserving the integrity of such official map or plan no permit shall hereafter be issued for any building in the bed of any street or highway shown or laid out on such map or plan, provided, however, that if the land within such mapped street or highway is not yielding a fair return

> on its value to the owner, the board of appeals or other similar board in any city which has established such a board having power to make variances or exception in zoning regulations shall have power in a specific case by the vote of a majority of its members to grant a permit for a building in such street or highway which will as little as practicable increase the cost of opening such street or highway, or tend to cause a change of such official map or plan, and such board may impose reasonable requirements as a condition of granting such permit, which requirements shall inure to the benefit of the city.

The court, in the present case, made the statement that statutes had been held unconstitutional when they prohibited compensation in subsequent condemnation proceedings for buildings erected upon land taken for highway purposes after filing of a map of the street, citing two previous cases to substantiate this statement.

The city claimed that the statute here involved provided a method for obtaining a building permit and did not prohibit compensation for buildings so permitted. The land owner had no cause of action since she had not exhausted her remedies under the statute.

However, the court stated that the statute afforded the landowner no remedy since she claimed that she derived a major portion of her livelihood from the sale of her real property and was in no position to submit plans and apply for a variance. The police power, the court stated, extended to the restriction of use of private property for the public welfare, but when such restriction became unreasonable it might amount to confiscation. The court, therefore, ruled that the landowner had a legitimate complaint and was entitled to take action against the city.[9]

Right-of Way Costs and Land Values - According to the latest releases of the Bureau of Agricultural Economics of the U. S. Department of Agriculture, the value of farm real estate increased seven percent during the period November 1949 to November 1950, raising the national index to 179, a new peak. This is in marked contrast to the six percent decrease reported for the period November 1948 to November 1949. Figure 3 indicates the percentage change for individual States, which took place between November 1949 and November 1950. It will be noted that farm values increased in each of the 48 States, reflecting the high level of economic activity as well as rising prices for farm products generally. Land values are expected to show continued strength during the year 1951.

It is probable that the six percent decrease indicated for 1949 and the seven percent increase registered for 1950 have not had an appreciable effect on overall right-of-way costs. If, however, farm values continue to rise as they have in the past year, they will undoubtedly be reflected eventually in land acquisition costs.

CONTROL OF HIGHWAY ACCESS

Authority to Establish Controlled-Access Highways - Controlled-access highways are now sanctioned by legislative act in 30 States, [10] by constitutional provision in one State, Missouri, and by judicial decision in an additional State, Minnesota. Additionally, the Arizona State Highway Department has been able to acquire access rights in connection with the Tucson Controlled-Access Highway, under a provision of law granting the State Highway Commission power to exercise complete and exclusive control and jurisdiction of State highways as it may deem necessary for public safety and convenience. Under this authority, the Commission adopted the following resolution, covering the Tucson project:

[9] See Memorandum No. 34, op. cit.

[10] California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

The Commission finds, determines and declares that the public interest and safety requires that rights of direct access to, from and across this project shall be limited, as indicated on the plans . . . The State Engineer is hereby authorized and directed to acquire, by the exercise of eminent domain, or otherwise . . . also require the right of ingress and egress to control and limit the access to said highway

right of ingress and egress to the highway from the abutting properties remaining in possession of the Grantor [11]

Although the State of California has a controlled-access law and has constructed hundreds of miles of expressways under the authority thus granted to the State highway authorities, attempts to restrict or limit this authority

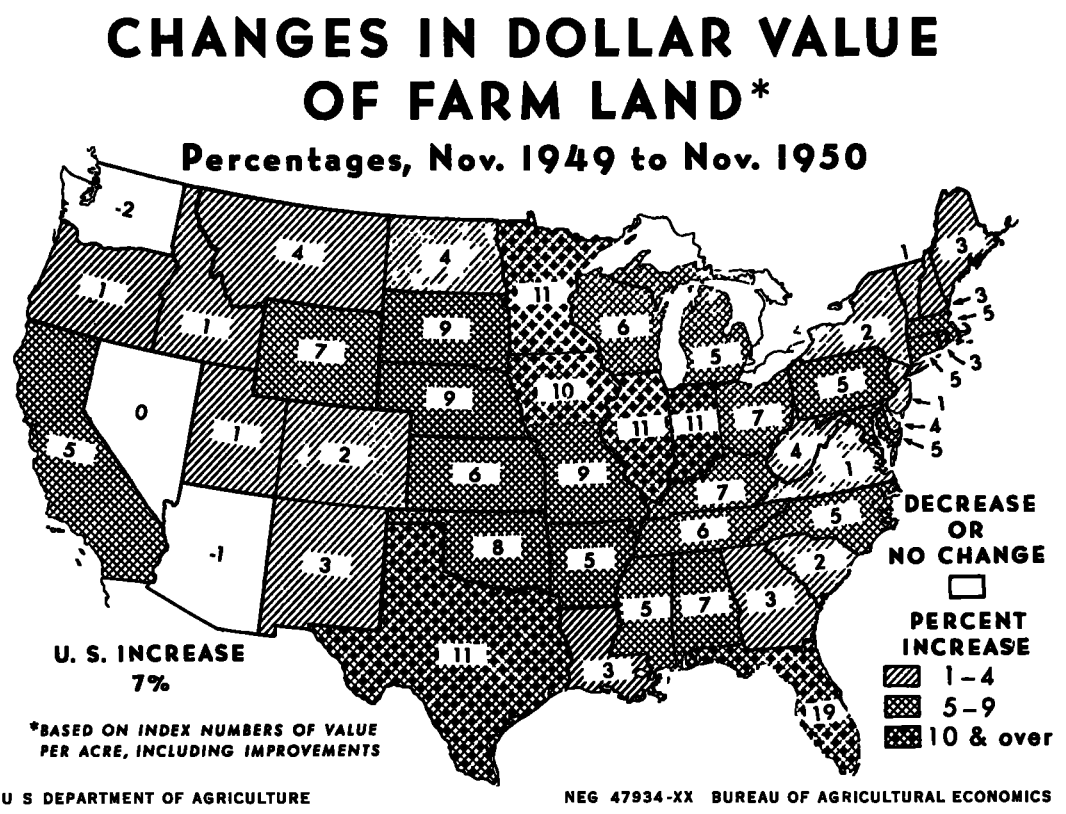

Figure 3.

On the basis of this resolution, the Right-of-Way Division included in the deed conveying the lands needed for right-of-way to the State, the following provision:

It is further understood and agreed the consideration received by the Grantor ___ is also in full payment and this instrument transfers, assigns and conveys all permanent impairment or obstruction of any easements, public utilities service, right of access or

are not uncommon. One such effort was made in connection with the State's plan to relocate a portion of State Route 3, between Roseville and Sacramento, as a freeway. The taxpayers bringing the suit claimed that such

[11] See Memorandum No. 38, September 1950, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular No. 116.

action was invalid because it provided for a new and different type of State highway than was intended by the constitutional provision authorizing the legislature to establish a system of State highways, and to pass all laws necessary and proper to construct and maintain the same. The taxpayers argued that the statutory provision giving the highway commission authority to designate and construct freeways on "such terms and conditions as in its opinion will best subserve the public interest," was an improper delegation of legislative power to an administrative agency. The State's authority to construct the relocated highway as a freeway was, however, upheld by the court. This case, Holloway et al, v. Purcell, 217P. (2d) 665, is described in more detail earlier in this report.[12]

Another California case (City of San Jose vs. C. H. Purcell, Director of Public Works of the State of California, and G. T. McCoy, State Highway Engineer, No. 70666 (1948) in the Superior Court of Santa Clara County) came before the court when the City of San Jose requested an injunction restraining the State Director of Public Works and its State Highway Engineer from locating and constructing a section of State Route 5 through the corporate limits of the city as a controlled-access highway. Authority for such action was based on so-called "initiative" ordinance enacted by the electors of the City of San Jose some eight months after the City Council of San Jose and the State Department of Public Works had signed the agreement required by law for the construction of a section of State Highway Route 5 through the corporate limits of the city.

The so-called "initiative" ordinance adopted by the city provided that permission for any highway, thoroughfare or route of the State of California, not already completed, to cross any corporate area of the City of San Jose could not be granted without approval of the electorate. A further provision of the ordinance sought to nullify the agreement entered into by the City Council with the State, by providing that any contracts, agreements or resolutions of the City Council approving any highway not completed as of the date of adoption of the ordinance should be made null and void upon approval of the ordinance.

The court found that the city failed for several reasons in its effort to use its power of the initiative and referendum to nullify the aforementioned agreement between the City Council and the State.

First of all, the court said, "a municipality operating under a charter is legislatively supreme only with respect to those matters which are in essence solely those of 'municipal' concern," citing several court decisions to this effect. The question then was as to whether or not the construction of a State highway through a municipality was merely a matter of local concern or was of State-wide interest. Plaintiff called attention to several decisions wherein the establishing, maintaining, locating, relocating and vacating of streets were held to be municipal affairs, relying on one decision in particular, City of Los Angeles v. Central Trust Co., 173 Cal. 323, wherein it was stated that "the matter of opening, laying out and improvement of streets within a city. . . . are matters of much greater concern to its inhabitants than to the people of the State at large and they are clearly municipal affairs."

The court, however, cited a more recent case (Los Angeles Ry Corp. v. Los Angeles, 16 Cal. (2d) 779) which recognized the fact that a matter which might once have been considered of merely municipal concern could "in the light of the complexities incident to State-wide growth, require State-wide recognition through general legislation and thus cease to be a purely "municipal affair" and in turn become a matter of general or State concern and therefore the proper subject of general regulatory laws." In the court's opinion, the proposed freeway was naturally a matter of local concern, but over and above the municipal interest was that of the entire State. The freeway was in

[12]See Section on Land Acquisition, Subsection entitled "Relocation of Highways."

its very essence a matter of general concern to the people of the State as a whole, who were potential, and many of whom would become, users of it as a segment of a State highway.

The court also brought out the fact that the California State constitution established the control of the State highway system by the State, Section 26 of Article IV providing that "The legislature shall have power to establish a system of State highways or to declare any road a State highway, and to pass all laws necessary or proper to construct and maintain them . . ." Pursuant to this provision the legislature had enacted the necessary statutes to provide for the exercise of such control by the State Highway Commission, including the following section (No. 111 of the Streets and Highways Code):

> Whenever the natural course of a State highway passes into or through any city and a State highway route through or around such city is not specifically described by law, the commission shall determine the location of the connecting portion necessary to make the State highway continuous Such location may be either through or around such city, depending upon the commission's determination as to which location will be of the greatest benefit to through traffic upon such State highway.

Statutory law thus definitely empowered the State Highway Commission, to the exclusion of every other agency, to make the determination which the city of San Jose had sought to limit and set aside by the ordinance above referred to.

In its request for an injunction barring the State Highway Commission from proceeding with construction of the contemplated freeway, the City of San Jose argued that under provision of the State's controlled-access law (Section 100. 2 of the Streets and Highways Code) such highways were made a matter of State and local concern. By eliminating the State-wide aspect and emphasizing the municipal aspect, the city contended that the electorate could annul and nullify the agreements of the two exclusive contracting parties which the State Legislature had authorized and empowered to act under the provisions of the controlled-access law, i. e., the State Highway Commission and the City Council.

In its argument the City assumed that "The City of San Jose" and "City Council" were one and the same. This was a false assumption, according to the court and the case of In re Pfahler, 150 Cal. at p. 81 was cited as follows: "The common council or other legislative body and other charter officers do not constitute 'the city' but are merely agents or officers of the city." Furthermore, in the present case, the City Council was not the agent of the city, but a State agency, deriving its authority to contract solely from the State, and in so contracting was wholly independent of the city. Previous decisions were also cited wherein official bodies had been properly held to be and recognized as State mandatories for the purpose of administering or executing matters which although affecting municipal areas were nevertheless so extensive in scope and character as to constitute matters of more than mere local concern.

In enacting the California controlled-access law, the legislature, recognizing that the construction of this type of highway would ordinarily involve curtailment of some of the ordinary and important incidents of the ownership of land, had deemed it expedient and fair to set up an empowered contracting entity to act in conjunction with the State, the "City Council" of the municipality involved. Such an agency would afford to the city and to the property owners a not unsympathetic or antagonistic contracting agency before which the claims and interests of both the city and the property owners might be urged, with reasonable assurance, that they would receive fair consideration. Plaintiff argued that such action had the effect of recognition by the legislature that the "City" had exclusive control over city streets, and that the State, except by agreement with the city was powerless to act. In other words, plaintiff believed that if the State actually had authority to close or intercept city streets in the process of constructing a freeway, Section 100. 2 would not have been included in the law.

The court believed that the legislature was not obliged to provide such a contracting agency, since, as earlier pointed out, its powers with regard to highway legislation under the State constitution were plenary. Furthermore, adequate remedies at law and in equity always exist in favor of an aggrieved party where the action of an official body or officer is arbitrary, capricious or fraudulent.

The court stated that plaintiff did not take into consideration the fact that the city streets included in the freeway were no longer merely "city streets" but were part of the State highway system, and no longer subject solely to municipal control. Plaintiff appeared to consider that "freeways" were not "State highways" for the reason that they had been given a certain status through legislative action which differentiated them from other "State highways" i.e., the legislature had prescribed for an "agreement" by a local body in the case of a "freeway". But the streets here involved were a part of the previously located State highway system and did not lose their status as such because of their construction as a "freeway". "All 'freeways' so located are 'State highways', but not all State highways are 'freeways'."

In addition, the court found nothing in the statutes relating to location or construction of "freeways" within municipalities which rendered them subject to the municipal control of the city or to restriction by or through legislative action on its part.

Finally, the court declared that the initiative ordinance was invalid because it was in direct violation of the provisions of the State and Federal constitutions which prohibited the passage of any law impairing the obligations of contracts. The plaintiff's defense against this charge was to the effect that the contract was void for want of mutuality. The court found no evidence that this was true. It did find that under the contract, the State, without any expense to the City of San Jose, would be required to make several definite improvements in connection with construction of the freeway which would benefit the city, such as providing and paying for street connections. The court found this alone sufficient consideration for the contract, quoting from Brownfield v. McFadden, 21 C.A. (2d) 208 to the effect that "a contract is supported by a sufficient consideration if there is some benefit to the promisor or detriment to the promisee regardless of the amount of the benefit or detriment."

On the basis of the arguments set forth above, and others, the court found the ordinance enacted by the city wholly invalid, sustaining the State's objections to the issuance of the injunction requested by the city. The decision was not appealed.[13]

Urban Redevelopment and Expressway Planning - In planning for expressways in urban areas, it is essential that some form of liaison be established between those in charge of the highway program and those in charge of urban redevelopment projects in order that the two types of improvement may supplement rather than interfere with one another. This need was augmented by the provisions of Title I of the Housing Act of 1949, extending Federal financial assistance to slum clearance or redevelopment projects. Included in the provisions of the Housing Act was the requirement that plans for slum clearance and urban redevelopment must conform to a general plan for the development of the locality as a whole, indicating the relationship to definite local objectives as to appropriate land uses and improved traffic, public transportation, etc.

Because the Housing Act further provides that the administrator of the slum clearance program shall take such steps as he deemed necessary to assure consistency between the redevelopment plan and any highways receiving financial assistance from the Department of Commerce, it was thought appropriate to have Mr. Carl Feiss, Chief, Community Planning and Development

[13]See Memorandum No. 40, October 1950, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular No. 119.

Branch of the Division of Slum Clearance and Urban Redevelopment of the Housing and Home Finance Agency, gave the Committee his views on how administrators of highway and slum clearance projects can best coordinate their activities. Mr. Feiss' paper, "Urban Redevelopment and Highway Planning," is reproduced in this bulletin.

Access Rights on New Highways - A controversial question, in connection with the construction of expressways on new locations, is that of whether or not access rights inhere in the owners of property abutting on the new location, and must therefore be acquired in the same manner as is done when existing highways are converted to controlled-access facilities. Individual cases have heretofore been adjudicated by the courts. However, after some study of the problem, Mr. J. B. Hutton, Jr., Attorney, Bureau of Public Roads, has come to the conclusion that a restricted dedication of land for use for expressways may afford the needed legal instrumentality to control or deny access to such facilities, in which case the State would not be liable for damages for the denial of access. Mr. Hutton addressed a session of the committee at the annual meeting of the Board on this subject, and a copy of the brief which he has prepared, "Restricted Dedication of Rights-of-Way for New Expressways or other Limited Access Facilities," is reproduced in this volume.

Effect of Expressways on Adjoining Lands - The committee's project, consisting of an economic study of the effect of the Shirley Memorial Highway in Virginia on land use and land values has made some progress during the year. Primarily, the purpose of the study is to develop a technique which will be useable, with modifications, for similar studies by State and local governmental agencies. A preliminary method was developed in a test area, which has proven adaptable when applied to another test area. Further efforts to improve this technique are being made. The need for projects of this type continues.

The California Division of Highways is continuously carrying on studies on the effects of expressways on adjacent property, publishing reports of their findings as soon as available. During 1950, two new studies were completed and published in "California Highways and Public Works." The first of these, "Freeway Ups Business, North Sacramento Shows Growth," by W. Stanley Young, was published in the January-February issue. The second, "Auburn Study, Economic Survey of Placer County Freeway Shows Business Benefits," by the same author, appeared in the May-June issue.

Studies of this type are also being carried on in Texas in connection with the Gulf Freeway in Houston. Many more are needed. If it can be demonstrated, as has been done in California, that expressways have a beneficial effect on land values and the community at large the task of "selling" this type of highway to the public will be much less formidable.

CONTROL OF THE ROADSIDE

Legislative and Administrative Controls - Although the need for control of the roadside is obvious to those concerned with the efficient operation of the highway, legislation providing for such control is difficult to obtain, due, in great part, to the efforts of a small but potent group of property owners and other interested parties who seek to exploit the roadside for their own selfish interests. In many cases, these interests have been able to forestall the enactment of legislation providing for any reasonable control of the roadside. At least two States and the Territory of Alaska, however, have succeeded in obtaining corrective legislation in recent legislative sessions.

1. *Alaska* - Chapter 59 of the Laws of 1949 enacted by the Legislature of the Territory of Alaska has for its purpose protection of traffic on the Territory's highways from obstructive outdoor advertising and the preservation of scenic beauty that might be impaired by such advertising. Section 2 of the act defines "outdoor advertising" as follows:

> Section 2. DEFINITION. The term "outdoor advertising" as used in this Act, shall include all commercial advertising so displayed as to attract the attention of persons on any public highway or while in a vehicle of a common carrier, or in any station, public building, park or other public place, whether such advertising be by means of printing, writing, painting, pictures, or a combination thereof, and whatever be the means of display, except that it shall not include advertising located within incorporated towns nor upon private property in rural areas and relating exclusively to the business conducted on such property or the sale or rental thereof, or directional signs on the public domain pertaining to and within 2500 ft. of such rural businesses

Section 3 prohibits all outdoor advertising as defined in Section 2, except political advertising material. Section 4 provides for penalties for violators ranging from a $50 minimum to a $500 maximum.

Alaska seems to have been very farsighted in enacting a law of this type while there still are comparatively few improved highways, and unsightly billboards have not yet had a chance to reduce the effectiveness of the highways or mar the scenic beauties.[14]

2. *Wisconsin* - Two new sections were added to the Wisconsin State statutes by the 1949 legislature, as a result of the Governor's Highway Safety Conference held the year before. Each of these new sections has for its purpose the control of roadside development in the interest of safety of the traveling public.

Section 1 of Chapter 138, Laws of 1949, specifies that all land subdivisions provided for under Chapter 236.03 of the Wisconsin Statutes shall be so designed as to provide for the safety of entrance upon and departure from the abutting highways or streets and for the preservation of the public interest and public investment in such highways or streets, insofar as such provisions are reasonable under the particular circumstances.

Section 2 provides for addition of a new section (j) to Chapter 236.06 (1) of the State statutes. Under the new section, no plat for lands abutting on a State trunk highway shall be valid or entitled to be recorded until it has been submitted to and approved by the State Highway Commission. However, in counties having a county planning board or department employing permanently at least one registered civil engineer, plats are to be approved by such board rather than by the State Highway Commission. [15]

3. *New Jersey* - A 1950 revision of the New Jersey Turnpike Authority Act of 1948 carries over a clause included in the original act implementing a provision of the revised constitution adopted by the State in 1947. The section of the toll road act referred to, (Section 5, Subsection (j), Public Law 1948, Chapter 454) provides that the turnpike authority may acquire by purchase or otherwise "any fee simple absolute in, easements upon, or the benefit of restrictions upon, abutting property to preserve and protect turnpike projects." This is apparently the first instance in which the constitutional provision (Article IV, Section 6, Subsection 3, cited in Highway Research Correlation Service Memorandum No. 15, December 1949) has been made available for use by statutory enactment. Its value, as a means of securing adequate protection for the public highways in the State seems indisputable. It is hoped that in the near future, other New Jersey highways may have the benefit of legislation similar to that enacted in the case of turnpikes.[16]

Roadside Protection in Oregon - The State of Oregon has made a determined effort through the years to control its roadsides by legal and administrative methods, and has been quite successful, due in large part to the efforts of citizen groups interested in preserving the natural beauties of the State. Mr. J. M. Devers, Chief Counsel of the Oregon State Highway Commission, presented a comprehensive report on the various mechanisms his State is authorized to

[14] See Memorandum No. 35, op. cit.

[15] See Memorandum No. 33, op. cit.

[16] See Memorandum No. 35, op. cit.

use to maintain control of the roadside, at a session of the committee during the annual meeting of the Board. The full text of his paper, "Legal and Administrative Control of the Roadside in Oregon", appears in this volume.

Roadside Surveys - The analysis of roadside surveys advanced significantly during 1950 in at least two States, Michigan and Minnesota, through the mechanism of the State-wide highway planning survey. A progress report of the Minnesota survey was presented to the committee at the annual meeting of the Board by Mr. O. L. Kipp, Assistant Commissioner and Chief Engineer of the Minnesota Department of Highways. The report disclosed that on the 510-mile test project, accident rates for all types of intersections were from two to three times greater where billboards were present than where they were absent. The accident rate for road sections having roadside commercial activities was more than two and one-half times that of sections without such developments. Mr. Kipp's report entitled "The Minnesota Roadside Survey" is included in full in this bulletin.

Voluntary Cooperation Plan - In recent years, many an attempt to provide for regulation or control of outdoor advertising by appropriate legislation in the various States has been forestalled by pleas from the billboard industry for at least a trial period of voluntary cooperation, before more stringent methods are adopted. These so-called voluntary cooperation associations thus formed consist of representation from State highway department, garden clubs, roadside councils, operators of roadside industries, such as motels, service stations, etc., as well as the outdoor advertising interests. Whether or not any real control of the roadside is effectuated by these cooperative ventures is a question on which very little agreement can be found, representatives of roadside councils and other citizen groups contending that these plans are proposed merely as a means of stalling off appropriate legislation, while representatives of the outdoor advertising industry claim that they are not given sufficient cooperation to prove what they can do. In the meantime, a moratorium on legislation providing for really adequate control is usually declared. Progress to date achieved by these voluntary groups has been negligible.

Because of this continuing controversy, it was thought appropriate to have Mr. Lloyd V. Sawyer, Secretary of the New Hampshire Voluntary Roadside Improvement Association, present a report to the committee at the annual meeting of the board, outlining what his Association hopes to accomplish in the future and just what had been accomplished to date. Mr. Sawyer's report is included in this bulletin. Because of the somewhat heated discussion which took place after this presentation, it was thought pertinent to include a short summary of the questions asked and Mr. Sawyer's replies.

PARKING

Provision for Off-Street Parking Facilities - Two outstanding court decisions were handed down by the courts during 1950, in which the acquisition of land for public parking facilities was held to be a public purpose, the courts in each case declaring that the fact that incidental benefits to private property might result did not alter the public character of the use.

1. *Virginia* - Under a decision handed down on January 16, 1950, by the Virginia Supreme Court of Appeals, the City of Richmond may properly acquire land for off-street parking facilities under authority granted by State statute. Additionally, the court upheld the constitutionality of a section of the city's charter, authorizing a "quick-taking" method of acquiring land. (City of Richmond et al. v. Dervishian et al., 57 S. W. (2d) 120)

In August of 1948, the City Council of Richmond adopted a resolution, as authorized by Section 22(b) of its charter, to institute condemnation proceedings to acquire property to be used for parking or storage of vehicles by the public. The sum of $275,000 was appropriated for payment for the land.

Subsequently, a Mrs. Mary Dervishian, owner of a parcel of property involved in the State's plans, appealed to the Hustings Court of the City of Richmond for an injunction against the city to prevent the contemplated action.

Mrs. Dervishian claimed that the purpose for which the city was taking her property was not a public one, and furthermore that Section 22(b) was unconstitutional in that it provided for a taking of property without due process of law. Other property owners involved later joined Mrs. Dervishian in her complaint. An injunction was obtained from the court restraining the city from instituting condemnation proceedings with respect to their properties.

In its opinion, the lower court stated that although the purpose for which the property was being taken was a public one, the pertinent section of the ordinance was unconstitutional and void for the reasons stated by the complainants. The city was permanently restrained from carrying out its plan for establishing off-street parking facilities in this area.

The Supreme Court of Appeals of Virginia, where the case was taken by the city, concurred in the opinion of the lower court that the purpose for which the land was to be taken was a public one, and further declared that the section of the charter under which the city was proceeding was constitutional. However, the high court did find that the property to be taken was not adequately described in the resolution which merely stated that the property was in the block bounded by Marshall, Clay, Seventh and Eighth Streets. The court also felt that the individual owners were entitled to know at the outset what amount the city considered adequate compensation for each separate parcel of property. The city was therefore restrained from proceeding under the present resolution without prejudice to the right of the city council to adopt a proper resolution or ordinance, including an adequate description of the individual parcels and setting forth the amount of compensation to be paid each owner.

Regarding the question of whether or not the purpose for which the land was being acquired in this case was a public one, the high court quoted the statutory provision under which the City of Richmond was authorized to acquire and maintain property for public uses, as follows:

> To acquire places for the parking or storage of vehicles by the public, which shall include but shall not be limited to parking lots, garages, buildings and other land, structures, equipment and facilities, when in the opinion of the council they are necessary to relieve congestion in the use of streets and to reduce hazards incident to such use, to operate and maintain such places, to authorize or permit others to use, operate or maintain such places upon such terms and conditions as the council may prescribe; to charge or authorize the charging of compensation for the parking or storage of vehicles at or in such places; and to accept donations of money or other property or the right to use such property from others to aid in whole or in part in the acquisition, maintenance and operation of such places

This the court considered an express declaration by the General Assembly that the contemplated use was a public one. Furthermore, since a city may acquire land adjacent to a street or highway to provide parking space for vehicles and to facilitate the flow of traffic thereon, the court found no reason why it should not provide such parking space away from the street. The purpose was the same and was a public one in either instance. The proper regulation of traffic in the interest and safety of the public may require that vehicles be parked off the street in locations set aside for this purpose rather than in the streets themselves. The acquisition by the city of the necessary property to provide such parking areas is a proper incident to its right and duty to regulate the use of its streets, and the use of the property for such purposes is a public one. Several previous decisions in Virginia and in other States were cited by the court to substantiate its opinion.

A minor point brought out by the property owners to the effect that the parking lot would primarily benefit two near-by department stores the court disposed of as beside the point.

Incidental benefits to private property in the vicinity do not alter the public character of the use.

The high court disagreed with the lower court in the latter's opinion that Section 22(b) of the city charter was unconstitutional. This section provides for a so-called "quick-taking" method of acquiring land for public purposes by the city, under the provisions of an act of the General Assembly (Acts of 1942, Chapter 252, pp. 372, 373, 374) amending Section 22 of the city charter. Section 22 (a) of this act provides for acquisition of land by eminent domain proceedings under the general laws.

Under the "quick-taking" method, the city may, after adoption of an ordinance or resolution, file a petition in the office of the clerk of court, signed by the mayor and setting forth the interest or estate to be taken and the purpose for which the property or interest is wanted. Section 22 (b) also provides for filing of a plat and description of the property. Funds covering the estimated cost of the property or damage thereto are to be deposited to the credit of the court. Title to the property or interest therein then vests in the city, and the city may take possession of the property for its uses and purposes. Section 22 (b) also provides for proper notice to affected persons. If the city and the property owner agree as to compensation, a written agreement to this effect may be filed in the clerk's office and the funds on deposit distributed accordingly. If no agreement can be reached, either the property owner or the city may apply to the court for appointment of condemnation commissioners. Funds to cover additional amounts which may be awarded by the commissioners must also be deposited by the city.

The lower court found this quick-taking method unconstitutional because it provided a method whereby the city might acquire an indefeasible title to and possession of the owner's property prior to notice to him, and in advance of a hearing on its right to do so. The Supreme Court of Appeals, however, stated that the U. S. Supreme Court had held that the requirements of due process did not inhibit the sovereign from taking physical possession of private property for public use in a condemnation proceeding prior to notice to the owner and in advance of a judicial determination of the validity of such taking. In one case, Bragg v. Weaver, 251 U. S. 57, (1919) the court upheld the validity of a similar law of the State of Virginia, stating that since the taking was for a public use and adequate provision was made for a judicial determination of the amount of just compensation due the property owners, the requirements of the due process clause of the 14th amendment had been met although under the statute the contemplated hearing was to be instituted and conducted subsequent to the taking.

In another decision, Bailey v. Anderson, 326 U. S. 203, (1945) the U. S. Supreme Court held that a Virginia law authorizing the State Highway Commissioner to take immediate possession of property necessary for highway purposes and "within sixty days after the completion of the construction of such highways," to institute condemnation proceedings to acquire title to property so taken, did not violate the due process clause. The court also referred to decisions upholding the validity of the Federal Declaration of Taking Act of 1931, upon which the Virginia law here under discussion was said to have been modeled.

Another point brought out in the landowners' bill of complaint was that the city had made no bona fide effort to acquire the property by purchase in accordance with the Virginia Code, Section 4363. The lower court and the high court agreed that there was no merit in this contention because an attempt to reach agreement with the owner for purchase of land is not a condition precedent to the institution of condemnation proceedings unless required by constitutional or statutory provision. Since there is no constitutional provision to this effect in Virginia, the matter was entirely governed by statute. The statute in question did not require such action.

Under the ruling of the Supreme Court of Appeals the city was restrained from continuing pursuant to the present resolution only because of the

omission of descriptions of the individual pieces of property and the estimated compensation for each parcel.[17]

2. *Illinois* - On September 21, 1950, the Illinois Supreme Court handed down a decision upholding the constitutionality of an Illinois statute authorizing municipalities to provide off-street parking facilities. In the same decision, the court upheld the validity of an ordinance adopted by the City of Kankakee pursuant to the statute. (Poole et at. v. City of Kankakee et al., 94 N. W. (2d) 416.)

The case came before the court as a result of a complaint by several citizens of the City of Kankakee who sought to enjoin the city from acting under the provisions of an ordinance adopted by the city for the purpose of acquiring land to be used for the operation of off-street vehicle parking lots in the business section of the city.

The State statute under question authorizes municipalities to acquire, own, construct, equip, manage, control, erect, improve, extend, maintain, and operate motor vehicle parking facilities. Land may be acquired by eminent domain. Bonds may be issued to pay for the purchase, such bonds to be payable only from the proceeds of operation of "any or all" of the city's parking facilities. Corporate authorities are to establish fees, if bonds are issued, sufficient to defray the cost of operation and maintenance plus payment of principal and interest on the bonds. Municipalities may lease facilities to the highest bidder and may make reasonable rules regarding the use, management and control of the parking facilities. (Illinois Rev. Stat. 1949, Chapter 24, Art. 52.1-1 to 52.1-10)

The complaint attacked the constitutionality of the statute primarily on the ground that it authorized a taking of property for a private use in violation of the State constitution, offering the following arguments to substantiate their contention:

1. The act benefits individuals rather than the community.

2. The act is private because it allows a community to go into business in direct competition with private citizens.

3. The power to lease the parking facilities manifests a private purpose.

The validity of the Kankakee ordinance was attacked on the following ground among others:

1. No necessity for the parking facilities could be shown to exist.

2. The ordinance exceeded the authority granted under the parking act in that it permitted the use of income from parking meters already installed as security for the bonds to be issued for the purpose of acquiring land for off-street parking facilities.

3. The pledge of revenues from existing meters was invalid because the city would be deprived of the use of such revenue for other purposes.

4. The ordinance was revenue producing rather than regulatory.

In determining whether the acquisition of land for off-street parking facilities, as authorized by the Parking Act, was a public purpose, the court relied on criteria previously established by the court and condensed in the case of People ex rel. Tuohy v. City of Chicago, 68 N. E. (2d) 761, (1946) as follows: (1) that it affect a community as distinguished from an individual; (2) that the law control the use to be made of the property; (3) that the title so taken be not invested in a person or corporation as a private property to be used and controlled as private property; and (4) that the public reap the benefit of public possession and use, and that no one exercise control except the municipality. The court found that the act under question met these qualifications. Furthermore, regulation of streets and traffic is in the interest of public health, safety, welfare, convenience, and necessity, and thus for a public purpose. In a previous case, City of Bloomington v. Wirrick, 45 N. E. (2d) 852 (1942), it was held that the appropriation of a part of the street on which parking meters were placed was a public use because it was incidental to the regulation of traffic on the streets. Likewise, it seemed unquestioned that cities had authority to condemn property adjacent to an existing street for the purpose of widening it to

[17] See Memorandum No. 36, op. cit.

accommodate the parking of vehicles and to facilitate the flow of traffic as well. The acquisition of property for off-street parking would also be a public purpose.

That the Parking Act benefited the community as well as the individual was manifest in the court's opinion. Traffic congestion strangulates movement and business, affects the safety of those who use the streets, and also affects the value and protection of adjacent properties. The economic effect of traffic strangulation has been reflected in slumping values of business real estate and a proportionate decline in local tax income. The provision of off-street parking facilities might well be included in the effort to alleviate traffic congestion and is definitely a step toward meeting the public need.

In answer to the argument that the use is private because it enables a municipal corporation to enter into business in direct competition with individuals now operating parking lots was answered by the court with a quotation from a previous case (People ex rel. Curren v. Wood, 62 N. E. (2d) 809, 813) (1945) regarding municipally owned airports: "The power to operate an airport is vested in the airport authority on the theory that such operation is necessary for public safety in aviation . . . The fact that private airports may and do exist does not prevent operation and supervision of a public airport, any more than the ownership and operation of a private road prevents operation, supervision and control of the public highways of the State." This the court found to apply also to the contention made here.

The final argument advanced, to the effect that the authority given the municipality to lease the parking facilities, imputed a private purpose to the act, the court found equally untenable. Previous court decisions had held that a city might lease property it owned when empowered to do so by statute. It had also been held in previous decisions that powers to contract for the use, and to fix fees and rentals were not inconsistent with the public character of municipally owned lands. The fact that the lessee might gain some private benefit from operation of a parking facility did not alter the public nature of the act, such benefits being incidental to the public purpose of the statute.

The court next considered the arguments of the complainants as to the validity of the Kankakee ordinance, considering first the matter of whether a necessity existed for the taking of land for parking facilities. An unbroken line of decisions, according to the court, had held that where the right to condemn existed, and the property was subject to the exercise of the right of eminent domain, and was being condemned for a public use, and the right to condemn was not being abused, courts could not deny the right to condemn on the ground that the exercise of the power is unnecessary or not expedient, as the determination of that question devolves upon the legislative branch of the government and is a question which the judicial branch of the government cannot determine.

The provision of the ordinance to the effect that revenue from existing parking meters might be utilized to retire bonds issued for the purchase of land for off-street parking facilities was questioned on the ground that the act itself did not authorize such action. The court held that although the act itself authorized the acquisition of sites, buildings and facilities, and the pledging of the revenues thereof, this was considered to be merely a grant of power rather than a limitation. Another section of the act provided that bonds issued by a municipality pursuant to the act were to be payable solely and only from revenues derived from the operation of any or all of its parking facilities, to be secured by a pledge of revenues of any or all of its parking facilities. Still another section authorized the municipality to issue bonds or borrow money for the purpose of acquiring, completing, erecting, constructing, equipping, improving, extending, maintaining or operating any or all of its parking facilities. To say that the parking system should be broken down into isolated parts for financing and disposal of revenue would be inconsistent with the public purpose of

the act, the orderly control and regulation of traffic.

In advancing the theory that under the ordinance the City of Kankakee would be deprived of the use of revenue from existing meters for other purposes, complainants relied on former court decisions wherein it was held that the mortgage of existing property and income created a debt which put the cities there involved beyond their constitutional debt limit. Later decisions, however, held that where no property of a city was pledged to secure payment of an indebtedness, it did not violate the constitutional debt limitation to pledge revenues both from the facility being extended and from the extension. Since no attempt was here being made to pledge or mortgage any city property, pledge of income from existing facilities did not render the ordinance invalid

The final attack on the validity of the ordinance, that it was revenue producing rather than regulatory, was based on a section providing that one half of all money remaining after bond payments and repairs were provided for might be transferred to the general purpose corporate fund, to be used only for the repair and maintenance of streets and the regulation and control of traffic on said streets. Since no ordinance fixing rates for the use of the facilities had yet been adopted at the time of the court's decision, there could be no sound basis for knowing whether the fee charged would bear a reasonable relation to the burden that the ordinance and the Parking Act cast upon the city. The fact that the ordinance made no provision for what might occur after all bonds were retired, at which time revenues might be far in excess of the cost of regulation and maintenance of the parking facilities, could not render the ordinance permanently invalid, since the law provided ample remedy for correction of such a situation either by the city council or by the courts on proper complaints.[18]

Use of Parking Meter Revenues -Although the statutes of 14 States[19] and the District of Columbia specifically authorize or require that net parking meter revenues (i.e., gross revenues less the cost of amortization, maintenance, administration, enforcement, etc.) be applied to the provision of off-street parking facilities, California is probably the first State where authorization to pledge such revenues for this purpose has been written into the State constitution.

On June 6, 1950, the California electorate approved a constitutional amendment permitting parking meter revenues to be pledged for the payment of revenue bonds issued to construct off-street parking facilities. The amendment does not make such procedure obligatory; it merely permits the pledging of revenues by local officials when it is considered desirable to do so.

Legislation previously adopted permitted use of current parking meter revenues for parking facilities but did not permit the pledging of future revenues from this source for that purpose. The constitutional amendment will facilitate the development of long-range parking programs.

The amendment as adopted, reads as follows:

> Whenever under the laws of this State or under its charter any city, county, city and county, parking authority, district or other public body is authorized to acquire or construct public parking lots, garages, or other automotive parking facilities, and for the payment of the cost of any thereof, to issue any bonds or other securities payable in whole or in part from revenues of any such parking facilities, such public body, and any other public body within the territorial area of which such public parking facilities are or will be situated, is also authorized to pledge, place a charge upon, or otherwise make available, as additional security for the payment of such securities, any or all revenues from any or all street parking meters then owned or controlled or to be acquired or controlled by it.[20]

[18] See Memorandum No. 41, op cit.

[19] Arkansas, California, Connecticut, Florida, Illinois, Iowa, Kansas, Maine, Massachusetts, New Hampshire, North Carolina, Oregon, South Dakota, and Wisconsin

Parking-Zoning Study - During the year, the committee's study on parking facilities through zoning was published by the Board as Bulletin No. 24, entitled "Requirements for Off-Street Automobile Parking Facilities in Zoning or Other Local Ordinances." The study was published in two sections: Section 1 consisting of an analysis of local laws requiring provision of off-street parking facilities in connection with various property uses, a model ordinance formulated by the committee, and a discussion of the economic and administrative aspects. Section 2 contains Appendix C, consisting of tables describing the most important provisions of each of the 155 local ordinances discussed in Section 1.

In connection with the use of the zoning device as an aid in resolving parking difficulties, it is interesting to note that a provision of the zoning ordinance of the City of East Lansing, Michigan, has been declared unconstitutional, because no standards were established therein to guide the building inspector in determining whether or not sufficient parking space had been provided for in connection with approval of applications for building permits. The provision which the Circuit Court of Ingham County declared invalid, read as follows:

> **Facilities for adequate off-street parking space shall be estimated and determined by the building inspector, who shall use his best judgment in estimating the amount of parking space required in each individual case and such determination shall be subject to appeal to the Board of Appeals.**

The decision in this case (Irene E. Spencer vs. George E. Snyder, East Lansing Building Inspector, Docket No. 1533, October 1949) was handed down as a result of an action to compel the building inspector to issue a building permit. The judge, in his opinion, stated that ordinances of this kind are usually considered invalid unless standards for the guidance of the official passing upon applications for permits are included. No such standard was here set up, but the building inspector contended that an exception should be made in this case because the public's interest was involved - that the rule should be relaxed and the provision conferring discretionary power sustained. Defendant cited several cases to support his contention. The judge, however, stated that although a public interest was involved in the case cited, it was not for this reason alone that the rule was relaxed. In each case, the subject matter appeared to be one impelling a less rigid construction to effectively protect the public. No reason appeared to be indicated in the present case to justify an exception to the rule.

The judge considered that the building inspector was vested with arbitrary powers under the ordinance. He might establish his own standards and vary them as to each applicant. Even though the inspector's conduct was subject to review by the Board of Appeals, standards should be included in the ordinance for his guidance. The building inspector was therefore ordered to issue the building permit.[21]

Truck Loading and Unloading Investigation - This is a companion study to the parking-zoning study. The basic data relating to requirements for truck loading and unloading facilities as contained in local ordinances were compiled some time ago, but the committee has sought additionally to formulate legislative suggestions for the use of municipalities desiring to enact appropriate legislation. This has not been an easy task, especially since scientifically-derived standards, relating truck loading and unloading requirements to the various commercial and industrial uses, are utterly lacking. Moreover, such factors as size of vehicle, warehousing facilities, the efficiency of loading and unloading operations, etc., further complicate a determination of reasonable requirements. The committee is presently investigating all of these matters, and will finally report the findings during 1951.

Parking Legislation Study - Work on re-

[20] See Memorandum No. 40, op. cit.

[21] See Memorandum No. 38, op cit.

vision of Highway Research Board Bulletin No. 2, Revised, entitled "An Analysis of State Enabling Legislation Dealing with Automobile Parking Facilities," 1947, and Bulletin No. 7 entitled "An Analysis of State Enabling Legislation of Special and Local Character Dealing with Automobile Parking Facilities", 1947, continued during this year. It is expected that the revision, including an analysis of all State and local legislation on parking which has been enacted through 1950, will be completed in 1951.

Parking as a Public Utility -A study on the possible application of the public utility concept to off-street parking facilities was undertaken during the past year, and a paper summarizing the results of the study was presented at an open session of the Department of Economics, Finance and Administration at the annual meeting of the Board. This paper, entitled "Parking as a Public Utility," is being published in the 1950 Proceedings of the Board. The public utility approach is being offered as a compromise in those cities where the provision of off-street parking facilities is at a stand-still because of a difference of opinion between the public enterprisers and the private enterprisers as to which should provide the needed facilities.

Parking Authorities Study - The Committee is cooperating with the Parking Committee of the Department of Traffic and Operations in a study of the effectiveness of urban parking agencies of all kinds. A questionnaire has been sent to approximately 50 municipalities where such agencies are known or are suspected of existing. The results are being analyzed and will be reported upon during 1951. The study will reveal, for example, how many parking agencies of all kinds there are, what their legal and administrative powers are, how they are constituted, what they have accomplished to date toward solution of the parking problem in their respective jurisdictions, and so on.

INFORMATION INTERCHANGE

During 1950 the committee issued nine monthly memoranda through the Correlation Service reporting on significant court decisions, new laws, administrative practices and other items of timely interest as follows:

Memorandum No.	1950
33	February
34	"
35	April
36	May
37	July
38	September
39	"
40	October
41	December

These memoranda provide a means of furnishing highway administrators and technicians information in capsule form not otherwise available for public distribution. This activity of the committee will be continued during 1951.