LAND ACQUISITION and CONTROL of ADJACENT AREAS

WHAT HAS LAND ACQUISITION COMMITTEE ACCOMPLISHED DURING 1950?

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HIGHWAY RESEARCH BOARD
BULLETIN NO 38
1951

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1951

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HIGHWAY RESEARCH BOARD
BULLETIN NO. 38

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

AND SPECIAL PAPERS

PRESENTED AT THE THIRTIETH ANNUAL MEETING
1951

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Washington 25, D. C. August 1951

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FOREWORD

The Committee on Land Acquisition and Control of Highway Access and Adjacent Areas is continuing, with this bulletin, the publication of annual reports, recording activities in the fields with which it concerns itself - highway land acquisition, control of access, roadside protection, legal and administrative aspects of parking, and related matters Additionally, special papers pertaining to these subjects are included in this volume.

It is the aim of the committee, in publishing these annual bulletins, to record information not otherwise available in published form, for the benefit of State and local highway officials and others interested in its activities.

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

David R. Levin, Chairman
Chief, Land Studies Section, Financial and Administrative Branch
Bureau of Public Roads

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,

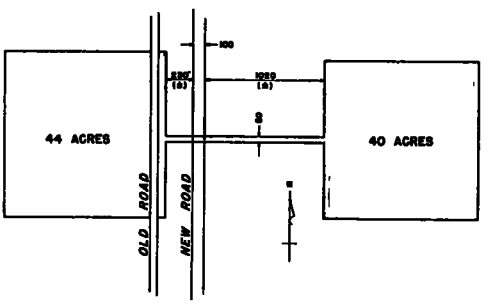

Figure 1.

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.

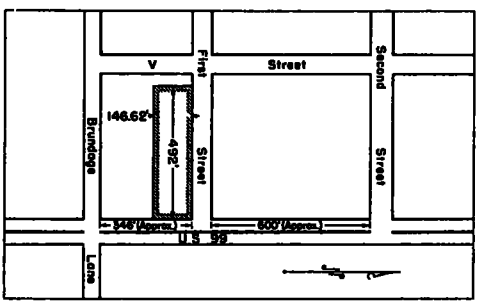

Figure 2.

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

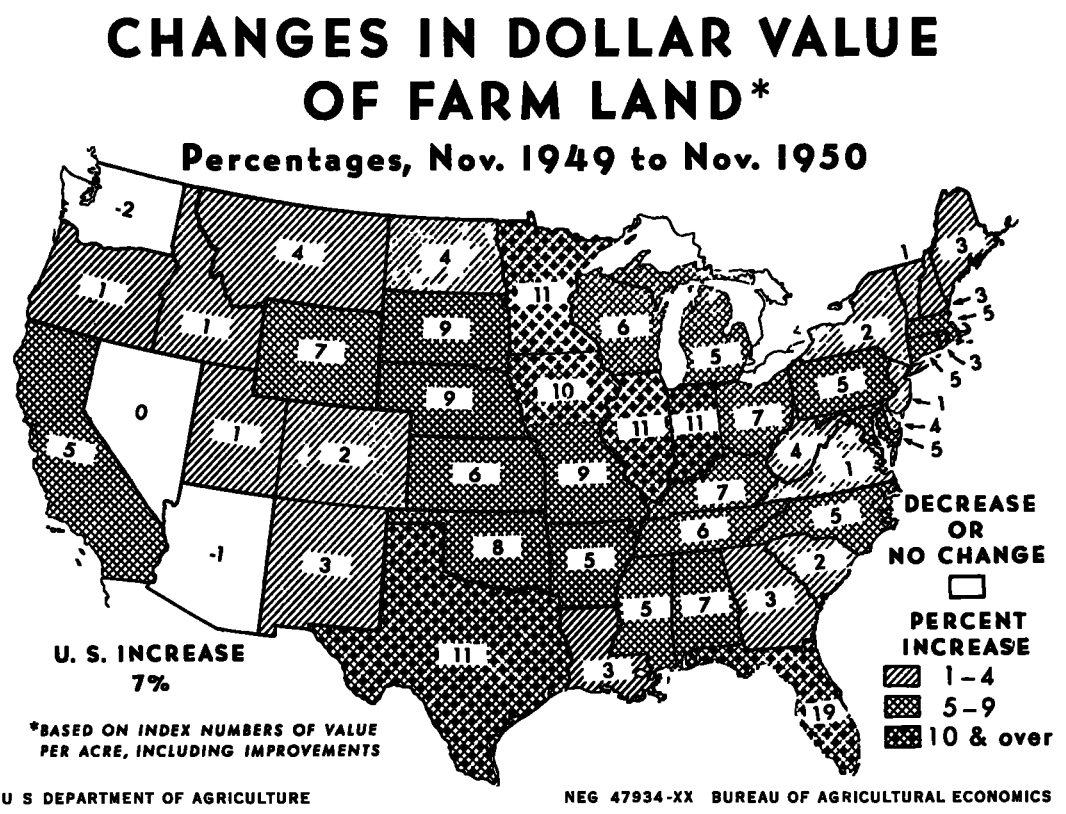

Figure 3.

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.

URBAN REDEVELOPMENT AND HIGHWAY PLANNING

Carl Feiss, Chief, Community Planning and Development Branch,
Division of Slum Clearance and Urban Redevelopment,
Housing and Home Finance Agency

It is a very real privilege for me to speak at this annual meeting of the Highway Research Board Committee on Land Acquisition and Control of Adjacent Areas, first because I am not a highway expert, and second, because I consider, as a city planner, that it is an important opportunity to be able to talk to men who are trying to solve the problems of our highways through fundamental research.

Before I go too far in what I have to say, I want to make my position clear to you. Mine is the fundamental assumption that cities are for people, not automobiles. What I am going on to say is based on this assumption. Also, I hope to persuade you that in planning for the rebuilding of our obsolete communities or building of new cities, one objective could be designing the city so well that people would not have to use automobiles in going to work or play, and the city would be so attractive that no one would want to leave it, even on Sunday. Or, I suppose we could reverse the objective and, instead of designing utopia, we could design autopia - the automotive city in which total mobility is the objective, all people live in trailers and we abandon the quiet residential street for the highspeed domestic highway.

Either way, or by some compromise between the two, we still should have people as the basic consideration, with those bright shiny gadgets running on macadam and concrete sluice ways as servants, not masters. Today, I am afraid that the question as to who is master is still an open one. Research into fundamental objectives is essential if we are to resolve the point.

In extending Federal financial assistance to any slum clearance or redevelopment project under Title I of the Housing Act of 1949, there are two major provisions of the Act in which streets and highways have an important role and which the Administrator must take into account in arriving at his decisions.

The first of these is the requirement that any plan for slum clearance and urban redevelopment must conform to a general plan for the development of the locality as a whole. The second requires that a redevelopment plan "shall be sufficiently complete (1) to indicate its relationship to definite local objectives as to appropriate land uses and improved traffic, public transportation, etc.," and provides further, "that the Administrator take such steps as he deems necessary to assure consistency between the redevelopment plan and any highways or other public improvements in the locality receiving financial assistance from the Federal Works Agency" (now the Department of Commerce).

The Administrator is also directed by the Act to "encourage the operations of such local public agencies as are established on a State or regional (within a State), or unified metropolitan basis or as are established on such other basis as permits such agencies to contribute effectively toward the solution of community development or redevelopment problems on a State, or regional (within a State) or unified metropolitan basis."

One of the basic considerations in planning for the development or redevelopment of any area eligible for financial assistance under Title I is the relationship of the area to the street and highway work which serves the city and the locality. The location and character of existing or planned major streets or highways in the vicinity of a proposed redevelopment project will not only influence but may be the principal factor in the determination of the

new uses in the project area. It is important in any case that the street system of any redevelopment project be integrated with the major streets and highways of the community and the locality, and that redevelopment plans be prepared with full knowledge of any proposed changes or improvements in the major street or highway systems.

Problems of traffic and parking and public safety and convenience must be carefully considered and provisions included in redevelopment project plans which will best serve the new uses in the area as well as the community as a whole, and which will be consistent with the long range plans for street and highway improvement in the locality.

Applications received to date by this Agency from many cities throughout the country have focused attention on the importance of urban highway programs in the general planning being done for the development of these communities as a whole.

Solution of problems of traffic, parking, provision of terminal facilities, ease and convenience of intercity and interregional access to areas now devoted to or proposed for industrial or commercial uses, together with other problems attending the continued decentralization of commerce and industry and shifts in population to the suburban and rural areas, are basic to the development of sound plans for land use and for the provision of community facilities and services. The conclusion has been inescapable, that lacking up-to-date scientific information such as results from modern urban traffic and parking studies and a clear understanding of those factors which influence and establish the basis for design of the major street and highway system, planning for the future development of our cities or for redevelopment of worn out areas within them cannot proceed with any assurance that our planning will help us to avoid the recurrence of the very situations we seek to correct.

We are convinced, therefore, that there is need for close liaison and a free interchange of information between the local redevelopment agencies and the local, State and Federal agencies responsible for urban highway planning and development if redevelopment planning is to proceed in a manner which will accomplish the objectives of all agencies concerned.

We have said that the results of urban highway planning and research are indispensable to sound planning for development and redevelopment. On the other hand, we believe that the proper replanning of worn out or arrested areas of our cities can be an important factor in justifying and supporting the need for realization of the street and highway plans.

PSYCHOLOGICAL RESEARCH

It seems to me that we must continually search for an understanding of some of the following questions behind human behavior as it relates to the automobile. Let me suggest here a partial list of both psychological and social-psychological problems we as planners and you as researchers should consider. Traffic volume and roadway construction research and analysis will have greater value to all of us if we keep alive studies of this suggested type.

QUESTION NO. 1. Why do people want to own automobiles?

This question has several possible answers, any or all of which may be pertinent to our studies. We know that convenience is not the only reason for auto ownership. By this I mean convenience of travel from place of residence to place of work or between places of work. We know that many people make trips by car who could do so better by public conveyance at less cost and, in many instances, within the same time limits. We know that the housewife often uses the car for shopping when again she could do it as conveniently by public conveyance or by walking. We know that there are a great many unnecessary trips made and experience in the last war during the restrictions on gasoline and tires indicated that many automobile activities could be curtailed, although we recognize that commensurate gearing up of public conveyances did not take place.

We do know that poeple very often

acquire cars simply to own them or because they want a bright shiny gadget which they can show off. Part of the custom of the country is that every family shall own a car - at least one. We have to accept this as part of the personal pride of each family and recognize that any shift of population planned for in urban redevelopment or development will, in all likelihood, include a shift in automobile location in number approximate to the shift in the number of families.

QUESTION NO. 2. Why is the automobile used as an instrument of recreation?

The automotive week-end, which is one of the phenomena of American living, requires much research and analysis. In other countries the week-end is a day of rest or is devoted to work in the garden or around the home. "Let's go for a drive", is the standard statement of the American family on Sunday and the hegira from the city to the country and return or tours within the cities, cause one of the major problems which we face in handling week-end traffic. In many parts of the country, one of the curiosities of the week-end is the driving by those less fortunate in their residential accommodations through the better or "snooty" residential districts - a kind of Cook's tour of the mansions. It has been the thought of several city planners that were the American public to be housed in less congested conditions providing for more garden space and recreation area that the desire and need for getting away from the slum or the high density areas would be lessened and that week-end driving might be curtailed, thereby reducing both the accident rate and congestion of highways. It is recognized, however, that there is a certain psychological satisfaction in movement within a vehicle, which raises the third question:

QUESTION NO. 3. Why do people like to drive automobiles?

There is undoubtedly a physiological satisfaction for more people in the sense of motion and speed. One of our most serious problems in residential neighborhoods is the high school kid with the jalopy who spends whatever time he can in indulging in the satisfaction of high speeds and the dangerous maneuvers of his not too well controlled vehicle. Until we know more about the fundamental satisfactions obtained in getting behind a wheel and putting the foot on the accelerator, we will not have a full understanding of how to control traffic and design our cities accordingly.

QUESTION NO. 4. How does one design a street pattern for psychological and physiological safety?

This is perhaps the most difficult of all the research problems in this area on which we need immediate help. Until such time as automobiles are equipped with radar and automatically slow down or stop when they approach each other or a telephone pole or a slippery curve or a pedestrian and the question of safety is taken out of the pilot's hands, the design of new streets and the redesign of old ones becomes the most complicated problem we are facing in our orientation of the redesign of cities. In urban redevelopment this is particularly important since we are anxious not to perpetuate the engineering mistakes of the past. We recognize, however, that a compromise is constantly necessary with existing land use and ownership patterns. We do not know, however, what those things are which we should avoid. There has been a good deal of discussion as you know about the effect of billboards as distracting influences on the eye of the driver. In some states the billboard at curves or on dangerous roads has been legislated against as a matter of safety. There are undoubtedly other distractions which we are continually creating and about which we know very little. Road side markets and uncontrolled ribbon development of a commercial nature with its attendant curb cuts and the distractions of neon signs and heterogeneous architecture are to be considered in the same

category. Mr. Kipp's report on this subject deserves most careful consideration. We also know, of course, that each individual will react to the same stimulus in different ways - just as we know that there is infinite variation in the physiological reactions to danger and sudden fright, as well as an infinite variation in the competence of people to concentrate.

QUESTION NO. 5. What is the best method to encourage travel by public conveyance instead of by private car?

We all recognize the fact that the continued increase in the number of private cars used in journey to work movements per day adds to congestion and the cost of municipal management. It is also a recognized fact that public conveyance can be a much more efficient and, in many instances, a safer method of transporting human beings from residence to place of occupation. However, despite logic and facts, many public transportation systems are failing and there is an increased difficulty in getting people to travel by bus, street car, or rapid transit vehicles. It is mandatory, if further decentralization takes place, or because of civil defense purposes dispersal activities shift work centers, that a solution be found to encourage people to want to travel again by public conveyance. At present there is undoubtedly a shift away from mass transportation. Research is needed into how to make a mass transportation system attractive and satisfactory and a complete analysis is essential of the journey to work.

Research is needed into the degree to which these physiological and psychological problems mentioned above should influence our city planning. I am certain that these fundamental questions require continued study.

Since urban redevelopment has the purpose of rebuilding cities along more modern lines and cleaning up blight and slums in the process, it is our hope that all technicians working in every phase of this activity will realize the mutual interests which are involved. Such mutual interests raise a whole series of new questions themselves requiring investigation, some of which I will try to touch on here illustrating with specific examples.

QUESTION NO. 6. The relationship between urban highway development and urban redevelopment.

It should be quite obvious that the replanning and rebuilding of slum and blighted areas would include where appropriate the replanning and rebuilding of the urban road pattern. However, the replanning of the urban road pattern of a locality would be, in our concept of local government, the function of the local planning agency responsible for the preparation of the general plan of the locality as a whole. In only very rare instances will the local planning agency also serve as the local redevelopment agency and therefore, for the purpose of our present activity, we distinguish between the two responsibilities. Urban highway planning is a land use function of the general plan which is the responsibility of the local planning agency working with other local governmental units. All urban redevelopment projects, by Federal law, must relate to a general plan of the locality as a whole. Where the general plan provides for highway improvement, including street and parking improvement, and such improvements affect or are affected by the local urban redevelopment program, then a relationship between redevelopment and highway planning may be developed.

While such a relationship on the surface may appear indirect, quite the contrary is the case. A number of cities participating in the Title I program of the 1949 Housing Act are using urban redevelopment as a basis for a major alteration in the street pattern and we are assisting in the financing of advance planning for these projects and the ultimate land acquisition. A noteworthy example is that of Nashville, Tennessee, where plans and estimates are well along in a program for the construction of a limited access highway in an area now a slum imme-

diately adjacent to and around the capitol. In this case the acquisition of land includes not only the right-of-way for the highway but other properties as well which are to provide for public buildings and park area. In Nashville, then, the first project in the urban redevelopment program involves an important addition to a local highway system as part of a planned multi-purpose improvement.

In Norfolk, Virginia, there is another important development, this time tied in with a large public housing program for the rebuilding of Negro slums. The bridge now under construction connecting Norfolk with Portsmouth is a single purpose structure. I am not questioning its design or structure or its importance as a connecting link to eliminate an out moded ferry system but until the Norfolk Housing and Redevelopment Authority came along, the traffic generated by the bridge was to be dumped without choice into the already overcrowded and narrow streets of a century old slum. From here this traffic was supposed to percolate through a maze of smaller connecting links and over railway tracks either to the business district or to the several radials into Norfolk which, stopping at the edge of the built up area, have never quite formed a system. Working closely with the Planning Commission, the Authority and its redevelopment consultants made a careful study of the possible effect of this pending traffic jam on the city. They realized how mixed a blessing the new bridge could turn out to be having found that unless the bridge traffic could be controlled and diverted to specific channels, no redevelopment plan could be satisfactory. As you know, contemporary planning thought diverts through traffic around residential areas and planned neighborhoods. With this in mind, then, the Norfolk Authority came to the Slum Clearance and Urban Redevelopment Division with a project of approximately 110 acres of housing reuse and approximately 70 acres for industrial reuse tied together by a new belt highway leading as a major thorofare, partially limited access in type, cutting a swath through the slums and connecting the new bridge directly with the radials mentioned above. The right-of-way for this road and interchanges and connecting arteries is part of the urban redevelopment project. Land acquisition for this major road and some of its connections is financed in the same general way as is other land acquisition in the urban redevelopment program, through loans and grants-in-aid. The grant-in-aid is made available when it is determined that the reuse value is less than the cost of acquisition. In this case, while the State Highway Division has approved the project, some state or other Federal funds may be in the offing for it. Construction of the roadways themselves - pavement, utilities, etc., - can count towards the one-third local grant-in-aid required by the Housing Act, provided no other Federal aid is used for this purpose. Ownership of land and improvement for the new system will be vested in the city of Norfolk, though the housing project will remain property of the Federal Government and the industrial areas will be sold to private enterprise. Here again, you can see a multi-purpose redevelopment program with a highway improvement as a major element in it.

There are many other cities in the urban redevelopment program in which land acquisition for urban roads plays an important part or in which an urban road program directly affects our work. We can assist in the supplementing of local municipal or county programs in which a project requires highway improvements and such improvements relate both to a general plan and the project plan. By careful coordination of the two Federal aid programs it should be possible, in many instances, to make the grant-in-aid dollar go much farther. The fact that the Housing Act of 1949 specifically states that a redevelopment plan for a project shall be sufficiently complete to indicate its relationships to local objectives as to improved traffic and public transportation, among other public improvements, gives weight to our purpose here.

I could go on citing a number of other instances of cities. Perhaps I should add that in Cincinnati which has selected eight areas in the Lower Mill Creek

Valley. The Mill Creek Expressway now under construction which will serve part of the interregional highway plan as US Route 25 involves slum clearance and redevelopment. In Honolulu, Area No. 1, at the fringe of the central business district, involves an arterial six lane divided highway at grade. This highway will serve as a principal distribution artery for traffic from the central business district and is part of the Federal aid program of the Bureau of Public Roads.

QUESTION NO. 7. Can urban redevelopment funds be used for the clearing of land and its acquisition for parking purposes?

The answer is "Yes". A redevelopment project may be in whole or in part for parking purposes. It could be part of a municipal financed parking program in which case the municipality may become the redeveloper. It could be a private parking garage in a private enterprise commercial redevelopment project. There are several possible variables. Compliance with the general planning requirements of the Act and the residential land use provisions of the Act form certain restrictions which do not present a wide latitude in choices. Several cities are already including parking and garages in their redevelopment schemes - Chicago's Project No. 1 includes a large garage, and two large private residential parking lots and one large shopping center parking lot in a slum clearance scheme for which demolition is already under way. Paterson, New Jersey, in its Area No. 1, is proposing a street extension and a new bridge over the Passaic River, as well as a circumferential route around the business district. Part of this program includes a four or five story municipal parking lot.

It is important to recognize that we are not interested in providing assistance for isolated parking lots. At all times they must be related to a project, or if the redevelopment program itself is a parking plan, it must be directly related to a general plan of the locality as a whole. We have rejected several applications where a single parking lot has been the only proposal. We certainly hope that the time will come when the entire circulation plan for a city will include the necessary storage facilities that will be required as new business ventures are developed and as improved highway conditions are made between the central business district and outlying parts of a city. Slum clearance and urban redevelopment can play a very important role in providing planned storage space where it is a logical part of the community development. This leads into a series of research projects in which we will need your help and on which I will enlarge below.

The first five questions I did not attempt to answer. The next two I did. The next three I pose for further consideration. They are questions on which I hope we can work mutually, since they are part of our joint efforts.

QUESTION NO. 8. How do we prevent highways from contributing to ribbon development?

It has been discovered that ribbon developments along roads and highways tend to create blight and slum. Much ribbon development is commercial in nature and sporadic in character. Our primary problem in ribbon development occurs along main arterial routes within cities with commercial development cutting the efficiency of the roads and adversely affecting adjoining properties to the rear of land abutting on the roads. Zoning to date has not proved effective in adequately limiting such development or correcting standing conditions. Some of our worst slum and blighted conditions occur in the vicinity of such development and are either created by it or contribute to the ribbon development problem. In many instances the assessed valuations of land along routes makes the clearance of ribbon blighted conditions almost impossible, and a number of projects have come in to us for clearance behind a wall of commercial slum. This is a phenomenon so common to urban development that it requires special study before any solution can be found. Certainly, from the

standpoint of urban routes and efficient land use, a concerted effort should be made to find a means of eradicating this traditional pattern.

QUESTION NO. 9. Does highway development improve land values and if so, how much?

Apparently highway development of certain types is beneficial to land values in industrial areas. In urban redevelopment industrial reuse of slum residential land is possible and the appropriate redesign of an industrial and commercial street system is needed. If we maintain the usual existing grid pattern as a basis for industrial reuse, we will undoubtedly handicap such reuse. Much further information is needed on the kind of urban roads needed for industrial areas to handle trucking and docking facilities for a new industrial development.

Conversely to the industrial highway development, it is apparent that excessive traffic for highway development tends to lower residential land values. While we recognize that it is important to provide easy access from residential to work areas, planning programs are attempting more and more to insulate residential areas from high speed traffic concentrations. There are a number of instances, however, in which new developments adjoin freeways or limited access highways, but we do not know what the effect of proximity is on residential reuse value. Careful appraisal of existing situations is needed to indicate the character of the protection which needs to be afforded the residential areas and what use to make of border strips of land where high speed traffic may constitute a nuisance which cannot be avoided.

QUESTION NO. 10. Is it possible to develop a nationally acceptable system of street and highway types?

One of the problems facing planners today is the development of an acceptable pattern of street types, grading from the limited access highway as the primary or maximum to the pedestrian street as the possible minimum in intensity of use. Apparently throughout the country there is no accepted terminology on road classification in terms of widths of right-of-way, pavement widths and types for all kinds of roadway plans. Maybe such a uniform classification would be undesirable, but as we attempt to differentiate more and more between kinds of traffic and kinds of land use in a planned community, the need for standards of roadway design which can be universally applicable becomes more apparent. As part of this, we also need the development of standards of the location of underground utilities and services and a better application of principles which can be uniformly accepted to both new subdivision development and the redesign of old street patterns. For the city planner there can be no dividing line between one type of roadway and another. Each has its function and each may be able to become part of an over-all communication system within a community. The old pattern of city streets has been one in which a street has limitless purposes. This has proved most unsatisfactory in practice, and to the greatest extent possible, we must modify the existing patterns and create in new developments new patterns to meet the needs of the people who will be using the streets. We must provide for the minimum of friction between the people for whom the city is being planned and the vehicles which they use in the performance of their daily activities.

SUMMARY

To summarize the highway problems as we see them today would be a most difficult thing to do in this short paper. I can only highlight a few of the questions which our new urban redevelopment program is raising. I can assure you that it is our hope that, by collaborative effort between the Federal agencies concerned with the physical development of communities, there can be created a sound advisory system whereby communities throughout the country can work to a common objective, - the

improvement of environment for living and for work and for the elimination, within our lifetime, of the hazards which we are all facing in making correct use of this presently lethal weapon, the automobile.

RESTRICTED DEDICATION OF RIGHTS-OF-WAY FOR NEW EXPRESSWAYS OR OTHER LIMITED ACCESS FACILITIES

J. B. Hutton, Jr., Attorney
Legal Division, Bureau of Public Roads

RÉSUMÉ OF ARGUMENT

There is no uncertainty as to whether a highway may be established in which an easement of access in favor of abutting landowners does not exist: the laws of 31 of the United States and of England permit establishment of highways to which abutters may have no access.

The point in issue in this argument is whether payment is required for not giving access rights to abutters at the time a limited access facility is dedicated, whether abutters' access rights necessarily exist or must be granted when a highway of limited access type is established on new location, and so must be extinguished, and paid for, as property rights in the new highway facility appurtenant to the adjoining land.

To clear the point in issue, authorities are presented which prove:

I

By definition, an easement is a right in the land of another: it is not a natural property right inhering in ownership of land per se.

Easements are created by grant, since they are not inherent property rights.

Easements of new kinds may be created if not against public policy.

II

Abutters' rights of access to highways are easements, are derived from grant, express or implied, and hence by the conditions of grants new modes of access or no modes of access may be created, which vary from the usual types, as by denying all direct access from abutting land and permitting access only at established junctions via such local, service roads as exist or may be created for the purpose.

Payment of damages to abutting landowners is not required for not creating or giving access rights to highways in the grant or dedication which establishes such highways, because

where no right is created there can be no liability for taking away something which is not a legal right.

A restricted dedication of land for use for expressways or other limited access facility affords the needed legal instrumentality to control or deny access to such facility without laying the State liable in damages for not permitting access to such facilities restrictively dedicated on new locations.

Since an economy of mass production of goods requires mass distribution, and since highways are of great importance in mass distribution of commodities and also in the movement of persons to work and to centers of social life, it is self-evident that a healthy economic and social life in those countries having mass production depends upon adequate highways; [1] and, in turn, adequate highways depend, among other things, upon the legal power of the proper authorities to design highways adequate for the daily needs of the people, and to control access [2] to expressways and other limited access facilities on which traffic must move swiftly and safely if the paralyzing congestion of large cities is to be overcome.

However, the control of access to expressways and similar facilities has been attended with liability to pay damages to owners of land adjacent to expressways on new locations because of an omission of the highway statutes to stipulate that upon dedication of new expressways or limited access facilities owners of adjoining lands should not have a legal right of access as a property right, or easement appurtenant to their land. [3] Because of this omission courts have held that under statutes relating to dedication of new highways a vested right of access to the highways from adjoining land was given at the time of dedicating the highways to public use, and hence that before such right may be taken away payment must be made to the owners of adjoining lands. Consequently, the costs of expressways and like facilities have been increased by the value to adjoining property of access rights which must be extinguished and paid for before the expressway may function as a facility for free flowing traffic.

In many cases the value of such access rights are appraised as practically equal to the value of the land itself fronting on expressways or major highways and having in consequence of such frontage a high value as commercial or industrial property. (Burnquist v. Cook (1945) Sup. Ct. Minn., 19 N W. 2d 394, at page 405, paragraph

[1] See: "Causes of Industrial Growth of the United States," Vol. VII, pp. 700-717, "Cambridge Modern History", "Railroad and Highway," J. H. Parmelee, and E. R. Feldman, pp. 231-233, "Highways in Our National Life" (1950), "Influence of Highways and Transportation on the Structure and Growth of Cities, and Urban Land Values," Homer Hoyt, pp. 204-207, ib., "Freight Transportation and Highways," W. A. Bresnahan, p. 253, ib.; "The Highway and Social Problems," F. E Merrill, pp. 136-137, ib.; "History of the Modern Highway in the United States," Spencer Miller, Jr., pp. 95-97, 111, ib.

[2] This is known to those who observe heavy traffic, and is recognized by specialists in this field. See the remarks of Mr. Wilkie Cunnyngham, Assistant Attorney, Missouri State Highway Department, in "The Limited Access Highway from a Lawyer's Viewpoint," (1948), 13 Mo. L. Rev. 19, 22-23, stating that limited access highways can carry three times the amount of traffic carried by unlimited access highways, may avoid 50 percent of the vehicle accidents which occur on unlimited access highways, and can save many millions of man-hours lost in retarded traffic, and see the remarks of Mr. Joseph Barnett, of the Bureau of Public Roads, at page 149, "Highways in Our National Life", and also see pages 34, 52, 76, 87-88, 115, and 147 "Highway Capacity Manual" (1950), by the Committee on Highway Capacity, Highway Research Board.

[3] For cases in point, see Burnquist v. Cook, discussed on p. 40 below, and State v. James (1947) Sup Ct. Mo., 205 S. W. 2nd 534, 537, in which Mr. Wilkie Cunnyngham appeared as counsel for the State.

16(3).) It is clear that the owner of land adjoining a new expressway or a limited access roadway receives a windfall when access rights are donated and then bought back in this situation and that the payment of the unearned increment is prejudicial to the general public because increasing the expense of providing expressways and adequate highway service.

To avoid the unreasonable expense of granting a right of access to a new expressway and of buying it back outright or as a component of land value as enhanced by right of access to the new expressway, it is suggested that amendments to highway statutes be enacted by the States which authorize restriction of access at the time a new expressway or like facility is opened and dedicated for general use, thereby preventing the vesting of access rights in favor of abutting landowners at the creation of the highway. Unless such reservation is made explicitly, highway departments may continue to be required to pay the value of access rights to the highways from abutting property when land is secured for new expressways.

In heavy traffic-duty sections of main highways in the vicinity of large cities, on dangerous curves, on bridge approaches, and other areas in which large volumes of traffic are to be served, control or prohibition of access from abutting property would alleviate congestion. While the police power may be used to accomplish this purpose to a limited extent on existing highways and streets, strict control is legally possible at new locations by withholding the right of access at the time a portion of a highway right-of-way is dedicated to public travel. Hence, wherever in the reconstruction of a segment of an existing highway a new location is used a restricted dedication of said right-of-way would enable the public authorities in control to shut off cross currents of traffic from abutting land. In city planning on new locations for streets, the same greatly needed power may be secured, and exercised without liability to pay damages for not granting access rights to highways and streets on said new locations. If the restriction is not imposed at the time of dedication, an implied grant of access rights in favor of abutters by reason of the analogy of unrestricted streets may result. (Cf. State v. Hoffman (1939) St. Louis Ct. App., Mo., 132 S.W. 2d 27, a case in which access rights to a new superhighway from adjoining land were recognized.)

In those cases in which Federally owned roads are constructed for service as segments of expressways, especially in the area of Washington, D.C., administrative problems in controlling access likewise would be simplified by enactment of a clause expressly permitting a restricted dedication of the right-of-way so as to exclude access rights, although legal opinion (30 Op. Atty. Gen., U.S. 470; 16 Op. Atty. Gen., U.S. 152; 22 Op. Atty. Gen., U.S. 240) exists to the effect that in the absence of an act of Congress authorizing grants of easements only revocable licenses may be granted to cross or use land of the United States. However, it has been contended that abutters acquire access rights to roadways opened up on Federally owned land. To put the point beyond necessity of proving the Congress does not by implication grant abutters right of entry onto bridge approaches or other facilities for free-flowing traffic merely by the act of dedicating the land to such use, enactment of the suggested restriction is needed, as declaratory and explicative of existing law, not as an innovation in such cases.

The need for amendments to statutes dealing with such restrictions appears from the result in Burnquist v. Cook below, and from a review of existing statutes cited on pages 56-58 of this brief.

An important case in Minnesota serves as an example of conferring and buying back an unearned increment of value, in the form of access rights from abutting land to a new highway. In the case of Burnquist v. Cook (1945) Sup. Ct. Minn., 19 N.W. 2d 394 a new right-of-way was secured for an expressway. The right-of-way coincided

with the southern boundary of a tract of land but did not include any part of the tract. Nothing was done to restrict access from said tract north of the expressway when the expressway was opened, although access from the tract on which the right-of-way was located was expressly extinguished. An action was begun by the State to extinguish rights of access from the tract north of the expressway. Also, the action related to thirty-three other parcels north of the expressway. A decision of the lower court extinguishing access rights without paying the abutting landowner damages therefor was reversed and the case was ordered to be retried on the issue of damages held to be due the abutting landowner. The Court said, in reference to the establishment of the new highway along the boundary line of the property north of the expressway, ". . . Easements of access which were then created and became appurtenant to such land were not involved or extinguished in the original proceeding." (Underscoring added.) And the court held that the verdict of no damages was contrary to the weight of the evidence in the case. This means that the State gave a right of access by implication in opening the new road without a legal restriction on access, and hence the State had to pay the value of the access right to the property when it took away the legal right it had given, in consideration of nothing.

The Court said, "While it is true that the creation of a public highway at the same time subordinates the land on which it is established to the easement of access insofar as abutting landowners are concerned, there is nothing in this fact which prevents the sovereign State from later extinguishing such easements in subsequent condemnation proceedings." The Court then held that extinguishment of the easement of access is an incidental power given the Commissioner of Highways to acquire "all necessary right-of-way needed in laying out and constructing the trunk highway system." (Sec. 161.03, sub. 1, Minn. Stat. Ann.) This power was said to be analagous to the power to condemn land for purposes of visability at intersections.

In this case land was acquired in 1937 for a highway on a new location. The Court pointed out that when the land was acquired nothing was done to extinguish rights of access from the property north of the new highway. No part of the land north of the right-of-way involved was taken. Properly considered, no access rights existed until (1) a highway was dedicated and (2) access rights to the highway were granted by express language or by implication based on an unrestricted dedication. Nothing was needed to be done or could be done to extinguish access rights from the property north of said right-of-way until access rights therefrom had been created. Since the highway was designed as an expressway from the beginning, the highway should not have been dedicated in such a way as to vest rights of access. By restricting the dedication so as to withhold access rights the necessity of extinguishing access rights could have been avoided, for no such rights would have existed and would not have to be extinguished if the State had not conferred the same at the dedication of the new highway.

See also Breinig v. County of Allegheny (1938) Sup. Ct. Pa., 2 Atl. 2d 842-47, holding exercise of vested rights of access to highways from abutting land cannot be prohibited absolutely under the police power.

Such result requiring indemnification for valuable property rights given as a windfall to owners of land beside new roads compels us to consider whether this is a reasonable precedent to follow in serving the public by providing expressways as economically as possible to relieve chronic traffic congestion in the big cities.

PROPOSITION OF LAW

States Owe No Duty to Give Access to Owners of Land Fronting on New Expressways or Similar Facilities Provided the States Restrict Access at the Time the Expressways or Limited Access Facilities are Dedicated to the Public, Thereby Preventing Vesting of Easement of Access as a Property Right, and

Neither is Payment of Damage Due for Not Granting Access Rights to New Expressways or Limited Access Facilities.

Have the owners of land adjoining land acquired by the State and on which the State constructs a new highway for free-flowing traffic a legal or constitutional right of access from the abutting land directly onto the new expressway if at the time the new highway is dedicated to the public a total or partial restriction is imposed by law against access by abutters, and, have such landowners a right to payment if unlimited access is not given?

It is argued that a restriction imposed by law prior to dedication of State land for highway uses prevents the vesting of access rights as a property right, in the nature of an easement appurtenant to the abutting land over the highway right-of-way as the servient tenement, and, therefore, since no access right, as a property right, ever vested in the owner of abutting land, no payment is required as for taking a property right, and due process requiring payment for taking private property is not violated. If this is correct, the values of land fronting on a new expressway or limited access facility will not be increased by the value of access rights to the expressway, and the State will not have to buy up the access rights in order to have an expressway, or other limited access facility.

If the State does not thus restrict access rights to new expressways, but confers rights of unlimited access to the new expressways as a property right, then the State will have to buy up the access rights to avoid cross-currents of traffic on the expressway from driveways to roadside shops, stores, filling stations, and eating places; and the State will be in the position of giving abutters access rights for nothing and then buying back at a high price the same access rights that were given away free by the State. Land actually taken under such restriction of access as proposed would be valued as it existed before the new expressway was opened and would not have its value increased by the value of access rights from such property to a new expressway. The prices of land in cities for new expressways are almost prohibitive. The question presently discussed affects the price of land needed for expressways and limited access facilities and is hence of major importance in the urban highway program. No injustice results to owners of land by declining to give them for the benefit of their land access rights to new expressways, or sections of limited access roads on new locations, a right their land did not enjoy before the expenditure of the millions of dollars required for expressways and similar roadways into the heart of the great cities; and it is evident that the value of all city property will be preserved or increased by opening adequate highways into the centers of the cities and ending the traffic strangulation which is slowly killing the downtown areas.

Numerous court decisions and standard legal treatises present official acts establishing highways and restricting or denying in various ways rights of access thereto from adjoining land, and show that a State may limit the access to a highway at the time it is created, thereby preventing the owners of adjoining property from having a legal right of direct access from their land onto the highway. In some of the instances referred to below the private person donating land originated the restriction, and in others the State originated it. In numerous instances the State adopted the restriction and established the highway as a public highway subject to said restriction. It follows that the type of restriction needed today for the safety and convenience of the public in using expressways by excluding unlimited access from adjoining land may be imposed when the modern expressway is dedicated to public use, and that no property rights of access will vest and no such property rights will have to be divested to eliminate interference with fast traffic on the expressways. The following pages contain summaries and quotations from the decisions and treatises which hold that limited use of a new highway may be made the condition

upon which such highway as a new highway is established and dedicated to the public, and that the rights of abutting landowners as well as of the general public to use a highway arise when the highway is established. Therefore, where a prohibition against access from abutting land to a highway facility on new location owned in fee by the State, or over which the State has acquired a right of exclusive possession, is imposed at the dedication of the facility, the abutting landowner may not recover damages as for taking a right of unlimited access, simply because no right of unlimited access to such facility was ever given him by the law.

ORIGIN OF RIGHTS IN HIGHWAYS

"In England all highways, except such as have been created by or in pursuance of statute, and possibly also such as are immemorial, have had their origin actually or theoretically in dedication." (12 English Ruling Cases 518; Reg. v. Inhabitants of East Mark (1948) 11 Q. B. 877.) "It appears from the first of the principal cases that a highway may be dedicated by the crown, and that dedication by the crown may be presumed from user." (Ib. p. 520.)

"A dedication is an appropriation of land to some public use, made by the owner of the fee and accepted for such use by or on behalf of the public. . . . It is purely of common law origin. But it is only in very modern times that the subject has assumed much importance." (27 American Decisions 559, citing as the first modern decisions Rex v. Hudson (5 Geo. 2) 2 Str. 909, 93 Eng. Rep. 935, Lade v. Shepherd (8 Geo. 2) 2 Str. 1004, 93 Eng. Rep. 997, and Trustees of Rugby Charity v. Merryweather (1790) 11 East 375; 8 R. C. L. 881.) "Most highways have or are deemed to have originated from the owner's dedication of his land to the public for the purposes of passage and acceptance by the public of his gift, evidenced by their user of the way. There being no obligation on an owner to dedicate, or on the public to accept, the public cannot complain that the owner has dedicated to them an unsatisfactory or dangerous highway, or has imposed restrictions upon his dedication; and, if they accept his land as a highway, they must use it for such purposes and subject to such restrictions as he has indicated and imposed." (16 Halsbury's Laws of England 187.) "A highway may be dedicated only for one or more of the recognized kinds of traffic." (Ib. p. 234, referring to p. 184 which states a highway may be established as a carriageway, a horseway, or a footpath.) "A road may apparently be dedicated as a public carriageway subject to a prohibition against a particular class of wheeled traffic, . . ." (Ib. p. 234.) In the case of Lade v. Shephard (8 Geo. 2) 2 Str. 1004, 93 Eng. Rep. 997, it was held by Chief Justice Hardwicke that property formerly belonging to the plaintiff became a highway by act of dedication and continued user by the public, that the public had a right of passage, but that an abutting landowner had no right to place one end of a bridge in the street in order to get over a ditch and enter the street.

"It was well settled in the 16th Century that easements, like other incorporeal things, if created expressly, must be created by deed. (Co. Litt. 9a.)" "It was also settled that they could be created by implication. This implication will arise if an intention is shown, by the words used in the conveyance of the property, to revive an easement which had been formerly annexed to the property, but which had since been extinguished by unity of seisin; or if the easement so arising is a right which is both continuous and apparent, e. g. if a man sold a house with a gutter running on to land retained by the vendor, or conveyed by the vendor to another; or, as we shall see, in case of ways of necessity." (Holdsworth, "Hist. Eng. Law," VII, p. 334.)

". . . English law . . . has therefore gone on the principle of treating the extent of any given right of way as a question to be determined by the facts and circumstances of each individual case; and as in other cases of rights appurtenant to a dominant tenement, the character of that tenement,

and the character of the road itself, are the most important circumstances to be taken into account in considering the extent of the easement. 'Prima facie the grant of a right of way is the grant of a right of way having regard to the nature of the road over which it is granted and the purpose for which it is intended to be used; and both these circumstances may be legitimately called into aid in determining whether it is a general right of way, or a right of way restricted to foot passengers, or restricted to foot passengers and horsemen, or cattle, which is generally called a driftway, or a general right of way for carts, horses, carriages, and everything else,' per Jessel, M. R., Cannon v. Villars (1878) 8 C. D. at p. 421." (Holdsworth, "Hist. Eng. Law," VII, p. 337.) See also Holdsworth, "Hist. Eng. Law," VII, pp. 321-336.

In Dyce v. Hay (1852) English House of Lords, 1 Macq. 305, Lord St. Leonards said, "The category of servitudes and easements must alter and expand with the changes that take place in the circumstances of mankind. The law of this country, as well as the law of Scotland, frequently moulds its practical operation without doing any violence to its original principles." The principle is quoted and approved in the case of the Attorney General of S. Nigeria v. Jno. Holt and Co. (1915) English Privy Council, Law. Rep., Appeal Cases, at 617.

"If an interest is to be an easement it must possess the four following characteristics:

"(1) There must be a dominant and a servient tenement.

"(2) An easement must accommodate the dominant tenement.

"(3) Dominant and servient owners must be different persons.

"(4) A right over land cannot amount to an easement unless it is capable of forming the subject matter of a grant."

"Since as we have seen, an owner of land is at liberty to create an easement in favor of a third person of a kind which has never been heard of before, provided that it possesses all the essential characteristics, it is impossible to give an exhaustive list of easements. The following list, which begins with the most important kinds, will afford some idea of how great their variety is:

"(a) Rights of way, whether for general or special purposes, and whether exercisable in all modes or limited to a carriage way, bridle way, footpath, or a way for cattle." Etc., etc., etc.

"Natural rights. Lastly, easements must be distinguished from what are generally called 'natural rights.' These, though they connote the imposition of duties upon third parties, are ordinary and inseparable incidents of the ownership of land, and are given the epithet 'natural' to distinguish them from rights, such as easements, which do not necessarily accompany ownership but must be acquired by grant, prescription, or the like. Thus:

> 'An owner has a right to so much support from his neighbor's land as will support his own land, unincumbered by buildings at the natural level'; and
>
> 'A riparian owner can insist ex jure naturae that other riparian owners shall not divert the natural course of the stream.'

"Without such rights as these it would be impossible for an owner to enjoy his land in the condition in which it was given for the enjoyment of man by nature."

"Such rights, since they impose restrictions upon other landowners, have a superficial resemblance to easements, but in fact they are fundamentally different, for they arise automatically as a natural adjunct to the ownership of land and do not require to be deliverately acquired." (G. C. Chesire, D. C. L., F. B. A., "The Modern Law of Real Property" (6th ed., 1949). pp. 216, 219, 231.)

This distinction between inherent property rights and those acquired by special act is observed in Higgins v. Betts (1905) Chancery Division, Sup. Ct. Jud., Eng., 2 Ch. 214, 215, which held that access of light from adjoining land is an easement to be acquired by prescription, or statute, or express contract or grant, and is not a natural

property right.

"The Methods by Which Easements May Be Created"

"The principle which governs this matter is that every easement must have had its origin in grant." Angus v. Dalton (1877) 3 Q.B.D. 102, per Cockburn, C.J. (Chesire, ib., p. 231).

". . . the one exception, namely Statute, is not of frequent occurrence."

"Acquisition by statute. Little need be said of this matter. It is obvious that a statute can create an easement and, what is more, can give the name easement to a right which lacks the essential elements of one." (Chesire, ib., p. 231.)

"Every easement has its origin in a grant express or implied," said Lord Cairns, in Rangley v. Midland Railway Co. (1868) Ct. Appeal in Chancery, 3 Chan App Cases at p. 310, a case in which a railway company was held to have an option to buy land and dedicate it for use as a footpath leading to a railway line.

"Our legal theory has always been - at any rate within the last century or two - that the sole origin of a public highway was dedication to the public use by the owner of the land over which it ran, and in consequence that in a case of dispute the public right could be established only by such evidence as would justify an inference of fact that the way had at some date, known or unknown, been so dedicated." And it was held that under the Right of Way Act of 1932, 20 years user of a footpath raises a presumption of dedication, in an action for an injunction against using a footpath across the plaintiff's farm. The court said that the effect of the said Act was to alter the former rule that long user was evidence of a dedication, but raised no presumption, Jones v. Bates (1938) Ct. of App., (Eng.) 158 Law Times 507. The former rule was given in Folkstone Corp. v. Brockman (1914) House of Lords, (Eng.) A.C. 338, which held" ' . . . it has always been held that where there has been evidence of user by the public so long and in such a manner that the owner of the fee, whoever he was, must have been aware that the public were acting under the belief that the way had been dedicated, and had taken no step to disabuse them of that belief. It is not conclusive evidence, but evidence on which those who have to find the fact may find that there was a dedication by the owner whoever he was.' " "'In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an intention to dedicate - there must be an animus dedicandi of which the user by the public is evidence and no more . . . . The uninterrupted user of a road justifies a presumption in favor of the original animus dedicandi even against the Crown.' " (p. 368.)

Likewise, in the United States, rights in highways are derived from dedication of land by the owners and acceptance of the dedication by the public, and rights in highways are derived also from dedication for highway use, as fixed by statute, of land condemned, bought, or owned by the State. The principle of establishing highways by dedication was a part of the English common law, and as such was introduced and followed in the United States. Tyler v. Sturdy (1871) Sup. Jud. Ct. Mass. 108 Mass. 196; Hobbs v. Lowell (1837) 36 Mass. 405. In accord: (Alabama). Sultzner v. State (1869) 43 Ala. 24; Steele v. Sullivan (1881) 70 Ala. 589; Webb v. Demopolis (1891) 95 Ala. 116, 13 So. 289; (California). Stone v. Brooks (1868) 35 Cal. 489; (Connecticut). Noyes v. Ward (1848) 19 Conn. 250; N.Y., N.H. and H. Ry. Co. v. New Haven (1878) 46 Conn. 257; Paulsen v. Town of Wilton (1905) 78 Conn. 58, 61 Atl. 61 (Delaware). State v. Brown (1916) 6 Boyce 179, 97 Atl. 590; District of Columbia). Compton v. Rudolph (1926) 12 Fed. 2nd 152, 56 App. D.C. 211; (Florida). Daugherty v. Latham (1939) 139 Fla. 477, 190 So. 742; (Georgia). Johnson v. State (1907) 1 Ga. App. 195, 58 S.E. 265; Davis v. State (1911) 9 Ga. App. 430, 71 S.E. 603; Dunaway v. Windsor (1944) 197 Ga. 705, 30 S.E. 2nd 627; (Illinois). Daniels v. People (1859) 21 Ill. (11

Peck) 439; Grube v. Nichols (1864) 36 Ill. 92; (Idaho). Hanson v. Proffer (1913) 23 Id. 705, 132 Pac. 573; (Indiana). Greer v. Elliott (1882) 86 Ind. 53, 68; (Iowa). Wilson v. Sexon (1869) 27 Iowa 15; Baldwin v. Herbst (1880) 54 Iowa 168, 6 N. W. 257; Keokuk and H. Bridge Co. v. C. I. R. (1950) 180 Fed. 2nd 58; (Kansas). Cementery Assn. v. Meninger (1875) 14 Kan. 312, 316; (Kentucky). Rowan's Exr's v. Portland (1847) 8 B. Mon. 232; Congleton and Co. v. Roberts (1927) 221 Ky. 712, 299 S. W. 579; (Maine). Browne v. Boudoinham (1880) 71 Me. 144; (Maryland). Harlan v. Town of Belair (1940) 178 Md. 260, 13 Atl. 2nd 370; Louis Sachs and Sons. v. Ward (1944) 182 Md. 385, 35 Atl. 2nd 161; (Massachusetts) Hobbs v. Lowell (1837) 36 Mass. 405; Valentine v. Boston (1839) 39 Mass. (22 Pick.) 75, 33 Am. Dec. 711; Tyler v. Sturdy (1889) 108 Mass. 196; Guild v. Shedd (1889) 150 Mass. 255, 22 N. E. 896, noting statutory change in mode of establishment; (Minnesota). Keiter v. Berge (1945) 219 Minn. 374, 18 N. W. 2nd 35; (Mississippi). Kinnaire v. Gregory (1878) 55 Miss. 612; Rylee v. State (1913) 106 Miss. 123, 63 So. 342; Armstrong v. Itawamba County (1944) 195 Miss. 802, 16 So. 2nd 752; (Missouri). Bailey v. Culver (1882) 12 Mo. App. 175, 183; Garnett v. City of Slater (1894) 56 Mo. App. 207, 211; State v. Muir (1909) 136 Mo. App. 118, 117 S. W. 620; Kennard v. Eyerman (1916), 267 Mo. 1, 182 S. W. 737; School Dist. etc. v. Tooloose (1917) 195 S. W. 1023; Cochran v. Wise (1921) 297 Mo. 210, 229 S. W. 1050; (Nebraska). State v. Otoe County Com'rs (1877) 6 Neb. 129; (New Hampshire). State v. Atherton (1844) 16 N. H. 203; (New Jersey). Smith v. State (1852) 23 N. J. L. (3 Zab.) 712; Holmes v. Jersey City (1857) 12 N. J. Eq. (1 Beasl) 299, 308; City of Atlantic City v. Atlantic City Steel Pier Co. (1901) 62 N. J. Eq. 139, 49 Atl. 822; Parsippany-Troy H. T., Morris County v. Bowman (1950) 3 N. J. 97, 69 Atl 2nd 199; (New Mexico). Lovelace v. Hightower (1946) 50 N. M. 50, 168 Pac. 2nd 864; (New York). Appleton v. City of N. Y. (1916) 219 N. Y. 150, 114 N. E. 73, 7 A. L. R. 629, 115 N. E. 1033, citing 2 Pollock and Maitland, "Hist. Eng. L.", p. 144; Post v. Pearsall 22 Wend 425, 433; 16 "Halsbury's Laws of Eng.", p. 12; Mayor etc. New Orleans v. U. S., 10 Pet. 662, 712-717; The Queen v. Inhabitants of Hornfey (1713) 10 Modern 150; Rex v. Hudson (1732) 2 Str. 909; Lade v. Shepherd (1732) 2 Str. 1004; (North Carolina). Sexton v. Corp. of Elizabeth City (1915) 169 N. C. 385, 86 S. E. 344; Stevens Co. v. Myers Park Homes (1921) 181 N. C. 335, 107 S. E. 233; (Ohio). City of Steubenville v. King (1873) 23 Ohio St. 610; (Oklahoma). Ruminer v. Quantilty (1947) 179 Pac. 2nd 164; (Oregon). Douglas County Rd. Co. v. Abraham (1874) 5 Ore. 318; Bakke v. Johnson (1922) 102 Ore. 496, 202 Pac. 1091; (Pennsylvania). Pittsburg Ft. W. and Co. v. Dunn (1867) 56 Pa. St. (6 P. Smith) 280; (South Carolina). Edgefield County v. Georgia-Carolina Power Co. (1916) 104 S. C. 311, 88 S. E. 801; (Tennessee). Nashville Tr. Co. v. Evans (1948) 206 S. W. 2nd 911; (Texas). Heilbron v. St. Louis S. W. Ry Co. (1908) 52 Tex Civ App. 575, 113 S. W. 610, 579; (Vermont). Judd v. Challoux (1944) 114 Vt. 1, 39 Atl. 2nd 357; Town of Springfield v. Newton (1947) 50 Atl. 2nd 605; (Wisconsin). Yates v. Judd (1864) 18 Wis. 126.

Acceptance of such dedication is essential. N. Y. H. and H. Ry. Co. v. New Haven (1878) 46 Conn. 257; Compton v. Rudolph (1926) 12 Fed. 2nd 152, 56 App. D. C. 211; Dunaway v. Windsor (1944) 197 Ga. 705, 30 S. E. 2nd 627; Congleton and Co. v. Roberts (1927) 221 Ky. 712, 299 S. W. 579; Harlan v. Town of Belair (1940) 178 Md. 260, 13 Atl. 2nd 370.

The foregoing section on the "Origin of Rights in Highways" shows that the legal foundation of such rights rests on a grant or dedication either by a private landowner, or by the Crown or State, that restricted dedications were known at common law, and that reasonable variations in restrictions imposed on highway use were quite familiar.

Since an abutter's right of access to a highway is an easement, and since easements are created by grants, if the dedication or grant by which a highway or street is established withholds such

right of access, then of course no such right of access is vested in abutting landowners and no taking of a property right has been committed by not permitting access and no damages therefor can be due in such case. The section following, on "Restricted Use Highways and Streets," presents authorities showing the power to impose restrictions when highways are dedicated. It follows that whenever the State wishes to restrict the dedication of land over which the State has right of exclusive possession, all that is required is for the State to authorize the highway officials to make a limited dedication of such land for highways so that abutters shall have no right of access. If private landowners may impose restrictions on the uses to which land may be put by the traveling public, and if railway companies may acquire rights to exclusive possession of land needed for railway tracks and may exclude abutting landowners from railway rights of way, then likewise in complete accord with the established principles of highway dedication the State may acquire exclusive possession of rights of way for limited access highways and may restrict the dedication so that no easement of access vests in abutters and so that no damages are due abutters for denial of access to the highway.

RESTRICTED USE HIGHWAYS AND STREETS

A dedication of land for a highway may be made subject to reservations in favor of the dedicator or to restrictions upon the freedom of the use of the land by the public, as a condition that a highway shall be used only at certain seasons of the year or shall be subject to certain use by the dedicator, or for the use only of certain classes of vehicles or pedestrians only. Tiffany, Real Property, Section 1111, 3rd ed.

"Land may be dedicated for a special and limited use, and use for any other purpose is unauthorized." (8 R. C. L. 908) "The dedicator may prescribe the terms, restrictions and limitations on which the land is given . . . ." (8 R. C. L. 909, citing notes in 52 Am. Dec. 479, 29 A. S. R. 299, 25 L. R. A. (N. S.) 980; 11 Ann Cas. 468.) "The dedication of land for a street or highway may be subject to limitations or conditions. So, a highway may be dedicated subject to limitations as to the time, extent and mode of its enjoyment, or subject to the right to use or dedicate a portion of it to a railroad." (13 R. C. L. 32. In accord: 12 Eng. Rul. Cases 581.)

"Public streets, squares, and commons, unless there be some special restriction, when the same are dedicated or acquired, are for the public use, etc." (Underscoring added.) 2 Dillion, Municipal Corporations, 4th ed., Sec. 656.

Restrictions on Access - In the case of Home Laundry Co. v. City of Louisville (1916) Ct. App. of Ky., 182 S. W. 645, it was held that a laundry company as an abutting owner on a street, known as Court Place, dedicated as a pedestrian street had no right of access for carts and wagons on such street. The street in question was dedicated as a way limited to pedestrian travel only, and its use as such was begun in 1853. Subsequently, the laundry company acquired a lot fronting on the pedestrian street, and combined the said lot with another lot fronting on another street, erected a plant on the two lots, and began making deliveries of coal from wagons on the pedestrian street. Such use by the laundry continued for a number of years, but it was held no rights were acquired by adverse use and possession because no notice of the adverse claim was given the public authorities in the manner required by a statute. Hence, the actual user of the street to make deliveries to the abutting property from vehicles did not operate to extinguish the original restriction. Complaint was made by a judge that noise from automobiles and other vehicles on the pedestrian street interfered with the trial of cases in a courtroom which was adjacent to the pedestrian street. Policemen were placed at the intersections of the pedestrian street with other streets and stopped all vehicles from entering the pedestrian street. The laundry company sued for an injunction, and the injunction was

denied by the trial and appellate courts. It appeared at trial that the street was established on land dedicated by abutting landowners, that the City of Louisville dedicated 8 feet, and the landowners on the opposite side of the street dedicated 8 feet. The ordinance of the said City authorized a grant of 8 feet "for public use," "provided the said street is only to be used by foot passengers, and not for wagons, carts, or drays." By an omission in drafting the deed, the proviso of the ordinance, restricting use to pedestrians only, was omitted; but for a period of over 15 years the use of the street was actually restricted to pedestrians only, and the court held that this cured the omission of the deed to contain the restriction imposed by said ordinance. The Court held, further, that the pedestrian street "had its origin in a deed of dedication executed by the abutting property owners, of which the city, as a private owner of property was one . . . ." "The dedicators of a public way may impose any conditions as to its use, which they may desire, and there is no doubt that a street may, by its dedication be limited to the use of pedestrians. Trenton Water Power Co. v. Donnelly 77 N. J. Law 659, 73 Atl. 597; Poole v. Huskinson 11 M and W 827; Hughes v. Bingham 135 N. Y. 347, 32 N. E. 78, 17 L. R. A. 454. It is within the authority of a city, if beneficial to the public, to control by reasonable regulations the use which may be made of certain streets, as by limiting the weight of loads which may be hauled over them . . . ." "When the municipality accepted the dedication of Court Place, which it did by causing it to be improved as a sidewalk, in the year 1853, the dedicators were still the abutting owners, and it appears that they not only did not interpose any objections to its acceptance as a way limited to pedestrian travel only, but were assessed, and, we presume, paid the costs of construction of the street as then constructed." "A public way is however, nevertheless a street, though its use is confined to travel by pedestrians only. Atlanta and W. P. Ry. Co. v. Atlanta B. and A. Ry. Co. 125 Ga. 529, 54 S. E. 736."

This decision, relating to the power of a city to effect a restricted dedication of a street and to deny vehicular access to all property abutting thereon, is in public law, relates to public rights in streets, and is not one in a case involving merely private acts relating to a private street. The court reasoned that dedicators of land for use as streets may impose any conditions they desire as to its use, that the city dedicated a part of the land as a private owner of property subject to certain restrictions, and that the restrictions are valid. Logically, the decision supports the proposition that the State may impose restrictions, at the time it creates streets on land under State control as to the uses to which the streets may be put. In its proprietary capacity as an owner of real property with requisite dominion thereover, the State may impose restrictions on the use of land dedicated for a highway location. In its governmental capacity with responsibility to promote public safety on the highways, in conjunction with its ownership of lands to be dedicated as highways, the State may impose reasonable restrictions at the time streets and highways are created which limit or deny access by abutters, although such restriction may vary the common-law easements of access enjoyed by abutting landowners. In this aspect of the matter, the State not only has all the power to restrict at dedication rights of abutters in highways which private dedicators have, but the State has greater power in this regard than private persons have. Hence, the pertinency of all decisions which hold valid restrictions on highway use imposed by private dedicators. Further, in every case in which a restriction is imposed by private dedicators and has been upheld as applied to a public street, it was necessary for public officials to accept the dedications, thereby ratifying it by official action. Hence, again, the decisions cited herein are pertinent as showing official action ratifying and adopting restrictions on lands dedicated for highway uses. It should be noted, also, in considering the precedents reviewed in this brief, that the dedication of highways and streets restricted to a specified and

special use which of necessity prohibited all vehicular access from abutting lands constitutes a precedent for restricted dedications today of lands for use as expressways from which all vehicular access from abutting land is prohibited, in order to permit a free flow of traffic unsnarled with cross-currents of cars from roadside filling stations, eating places, and other commercial places.

In accord: Stegman v. City of Fort Thomas (1938) Ct. App. Ky., 116 S. W. 2nd 649, in which the Court, referring to a reservation in a deed, held, "The city under the provisions of the reservation has the right to open the street for pedestrians only, and when it does so, the street becomes a public highway."; Sherington Urban District Council v. Holsey (1904) Chan. Div., High Ct. Justice, England, 91 L. T. R. 225, holding valid a dedication of a street for pedestrians only. "It has not been shown that there has been any dedication as a public highway for all purposes."

In Attorney General and Newton Abbott Rural District Council v. Dyer (1947) Chan. Div. High Ct. Justice (Eng.) 1 Chancery 67, an action was begun to establish a public right of way on foot in a lane over defendant's land to the bank of a river. Judgment was rendered for the plaintiff. The Court held, "It must now be taken as clearly settled not to be a requisite of a public right of way that it must lead from one public highway to another. Thus, there may be a public right of way to a viewpoint or beauty spot . . . . The high water mark of the sea at ordinary tides may, I conceive, be a good terminus for a public right of footway even though its proved use were confined to walking to the sea's margin and thence returning. In accord: Huey v. Whitley (1929) Chan. Div., Sup. Ct. Jud., (Eng.) 1 Ch. 440, in which evidence of user for 60 years of a footway was given and the Court said, "I should be bound to hold that there had been at some time a dedication to the public of this path as a public footpath."

In Tyler v. Sturdy (1871) Sup. Jud. Ct. Mass., 108 Mass. 196, an action for tort was begun and the defense was that the defendant had not trespassed because he had used a footpath established by dedication and use. A case was made for appeal upon the question whether a public footpath could exist in Massachusetts by dedication or prescription. The Court held, "By the common law of England, footways for the use of the public were one of the kinds of public ways, and might be created by dedication or prescription. Co. Lit. 56a. Thrower's Case, 1 Ventr. 208, The Queen v. Saintiff, Holt, 129; S. C. 6 Mod 255, 1 Salk 359; Holt, 339. Rex v. Burgess, 2 Burr. 908. Mercer v. Woodgate, Law Rep. 5 Q. B. D. 26. This part of the English law, being manifestly adapted to the condition of our ancestors upon their settlement of this country, was part of the common law which they brought with them, claiming it as their birthright, Pawlet v. Clark, 9 Cranch 292, 333. Storer v. Freeman, 6 Mass. 435, 438, Hobbs v. Lowell 19 Pick 405. Commonwealth v. Churchill 2 Met. 118. As it required no legislation to give it effect, we should not expect to find many traces of it upon the statute books; but it is recognized by clear implication in the ordinances of the Colony of Plymouth, and its adoption is reasonably to be inferred from the early records of Massachusetts, the acts of the Province after the union of the two colonies under the one charter, and the statutes of the Commonwealth.

"It was assumed in Hemphill v. Boston 8 Cush 195 and Danforth v. Durell, 8 Allen 242, that public footways might be created by dedication in this commonwealth. And the existence of such ways by dedication or prescription has been recognized in other States. Chadwick v. McCausland 47 Maine 342, Nudd v. Hobbs 17 N. H. 524, Gowen v. Philadelphia Exchange Co. 5 W. and S. 141, 3 Kent Com. (6th ed.) 451, note."

In Abrey v. Livingstone et. al, Park Com'rs (1893) Sup. Ct. Mich., 95 Mich. 181, 54 N. W. 714, it was held that a city had power under an act authorizing purchase of land for suitable approaches to a bridge leading to a park to dedicate a strip of land for a bridge approach and to leave a strip

varying from 25 to 50 feet on each side of the said approach road for ornamental or other use and to exclude abutting landowners therefrom who demanded access rights over said strip to the roadway or street.

In Ferguson Seed Farms v. Fort Worth etc. Ry. Co. (1934) Ct. Civil App. Tex., 69 S. W. 2nd 223, an action for damages was brought for cutting off access to property abutting on a street by construction of spur tracks on the street, and for injunction requiring the removal of the tracks. Land was platted into lots, blocks, and streets by the owner and the streets were dedicated to public use for foot and vehicular travel, reserving the right to operate utilities and railways through said streets as though not dedicated to public use as limited by the dedication. The town accepted the dedication. Later the owner of the property granted a railway the right of way to erect tracks in the street. The tracks were placed on the sides of the street and interfered with and made access difficult to abutting property, and the abutters brought this action. It was held: "A dedicator may impose such restrictions and reservations as he may see fit when dedicating his property to the use of the public, subject to the limitation that the restriction or reservation be not repugnant to the dedication or contrary to public policy. (Roaring Springs Townsite v. Paducah Tel. Co. 109 Tex. 452, 212 S. W. 147; Gibson v. Carroll, Tex. Civ. App., 180 S. W. 630; 18 C. J. 70; Oklahoma City and T. R. Co. v. Dunham 39 Tex. Civ. App. 575, 88 S. W. 849, 851; Ayres v. Penn. Ry. 48 N. J. Law 44, 3 Atl. 885; Tallon v. Mayor of City of Hoboken 59 N. J. Law 383, 36 Atl. 693; 1 Elliott, 'Roads and Streets,' 3rd ed., Sec. 163; State v. Society etc., 44 N. J. Law 502; Village of Bradley v. N. Y. Cent. R. Co. 296 Ill. 383, 129 N. E. 744; Arn v. C and O Ry. Co. 171 Ky. 157, 188 S. W. 340; City of Noblesville v. Lake Erie and W. Ry. Co. 130 Ind. 1, 29 N. E. 484; Brunswick etc. v. Mayor of Waycross 91 Ga. 573, 17 S. E. 674; Lynchburg T. and L. Co. v. City of Lynchburg 142 Va. 255, 128, S. E. 606, 43 A. L. R. 752, Ann., 766; Cane Belt Ry. Co. v. Ridgeway, 38 Tex. Civ. App. 108, 85 S. W. 496)."

"Dedication of a highway is a mere gift to the public, and the donor may annex thereto any restriction or condition he pleases, not inconsistent with or repugnant to the gift. Otherwise there would be no gift. The donee cannot dictate the terms of the gift. He can accept it or not, as he pleases. If he accepts unconditionally, he thereby agrees to perform the conditions annexed to the gift." In accord: Lynchburg T and L Co. v. Lynchburg, (1925) Sup. Ct. App. of Va., 128 S. E. 606, 43 A. L. R. 752, 131 A. L. R. 1472, annotation citing Ga., Ill., Ind., Kans., Ky., N. J., Pa., Tex., Va., and Wash. decisions; 1 Elliott, Roads and Streets 3rd Ed., Sec. 163. Cf. Gwin v. Greenwood (1928) Sup Ct. Miss., 115 So. 890, 58 A. L. R. 849, and Tallon v. Hoboken (1897) 60 N. J. L. 212, 37 Atl. 895, upholding reservation of right in dedicator to place utility lines in streets platted by him. For cases contra see 58 A. L. R. 854, on ground the reservation is against public policy.

In an action to enjoin obstruction of an alley, judgment was given for the defendant, and the Court of Appeals of Virginia held in affirming the judgment, "The owner of land to which there is a right of way appurtenant may convey the land without the appurtenance if he chooses; and where the way is not a way of necessity, and the appurtenance is excluded by the grant, it will not pass by a grant of the land." In this case the rule was applied to conveyances of adjoining lots fronting on a street and having an alley across the back of the lots, and it was found that the conveyances gave the fee to the space in the alley to the owners of the two lots under the conveyances without a right of passage through the entire length of the alley across both lots. Harris v. Thomas (1927) Sup. Ct. App. of Va., 138 S. E. 728.

In Woodyer v. Hadden (1813) Ct. Common Pleas, 5 Taunt 125, 128 Eng. Rep. 634, per Gibbs, Chambre, Heath, and Mansfield, C. J., an action for damages was brought against an abutter for trespass on a private, cul de sac street. Judgment for the plaintiff was

affirmed. Per Gibbs: "The owners of the land had a right to say that this should not be used as a common highway, but only as an occupation way." Per Mansfield: "I therefore think this street never was dedicated to the public, and I do not know that if it were a public street perfected, that it is therefore a public way for all purposes: all that persons can require is a right of passing and as at present advised I do not know that persons coming with horses and carriages to exercise for their recreation round a square, and breaking up the pavement, have a right to do it, or that they would not be trespassers, after notice to abstain." In this case the private, cul de sac street was opened for the plaintiff's tenants and the defendant's property was separated from the street by a fence at the end of the street. The defendant tore down this fence to develop his property, desiring to use the private street; but the plaintiff put up a wall. The defendant tore down the wall and used the street. The plaintiff sued for trespass, and recovered against the abutter on the private street which had not been dedicated to the public without qualification.

In City of Atlanta v. West (1939) Ct. App. Ga., 3 S. E. 2nd 755, an action was brought to recover the value of land. Judgment for the plaintiff was affirmed. "The contention that the person who gave the land for the street could not reserve a strip along one side of the street, and thus cut off the public from access to the street from the property adjoining this strip, cannot be sustained. It is not the law that the dedicator of a street must so extend the width of the street which he gave to the public as to accommodate landowners on the other side of the street and give them access to the street." The plaintiff's grantor dedicated the street, reserving the one-foot strip. The city took this strip de facto. The plaintiff recovered its value in this action.

In Cityco Realty Co. v. Slaysman (1931) Md. Ct. App., 160 Md. 357, 153 Atl. 278, 76 A. L. R. 296, the court held valid a reservation by a private dedicator of a one-foot strip between the defendant's property and a public road which the dedicator granted to the county after reserving said one-foot strip, and the court granted an injunction to keep the defendant from crossing the said one-foot strip and entering the road. The Court said, "Nor did the reservation of such a strip between the appellee's land and a public highway violate any requirement of public policy . . . ." (Citing a statute permitting the widening of roads if required by public convenience.)

In Berridge v. Ward (1860) Nisi Prius, England, 2 F and F 208, 175 Eng. Rep. 1026 per Cockburn, C. J. an abutting landowner was excluded from the highway by a wall, and access was given only at a gateway. Cockburn, C. J., said that if the highway were dedicated beyond living memory it is an ancient highway and the abutter has a right of access at any point, and temporary obstruction would not divest it of that character; but if it was not an ancient highway, then the question for the jury was whether the owner dedicated it as a highway without qualification, and the obstruction by the wall is material as showing the owner never dedicated the highway without qualification; if once dedicated without qualifications the owner cannot divest it as a highway without qualification. On these instructions the case was submitted to the jury which found for the abutter.

It was held in Poole v. Huskinson (1843) Exch. of Pleas, 11 M and W 827, 152 Eng. Rep. 1039, per Abinger: A new trial must be granted the plaintiff for error in instructing that a dedication of a street to inhabitants of a parish is a dedication to the public, for use of which this action of trespass was brought. Per Parke: "I agree. There may be a dedication to the public for a limited purpose, as for a footway, horseway, or driftway; but there cannot be a dedication to a limited part of the public. In this case a private way had gates across it, and signs had been put up prohibiting use as a public carriage road, and the defendant had broken down the gates and used the road.

In Lightbound v. Higher Bebington Local Board, Court of Appeal, England,

(1885) 16 Q. B. D. 577, the appellant was assessed for the paving of a street on which he was alleged to have property "fronting, adjoining, or abutting." A wall and a narrow strip of land separated the appellant's land from the street which was paved, and a footpath running at right angles to the wall and to the street connected the appellant's property with the street. It was held that the location of the wall and the narrow strip of land between the street and the appellant's property took the appellant's property out of the class of abutting property, that no benefit from the paving was conferred on appellant's property and that hence no tax for the paving assessment was due.

Conversely, it was held in Williams v. Wandsworth Board of Public Works (1884) (England) 13 Q. B. D. 211 that an owner of a strip of land 4 inches wide and 265 feet long which bounded a new street on the north side and on which the owner was obligated to maintain a boundary line fence between his land and land of his grantor was liable for a tax on the strip of land for the paving of the street. The court reasoned that the owner could rent the land to property owners on the north side of the new road to give them access to the road, and hence the owner held valuable land abutting the street, within the English court decisions construing "owner" of abutting land on streets, for tax purposes.

The foregoing English decisions show the opinions of the English judges to be that special restrictions may be imposed upon streets and highways at the time land is dedicated to public use, as a highway or street, and similarly, private streets may be subject to restricted use.

Restrictions on Mode of Use of Highways- In Jones Beach Blvd. Est. v. Moses (1935) N. Y. Ct. App. 197 N. E. 313, land was granted in fee simple, reserving 18 rights of way over and across the said property, on which a highway was to be built, the said rights of way to be private roadways 1,000 feet apart, location, construction, maintenance and use to be approved by a park commission in charge of the highway. An ordinance was passed forbidding left turns except at regular crossings or plazas. The ordinance as applied to the plaintiff required him to go 5 miles before making a left turn, after certain outlets had been released. It was held that the ordinance is valid and does not infringe the terms of the deed. This case is pertinent to the present problem of limited dedication in this that the deed of dedication as construed by the court withheld from abutters the privilege of making a left turn, and hence limited use may be imposed by the deed of dedication which thus serves to prevent the vesting of unlimited rights of access and unlimited user of the new highway.

In Hughes v. Bingham (1892) N. Y. Ct. of App. 32 N. E. 78, 17 L. R. A. 454, it was held that a town which has power to accept land for streets may accept a deed to a strip of land for a street to be kept open only from December to May each year. The general power included power to take an interest in land less than a fee or upon conditions such as were inserted in this deed, said the court.

It was held in Atlantic City v. Associated Realties Corporation (1908) 73 N. J. E. 721, 70 Atl. 345, that Atlantic City, under an act giving it power to accept land for improving streets and sidewalks has the right to accept a deed for a grant to the public of a right of way over lands on the ocean front for a board walk, subject to reservation to donors of the privilege of placing certain structures thereon.

In Illinois Malleable Iron Co. v. Commissioners of Lincoln Park (1914) Sup. Ct. Illinois, 105 N. E. 336, 51 L. R. A. N. S. 1203, the court held valid an ordinance denying an abutting landowner the use of the parkway beyond the first intersection for loaded vehicles. The abutting landowner claimed an easement throughout the length of the street. The Court said, "The power of the legislature over public streets, so far as the public interest is concerned, is absolute, and it may change their control at its pleasure, giving jurisdic-

tion over them to the city, to park commissioners, or such other authority as it may see fit." Hence, it was held that the use of the parkway was subject to limitation by ordinance. In accord: Barnes v. Essex County Park Commission (1914) Ct. of Errors and Appeals of N. J., 91 Atl. 1019. ". . . the legislature may impair the public easement in a public highway by prohibiting business traffic thereon . . . and such power may be delegated."

The decisions cited in the preceding paragraph are pertinent not only as showing that limitations may be imposed upon the use of existing highways but also a fortiori that limitations upon the use of new highways may be imposed prior to the establishment thereof, and consequently that condemnation of access rights would be unnecessary if unlimited access rights were never granted.

In the case of Marquis of Stafford v. Coyney (1827) Ct. of Kings Bench, (England) 7 B and C 257, 108 Eng. Rep. 719, per Bayley, it appeared that Lord Stafford agreed by agent to the opening of a road across his property if no coal were carried over the road, (in competition with his mines), and the road was opened. The defendant moved coal across the Stafford land over objection and this action of trespass was brought. It was held in reversing a dedication for error in instruction that the public must take subject to the restricted dedication or not at all. The court believed a partial dedication valid, but one judge doubted this.

In Mercer v. Woodgate (1869) Ct. of Queen's Bench, (England) L. R., 5 Q. B. 26, it was held in reversing a conviction for ploughing up a public highway, per Cockburn, "I am of opinion that this conviction was wrong. There is no doubt that as far as living memory goes back, while on the one hand, the public has enjoyed this right of way, on the other hand, the owner or occupier of the field during the same period has from time to time ploughed up the whole of his field without regard to the particular track over which the footpath passes. The only proper inference to be drawn is, that the exercise of this right of the owner has been coeval with the exercise of the right of way of the public, and again the only proper inference from that is, that the right of the public was granted, or the original dedication of the way was made, subject to this right in the owner periodically to plough up the soil." "I am clearly of the opinion that there may be, in law, a partial dedication like that contended for by the appellant in the present case . . . ."

Per Blackburn, J., "If the use of the soil as a way is offered by the owner to the public under given conditions and subject to certain reservations and the public accept the use under such circumstances, there can be no injustice in holding them to the terms on which the benefit was conferred."

Per Mellor, J., "I am of the same opinion. The owner might have dedicated this pathway in express terms, with a condition attached of ploughing it periodically; and we all know many such paths which the occupiers are constantly in the habit of ploughing up from time to time."

Per Hanner, J., "It follows that the evidence in the present case shows a partial dedication only, and that either the right of the public is subject to the reservation or there is no dedication at all; in either case the appellant was wrongly convicted."

In Arnold v. Blaker (1871) Exchequer Chamber, (England) 6 Q. B. D. 433, it was held per Kelly, that a footpath across a field may be dedicated as a right of way subject to a restriction by which the owner of the soil might plough up the path from time to time and for a short time interfere with the free use of it. "The question is whether a restriction which derogates so much from the benefit conferred upon the public can be attached to the dedication of a highway." ". . . the reservation is quite consistent with the dedication . . . ." And hence it was held that the surveyors of highways had no right to pave the same with hard material preventing its being ploughed up.

In the case of Atlantic City v. Atlantic City Steel Pier Co. (1901) Ct. Chan. N. J., 49 Atl. 822, it was held that a

covenant in a deed to a city dedicating a right of way along a beach at Atlantic City and providing that the city shall not grant a right of way over the same to any railway company is a legitimate limitation of the dedicatory purpose in creating easements for the mutual advantage of the parties.

In the case of Judd v. Challoux (1944) Sup. Ct. Vt., 114 Vt. 1, 39 Atl. 2nd 357, an action of trespass was begun for removing a gate from a pent road which was established by dedication by private landowners and public acceptance. Judgment for the plaintiff was affirmed. The pent road was established by dedication, and acceptance by the town, and the town had maintained the road and had repaired the gate for 50 years. A statute, P. L. 4838, authorized imposition of penalties for wilfully removing any gate on pent roads. The Court held, "A pent road is deemed to be a public highway. P. L. 4741; Town of Whitingham v. Bowen 22 Vt. 317, 318; Wolcott v. Whitcomb 40 Vt. 40, 41; French v. Barre, 58 Vt. 567, 573, 5 Atl. 568. It is not an open highway, but one that may be enclosed by gates, bars, or stiles. P. L. 4836. Bridgman v. Hardwick, 67 Vt. 132, 134, 31 Atl. 33. The term 'pent', which means 'penned, shut up, confined, or closed', is used to distinguish such road from an open highway." The selectmen may designate the location of the gates, and if the selectmen make no designation the landowner may put them up where reasonably necessary. Such roads may be established by the selectmen by following a statutory procedure.

". . . There is no reason why it cannot be established by dedication and adoption, as an open highway may be, and as is shown to have been done here. The legality of its establishment is not affected by the absence of a record. French v. Holt, supra, 53 Vt. at p. 368."

MODE OF CREATING ACCESS RIGHTS

The right of access to an ordinary highway from adjoining land is created when the State establishes a highway for the use of the general public and abutters, Kane v. New York Elevated Ry. Co. (1891) N. Y. Ct. Appeals, 125 N. Y. 164, 26 N. E. 278, 11 L. R. A. 640; Lewis, Eminent Domain, 3rd Ed., Sec. 121.

In Gleason v. Metropolitan District Commission (1930) Sup. Jud. Ct. Mass., 170 N. E. 395, the Court held, "A taking of land for purposes of public travel or as a public way, in the absence of special restrictions and limitations, imports that abutters thereon have reasonable right of access thereto"; and that in the instant case power to deny access was not given in the statute authorizing construction of a roadway and hence did not exist. (underscoring added.)

In the case of Story v. New York Elevated Railway Co. (1882) 90 N. Y. 122, a deed to land granted by a city provided that the streets on which the land fronted should be for free and common passage forever as public streets in like manner as other streets of the city are or ought to be. The Court held: "Where an individual conveys village or city lots designated upon a map as abutting upon a public street, the map being referred to in the deed, it is well settled that the grantee acquires as against the grantor a right of way over the strip referred to as a street . . . ."

"The same rule applies to the State or a municipal corporation when it deals with its lands as owner or proprietor."

"The street thus became what is known to the common law as the servient tenement, and the lots abutting thereon the dominant tenement. Such servitude constitutes a private easement in the bed of the street, attached to the lots abutting thereon and passed to the plaintiff as the owner of such lots. That an easement is property, within the meaning of the constitution, cannot be doubted." (Ib. p. 150.) The Court held that to permit a railway corporation to take the street for an elevated railway infringes the abutter's property right and requires compensation, (Ib. p. 158), under statutes giving the railway company power of eminent domain, (Ib. p. 160.)

In Sauer v. New York (1907) Sup. Ct. U. S. 206 U. S. 536, 51 L. Ed. 1177, the

Court held, an owner of land abutting on a city street does not have an absolute easement of access, light and air to the street as a right appurtenant to his land; and consequently no property right is taken when the State constructs an elevated roadway in the street which limits access and light and air to the land abutting on said street. "Upon the ground, then, that under the law of New York the plaintiff never owned the easements which he claimed, and that therefore there was no property taken, we hold that no violation of the 14th amendment is shown." "The Court of appeals denied the plaintiff the relief which he sought, upon the ground that, under the law of New York, he had no easement of access, light or air, as against any improvement of the street for the purpose of adapting it to public travel. In other words, the court in effect decided that the property alleged to have been injured did not exist." "The reasons upon which the decision of that court proceeded will appear by quotations from the opinion of the court delivered by Judge Haight. Judge Haight said, 'The fee of the street having been acquired according to the provisions of the statute, we must assume that full compensation was made to the owners of the lands through which the streets and avenues were laid out, and that thereafter the owners of lands abutting thereon hold their titles subject to all of the legitimate and proper uses to which the streets and public highways may be devoted. . . . But as to changes made from the natural contour of the surface, rendered necessary to adapt the street to the free and easy passage of the public, they may be lawfully made without additional compensation to abutting owners, and for that purpose bridges may be constructed over streams and viaducts over ravines, with approaches thereto from intersecting streets.'" "The same law which declares the easements defined, qualifies and limits them."

Similarly it has been held a State and its agencies are not liable in damages to abutting owners for injuries resulting from construction of bridges and their approaches in public highways and streets because in law access rights are held subject to the paramount public rights in highways and streets, in absence of statute or constitutional provision imposing such liability. Willis v. Winona City 60 N. W. 814, 26 L. R. A. 142; Barrett v. Union Bridge Co., Sup. Ct. Ore. 243 Pac. 93, citing Lewis "Eminent Domain," 3rd Ed., Sec. 120; Brand v. Multnomah County 38 Ore. 79, 60 Pac. 390; Transportation Co. v. Chicago 99 U. S. 635; cases pro and con are cited in Elliott "Roads and Streets," 4th ed., Sec. 889, p. 1167, notes 86 and 87; 8 Am. Jur. Sec. 23, p. 925; L. R. A. 65; 21 L. R. A. (N. S.) 209; 45 A. L. R. 534.

In Muhlker v. N. Y. etc. Ry. Co. (1904) 197 U. S. 544, 572, Holmes, J., said in discussing the origin of access rights of abutters: "The plaintiff's rights, whether expressed in terms of property or of contract, are all a construction of the courts, deduced by way of consequence from dedication to and trusts for the purpose of public streets. They were never granted to him or his predecessors in express words, or, probably by any conscious implication."

See Section 474, Thompson, "Real Property," (Permanent Edition), to the effect that the grant of the easement of access to abutters on streets platted by the grantor is an implied covenant of the grantor.

In Wagner v. Bristol Belt L. etc. Co. (1908) Sup. Ct. of App. of Va., 62 S. E. 391, it was held that an abutter is not entitled to damages for a servitude added to a street, fee to which was in the State, which interfered with his parking automobile in front of his property. This case illustrates the liability of the abutter to have his use of the street reduced when public convenience so requires. In this case a street railway was placed in the street and prevented the abutter's parking in front of his property.

Since access to existing streets from adjoining land is at present subject to being greatly reduced whenever the public authorities decide to construct a facility in the street to improve travel, because the law implies that such condition was understood, by so much

the more it follows that an express condition may be imposed when the street is first dedicated restricting access thereto from adjoining property in the interest of the safety and convenience of the traveling public. It follows that if at the time the uses of a new highway are declared by law access is expressly restricted, then no property right of access vests and due process does not require payment for not recognizing it. A statute applicable to expressways on new locations which forbids giving legal rights of access to owners of adjoining land and which is construed as precluding liability for denying such access would be consistent with the Constitutional prohibition against taking private property without compensation because under such statute no property right in the form of an easement of access is created, and since no such property right has been given nothing has been taken away and no payment is required by due process of law.

STATUTES RELATING TO ACCESS RIGHTS AND NEW EXPRESSWAYS

The reading of the following statutes relating to easements of access to expressways shows that the statutes should be made clear by amendment or judicial construction to avoid a windfall to owners of property abutting new expressways.

Laws of New York, McKinney's Consolidated Laws of Art. XII-A, Sec. 346, Bk. 24, 5th paragraph: "The superintendent of public works is authorized to classify any part of a state thruway as a controlled access highway pursuant to this chapter, when the construction thereof is done on a location where no public highway theretofore existed."

Ib., Sec. 346 (14): "If the work of constructing, reconstructing and maintaining such state thruways and bridges thereon causes damage to property not acquired as above provided, the state shall be liable therefor, but this provision shall not be deemed to create any liability not already existing by statute." (Underscoring added.) See also Public Acts 1913, Ch. 174, 1927, Ch. 282, Gen. Stat. 1930, Sections 1473, 1475, 1513, 1528; 21 Sp. Acts 1931, Nos. 314, 408, Sec. 3, 498; 21 Sp. Acts 1933, No. 379; Gen. St. Supp. 1935, Sec. 537 C., establishing the Merritt Parkway, which is restricted to noncommercial vehicles. Virginia Code of 1942, title 18, ch. 83, Sec. 1975 yy(3): "The State highway commission may designate an existing highway as or included within a limited-access highway and existing easements of access, light, or air may be extinguished by purchase, eminent domain, or grant, in accordance with the methods of obtaining rights-of-way for highway purposes." (Underscoring added.)

Ib., (4): "The State highway commission is authorized and empowered to regulate and restrict access to any limited-access highway established under the provisions of the preceding sections, from any existing highway, road, street, or abutting property owner in such manner as it is authorized to regulate and restrict traffic upon highways, and access to any such limited-access highways from any new highway, road or street, which shall be established by and with the consent of the State highway commission."

See also statutes similar to the Virginia Statute in: Connecticut, Sec. 351 h(b), Gen. Stat. 1945, Sup., Title XI, Ch. 80, Pt. II; Illinois, Sec. 336, Ch. 121, Smith-Hurd Ann. Stat. 1945, pocket part; Massachusetts, Sec. 7 C, Ch. 81, Vol. II, Ann. Laws recompiled 1945; New Jersey, Sec. 27: 7 A-5, Tit. 27, Ch. 7 A, Ann. Stat.; Ohio, Sec. 7464-2, Title III, Ch. 18, Vol. 1, 1945 Cum. Supp., Page's Gen. Code Ann.; Rhode Island, Sec. 3, Title X, Ch. 75, General Laws 1938, Ann.

Under the English Trunk Roads Act of 1946 (9 and 10 Geo. 6, Ch. 30), Section 4, trunk roads may be established, and the Minister of Transport may restrict travel so as to permit movement only in one direction, Sec. 3, and may stop up entirely side roads between junctions with the trunk road approved by him, Sec. 4. Under the Special Roads Act of 1949 (12 and 13

Geo. 6, Ch. 32), providing for roads restricted to special classes of traffic, and amending the Trunk Roads Act, authority is given "to stop up any private means of access to premises abutting on or adjacent to land comprised in the route of the special road" and "to provide new means of access to any such premises as aforesaid: Provided that no order authorizing the stopping-up of any private means of access to premises shall be made or confirmed by the Minister by virtue of paragraph (a) of this subsection unless the Minister is satisfied either that no access to the premises is reasonably required or that other reasonably convenient means of access to the premises are available or will be provided in pursuance of an order made by virtue of paragraph (b) of this subsection."

"Where access to any premises has been stopped up in pursuance of an order made by virtue of this section or is limited by virtue of the restriction imposed under this Act on the use of the special road, and any person has suffered damage in consequence thereof by the depreciation of any interest in the premises to which he is entitled, or by being disturbed in his enjoyment of the premises, he shall be entitled to recover from the special road authority compensation in respect of that damage: Provided that in assessing such compensation regard shall be had to any new means of access provided by the special road authority." (Sec. 7., op. cit.) (Underscoring added.)

For purposes of the present discussion the significant thing about the English statute is its silence. It makes provision as to stopping up private means of access to premises abutting on or adjacent to land comprised in the route of a special road. This relates to existing roads and to existing means of access, which are held as vested property rights under English law. The act is silent as to access to highways on new locations for special purposes, private means of access to which are non-existent since the proposed new roads are non-existent prior to dedication. If the dedication were restricted, no such rights of access would be created. The silence of the act may be provided for by an amendment withholding access rights from special roads on new location, or by judicial construction interpreting the dedication of a special road as impliedly withholding access rights. Otherwise, the dedication would imply access rights, although the purpose of special roads is to control access.

The statute in Texas provides: "No existing public street shall be converted into a freeway except with the consent of the owners of abutting lands or the purchase or condemnation of their right of access thereto: Provided, however, nothing herein shall be construed as requiring the consent of the owners of the abutting lands where a street is constructed, established or located for the first time as a new way for the use of vehicular or pedestrian traffic."

Sec. 3., Vernon's Ann. Rev. Civil Stat. of Tex. 1942, Vol. 2, Title 28, Art. 1085a, 1946 Cumulative Pocket Part.

The New York, Texas and Virginia statutes quoted above are broad enough to be construed judicially to authorize payment for existing easements of access owned by abutting landowners, but not to require payment where such easement was not in existence when the limited access road was laid out and established as a new highway. Of course, as in every problem of statutory construction, the cited statutory provisions would have to be construed in the light of other statutes of the States relating to the legal incidents of establishment of new highways; and, since judicial conservatism tends to construe statutes as implying common-law conditions, it would be desirable for the limited access legislation to be amended so as to provide that where a new highway is designed and laid out as an expressway no easement of access is retained by or conferred upon abutters, that no payment for extinguishing such easement shall be paid, and that only damages for the land taken shall be paid without including in said damages the loss of access to the new road, and the resulting enhancement of land values, especially in urban areas, that

would result if unlimited access to the new expressway were given. The Texas statute quoted above explicitly declares that it shall not be construed as giving an abutting landowner a right to object when access is denied him to a new expressway, or freeway. This construction should be followed even without an explicit legislative construction of the limited-access highway statutes which require payment for extinguishment of existing easements of access, for the whole point of the limited-access highway statutes in creating new highways is to deny access rights to abutters, and therefore such highway is never encumbered with a use in favor of the abutter, and there should be no legal necessity of buying up such alleged use, or right of access. However, since very frequently court decisions are unpredictable, it is considered advisable that legislation be drawn so that no possible doubt may remain on the question.

The form of the restriction as drafted in the conclusion to this argument and brief declines to give a property right or easement of access to new expressways from abutting land. It is an appropriate amendment to the types of statutes referred to above, negativing by legislative action the grant of access rights to expressways on new locations. By appropriate changes in language such provision might be applied to any new highway facility, whether an expressway, or simply a dangerous or congested section of a road. The legal means of accomplishing this needed result is thus quite simple in its terms, but far-reaching in its effects on highway transport.

CONCLUSION

The foregoing decisions recognize the power of private persons and of cities and States to dedicate land for highways under the conditions restricting the use of the new highway which were stipulated when the highway was established. Some of the conditions deny access by abutters on foot and by vehicle, some exclude access by abutters and others using vehicles and permit pedestrian use only. Other conditions exclude loaded vehicles, permit winter travel only, forbid turning to the left except at designated places, etc.

The point of interest is that the abutter receives or reserves no grant of unlimited access, and the cases have held he is entitled neither to damages nor an injunction, when access is restricted by the conditions of the original dedication of the highway. We repeat, this power to restrict access at the dedication of a highway, approved by public officers and courts accepting for the public the restricted dedication, affords a legal instrumentality for controlling access to expressways and limited access facilities without liability in damages to owners of abutting land; and the use of the power to restrict abutter's access to expressways and limited access facilities is in harmony with the long-established doctrines of easements exemplified in precedents heretofore presented. Traffic engineers and administrators may be interested in the decisions and authorities relied on to prove access to expressways and other limited access facilities on new locations may be restricted at dedication of the facilities without liability in damages.

In Delaware River Joint Toll Bridge Commission v. Colburn (1940), 310 U. S. 419, the Supreme Court of the United States held that the erection of a bridge embankment, on land purchased by the Commission adjoining the rear of property owned by respondents whose front extended to a public street, which embankment crossed and required the closing of certain streets in the neighborhood not immediately adjacent to the respondents' land, gave the abutters, the respondents, no cause of action in absence of a statute imposing liability for consequential damages inflicted by erection of structures wholly on land of the bridge commission acquired by purchase or condemnation. The same doctrine by permitting free use of land acquired for a special purpose without liability for inconvenience to abutters unless the law by positive enactment imposes such liability, would

exclude a claim of damages by an abutter for being denied access to an expressway. An expressway shuts off access by abutters, and so does an elevated bridge approach. To give a cause of action because access is not given, although consequential, economic loss occurs, a special legislative act would be required, under this doctrine.

To establish a highway whose use is restricted (so as to prevent giving to abutters the right of unlimited access to the new road, and to avoid having to pay when no right of access is given), an express provision limiting the use of a highway may be inserted in the deed of land purchased, or in the statutes authorizing the opening of new highways and condemnation therefor. The statutes of such States as New York and Virginia upon the establishment of limited access roads authorize payment for existing easements, and the law of New York expressly forbids creation of liability not already existing by law. These statutes may be applied to the case of a new highway dedicated from the beginning as a limited access highway, and payment would not be required for taking the abutter's right of access, since no such right was ever given, under such construction. To avoid the labor of explaining the analysis of abutter's easements in existing highways and the legal basis thereof, it would be advisable to amend the limited access statutes by adding a clause that the new highways established thereunder shall not be subject to access by abutters, except at points designated by the highway authorities, and damages shall not be allowed because unlimited access is not given, but only damage for land actually taken shall be paid, and the basis of value for such payment shall not include the enhanced value of land having access to the new highway but only the value of the land with such access rights and economic utility as existed prior to establishment of the new highway.

Where existing statutes do not protect the public from liability for not giving access to the owners of land that abuts on new expressways on lands upon which no highway previously existed such statutes should be appropriately amended to safeguard the interests of the public in this respect. It is suggested, therefore, that the State highway departments take cognizance of this important matter so that their legal advisers may consider and determine whether the existing statutes of their States should be amended. Also, it is suggested that any new legislation to authorize the construction of expressways in any State not now having such legislation should include appropriate provision for the protection of the public from liability for not giving access to the owners of land that abuts on such new expressways on lands upon which no highway previously existed. Such provision, whether for an amendment of existing legislation or as part of new legislation, with appropriate changes in language to insure consistency of terminology and purpose, should be, in substance, about as follows:

No easement of access to or from expressways (or like limited access facilities) constructed on locations to which access rights have not existed previously shall be created for the benefit of abutting land by the dedication of such expressways (or other like facilities) pursuant to the statutes applicable thereto except at such controlled points as shall be approved in writing or established for access by the agency having administrative control of such expressways (or other facilities), and the owners of such abutting land shall not be entitled to receive any compensation for not being given access to or from such expressways (or other like facilities) at other than such controlled points. [4] In determining the compensa-

[4] In consequence of not creating a property right of access no damages are due when enjoyment of access is denied. Sauer v. N. Y., supra p. 44, Cf. Purdon's Pa. Stat. Ann., 1942, (Perm. Ed.), Tit. 36, Ch. 1A, Sections 670-206--670-208, providing, "No person shall be entitled to recover any damages for any buildings or improvements . . . placed . . . within the ultimate widths" of pre-empted areas. Under the Pennsylvania act no damages are due because a property right at the specified location was not created, and could not be under the said legislation.

tion to be paid for taking any land or interest therein for such expressways (or other like facilities) the value of the land or interest therein taken and the diminished value of land from which land taken has been severed, if any, shall constitute full compensation, without any allowance for not having access to or from such expressways (or other like facilities) at other than such controlled points.

In States wherein only easements are acquired for highways, courts having jurisdiction over eminent domain proceedings should be empowered to take and award such an estate, or interest less than the fee, as will give the State the right of possession and use of lands condemned for expressways, or other limited access facilities, and exclude access thereto from abutting land except at controlled points approved in writing or established by the agency of the State in control of such expressways, or other like facilities. [5]

The central point of this argument relates to the dedication and establishment of highways subject to restriction of access by abutters to controlled points provided for that purpose. Such restricted dedication requires that the State have, through its agencies or political subdivisions, a right to possession and use of the land on which expressways are to be constructed. Likewise, voluntary conveyances should include the right of possession and use of the land conveyed together with a limitation of access by the abutter to such controlled points as may be provided for that purpose. To enable the State to dedicate a highway of any kind at a new location subject to a prohibition of access from abutting land, the State must have a right to the exclusive possession of the land to be dedicated, and the officers of the State who are authorized to dedicate a new highway must be given power to impose the restriction and must impose it in fact. The process will be clear from doubt if the restriction is imposed in explicit language, and is not left to implication. In States in which unrestricted highways are located on lands owned in fee simple by abutting landowners subject to rights of way in the general public in the nature of easements, in order for the State to have the ownership of an interest in the land which would enable it to impose a restriction against abutters' access thereto the State would have to acquire a right of exclusive possession. When such interest is acquired, then the State in dedicating the highway facility constructed on such land may reserve and restrict the expressway or other facility so that abutters have no access rights, and may dedicate the facility for free flowing traffic without interference from cross-currents of traffic. The purpose of the suggested statutory amendment, above, is to secure the requisite dominion over the land which would entitle the State to specify the uses to which it may be put when opened to the public.

The effect of the foregoing statutory amendments would be to prevent the vesting of the easement of access from abutting lands to expressways located on new routes or segments of routes. This is considered preferable to the procedure of vesting such rights and then extinguishing the same. It has been suggested that only nominal damages need be paid where the right is vested and then extinguished, but no assurance may be had that vested property rights of access to a highway have generally only nominal value. The contrary appears to be the case. (U. S. v. Welch (1909) U. S. Sup. Ct. 217 U. S. 332, 54 L. Ed. 787, per Holmes; Re West Tenth St., Borough of Brooklyn v. West Tenth Street Realty Corp. (1935) N. Y. Ct. App., 196 N. E. 30, 98 A. L. R. 634; Town of Stamford v. Vuono (1928) Sup. Ct. of Errors of Conn., 143 Atl. 245.) If there exists an easement of access to a highway to be constructed in future and if such easement is a

[5] See Troy and B. R. R. Co. v. Potter (1896) 42 Vt. 265, 1 Am. Rep. 325; Atlanta and W. P. R. Co. v. Atlanta B. and A. R. Co. (1906) Sup. Ct. Ga., 54 S. E. 736; Midland Valley R. Co. v. Sutter (1928) C. C. A. 8th, 28 Fed. 2d 163, certiorari dismissed 280 U. S. 521; 155 A. L. R. 393, ann., holding the type of easement held by a railway company in its right of way gives exclusive possession as against abutting landowners.

property right which must be extinguished before an expressway can be established, then such easement would have to be paid for according to its value to the dominant tenement, just as other vested property rights whose actual enjoyment is in the future must be paid for. (See Sec. 233, Vol. 18, p. 867, "Eminent Domain," and "Life Tenants and Remaindermen," American Jurisprudence; Simes "Law of Future Interests" Sections 612, 613, 616 (d).) However, it is not believed that in law any easement of access exists prior to the dedication of a highway.[6] All that exists is the right of a landowner to go from one part of his land to another on which no highway has been constructed. All that is necessary in buying or condemning the land on which a limited access highway is to be placed is to secure a right to exclusive possession of the land. In no accurate use of language can this last be said to be an extinguishment of access rights to a highway, for such rights are created only when the highway is dedicated. All easements are the effects of grants, and the abutter's easement of access to a highway is no exception, since the effect has no existence prior to its cause. Questions relating to adverse use and possession of highways as expressways are outside the scope of this essay, but such adverse user would imply the rights in expressways as established and defined in the statutes and decisions of a State in which such expressway may be located.

Unless by judicial construction of statutes of the type set out above from Virginia, New York or Texas, or by express amendment of statutes authorizing establishment of expressways, access by abutters may be restricted so that there is given the abutter no vested legal right of access to new expressways, millions of dollars of highway funds will have to be paid to buy back the unearned increments accruing to owners of lands abutting on new expressways. Such a result is unconscionable. But recognition by judicial decision of the legal power of restricting the dedication of expressways so as to prevent the vesting of unlimited access rights in abutters, or the enactment of statutes expressly conferring such power of restricting access to expressways at dedication, and the reasonable use of this legal power will reduce the expense of building expressways to relieve traffic congestion and will promote all the economic and social interests which depend upon adequate highway systems. Thus the exercise of this legal power of restricting the dedication of rights of way for expressways is essential to the economical construction of adequate expressways and will promote a healthy economic and social life in all heavily populated parts of the United States.

[6] See pages 54-56 of the brief for decisions supporting this statement. See also the opinion of Mr. Wilkie Cunnyngham to the same effect, "The Limited Access Highway from a Lawyer's Viewpoint," (1948), 13 Mo. L. Rev. 19, 37-40.

LEGAL AND ADMINISTRATIVE CONTROL OF THE ROADSIDE IN OREGON

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The State of Oregon launched a program of location and construction of State highways under a State agency in 1913. The Oregon legislature in that year created a State Highway Commission and empowered it to locate and construct a system of State highways. By the provisions of the law the Commission was composed of the Governor, who then was Oswald West, the Secretary of State, who was Ben Olcott and the State Treasurer, who was Thomas Kay. In 1917 the legislature enacted a new law which embodied many of the principles of the old law, but provided for a Highway Commission of three non-salaried members, to be appointed by the Governor. The new Commission, like the first, was charged with the duty of locating and constructing a system of State highways.

The emphasis of their official obligations was on location and construction. No thought was then given to roadside development. The primary objective was a means of transportation; not scenery or roadside beauty. A companion act was passed by the same legislature, but was referred to the voters for approval. By the companion act the legislature set up a system of State highways which were designated by name or route, which highways the Commission was directed to construct and maintain. By the same act a bond issue of six million dollars was authorized. The highways designated by the State legislature comprised a mileage of approximately 4,000 miles. The citizens of the State approved the act and the Highway Commission immediately went to work.

The commissioners then in office and the succeeding commissioners carried on and now Oregon has approximately 4,805 miles of primary highways and 2,508 miles of secondary highways.

As we have already stated, the emphasis in the beginning was on the location and construction of highways. What was desired was a highway surface on which to travel. Little, if any, thought was given to roadside development or beautification. In fact, instead of roadside beautification we had in many cases roadside desecration. When highway cuts were made, they were often left ragged and unsightly. When fills were made, the slopes were often rough and rocky. Oftentimes waste materials were stockpiled along the highways. We were then trying to meet a demand for highways because then road surfaces were such that if a motorist got 5,000 miles out of a set of tires he was doing well; time, too, was a factor.

In Oregon much highway mileage passes through and is located within forests, where beauty and grandeur cannot, when once seen, be easily forgotten. The building of a highway through these fine forests called for the falling and destruction of beautiful pine and giant firs. A finished highway was then an invitation to owners of timber along the highway to fall the timber and transport the logs to market over the new highway. Only the marketable trees were cut and the dead and unsightly trees were left standing amidst the stumps and debris left as a result of the falling and removal of the stalwart giants of the forest.

Soon the women of the land organized to protest such desecration of roadside grandeur. They enlisted the aid of male citizens and by their joint effort there resulted the enactment of a law in 1921 by which the Highway Commission was authorized to:

> . . acquire . . in the name of the people of the State of Oregon, by purchase, donation or by proceedings in

eminent domain, rights of way, land or trees and ground necessary for the culture and support thereof on or along the course of any state highway, or any public highway within a maximum distance of 300 feet on each side of the center thereof, in any case where the acquisition of such rights of way, land and trees will be for the benefit of the state highway or public highway in aiding the maintenance and preservation of the roadbed of such highway, or aid in the maintenance and preservation of the attractions and scenic beauties thereof

The Highway Commission at once exerted itself under the provisions of that law in the development of a program of acquisition of timber strips along State highways. Soon the value of such acquisitions was recognized, but it was recognized also that the law was too limited. The acquisition of a 300 foot strip of timber left the owner of the land adjoining that strip the right to cut the timber back of the narrow margin, leaving the ribbon area unprotected from strong winds and storms. Therefore, to overcome that situation the same people who urged the enactment of the 1921 act urged the passage of a law with wider opportunities and privileges, so in 1925 the legislature enacted a law, which was subsequently amended and by which the Highway Commission is authorized and empowered to:

Acquire by purchase, agreement, donation, or by the exercise of the power of eminent domain real property, or any right or interest therein, necessary or deemed necessary for the culture of trees and the preservation of scenic places, and other objects of attraction or scenic value adjacent to, along, or in close proximity to state highways, or which may be conveniently reached from or by a public highway, also land and ground necessary for the development and maintenance of parks, parking places, auto camps, camp sites, roadside development, recreational grounds, or resorts, forest or timbered areas, or other places of attraction and scenic value which in the judgment of the commission are necessary for the convenience of the public, and which will contribute to the general welfare and pleasure of the motoring public or road user.

Develop, construct, improve, operate and maintain the places named in the foregoing paragraph to such an extent and in such manner as will best afford to the motoring public and road users necessary conveniences and accommodations and as will contribute to the general welfare of the people of the state or the members of the motoring public using and traveling the highways of the state.

In addition to the statutes already cited, there is a law which was enacted in 1915 which makes it unlawful for any firm, person or corporation to in any manner maintain an advertising sign within the limits of a State highway or on the property of another within view of such highway, without such owner's written consent. That law gives to the Commission authority to remove any advertising sign which has been erected and is being maintained illegally.

In 1939 the Oregon legislature granted to the Highway Commission authority to take not only an easement but the fee title to real properties acquired for rights-of-way or other public use and in addition the Commission is authorized to:

. . when acquiring real property for right of way acquire all right of access from abutting property to the highway to be constructed, relocated or widened on such right of way.

In 1947 the legislature enacted a law which is known as the "Throughway Law," and by that law the Commission may locate and construct State highways as throughways and may under certain conditions relocate an existing highway and construct the same as a throughway. This law vests in the Commission wide authority with respect to roadside controls. In 1949 a law was enacted which denies an abutting owner an approach to a State highway without first getting the permission and consent of the Highway Commission. The only restriction in that law is that in exercising its powers and authority the Commission may not so exercise its powers "as to deny any property adjoin-

ing such road or highway reasonable access thereto."

The western boundary of the State of Oregon fronts on the Pacific Ocean. The shore line from the Columbia River on the north to the Oregon-California State Line on the south comprises a distance of approximately 325 miles. By virtue of a federal act which admitted the State of Oregon into the Union the western boundary of the State is fixed in the following language:

> Beginning one marine league at sea, due west from the point where the 42nd parallel of north latitude intersects the same.

That means that Oregon's western boundary is one marine league from the shore line.

In 1899 the legislature declared by law as follows:

> The shore of the Pacific Ocean, between ordinary high tide and extreme low tide, and from the Columbia River on the north to the Oregon California State Line on the south, excepting such portion or portions of such shore as may have heretofore been disposed of by the state, is hereby declared a public highway and shall forever remain open as such to the public.

Following the admission of the State into the Union, some portions of the shore of the ocean were alienated by State authorities and title thereto vested in private owners, but in 1947 the legislature declared that "no portion of said shore shall be alienated by any of the agencies of the State."

The Oregon legislature has said:

> It shall be, and is hereby made, unlawful for any person to dig up, cut down, injure, destroy or in any manner remove any trees growing upon the right of way of any state highway without first procuring the written consent of the Oregon state highway commission so to do.

The Oregon legislature has sought to protect the wild flowers of the State and especially those growing along public highways, and in this connection said:

> It hereby is declared to be the duty of all citizens of this state to protect the wild flowers of this state, in this act referred to, from needless destruction and waste.

Following that declaration the legislature said:

> It shall be unlawful for any person, firm or corporation within the state of Oregon to wilfully or negligently cut, dig up, trim, pick, remove, mutilate or in any manner injure or mar any plant, flower, shrub, bush, fruit or other vegetation growing upon the right of way of any public highway within the state of Oregon, or upon public lands, or upon the land of another within 500 feet of the center of any public highway, without the written permit of the owner, signed by the owner or his authorized agent . .

The legislature, however, exempted from the provisions of the act employees of the Federal Government or of the State or of a political subdivision of the State engaged in work upon any State, county or public road while performing such work under the supervision of the Federal Government, the State or a political subdivision thereof.

SUMMARY

By way of summary of statutory authority vested in the Highway Commission which now prevails in the State of Oregon we submit the following resumé:

1. Authority to locate, construct and relocate highways.
2. Authority to acquire land bordering on highways for the purpose of preserving trees and promoting landscape values.
3. Authority to acquire and control access to and from highways.
4. Authority to regulate approach roads.
5. Authority to acquire and develop parks, recreational areas and other places of attraction and public interest.
6. Authority to construct throughways, regulate access and preserve and develop roadside beauty and scenery.
7. Authority to regulate the use of the shore of the ocean.
8. Authority under certain limits to control and regulate outdoor adver-

tising.

9. Authority to connect highways with the shore of the ocean by constructing pedestrian trails and bridle paths.

10. Protection of trees and wild flowers.

The foregoing is a general list of authorities now provided and enjoyed in Oregon. Later in this paper we shall enumerate new statutory authorities which the Commission proposes to request the Oregon legislature to enact when in session in 1951.

ADMINISTRATIVE RESULTS

Acting under the law by which the Commission is authorized to acquire land bordering State highways and to acquire land suitable for parks, and to preserve scenic beauty or other values along or in the vicinity of State highways, the Highway Commission has to date acquired 181 separate areas all of which are supervised by the State Parks Superintendent; in fact, these areas were purchased or otherwise acquired by the Highway Commission influenced in a large measure by the recommendation of the State Parks Superintendent. These areas comprise a total of approximately 64,000 acres and embrace a wide variety of recreational interests. Of those 181 areas 114 have, in one way or another, been developed for use and enjoyment of the general public. Some of them border on main State highways and all are easily reached over well constructed highways so that all are available to the traveling public.

This development program was advanced during the Civilian Conservation Work Program and the progress made under that program has resulted in a major contribution to the use and value of State parks and their enjoyment by our citizens and by the thousands of visitors who annually travel Oregon highways. Both the acquisition of like areas and the development program are continuing to the extent that funds are available therefor.

The Highway Commission, in addition to the acquisition and development of areas for park purposes, has acquired large areas which have been dedicated to the widening of highway rights-of-way, and by so doing the Commission has made possible the preservation of existing stands of timber and has also made possible the reforestation of lands from which trees have been removed. The Commission has in some instances followed a policy of leasing from federal agencies timbered strips or areas which were not for sale, but which later were exchanged by the government for timbered lands owned by counties. Then the government lands acquired by the counties were conveyed to the State pursuant to agreement between the county and the State.

The Highway Department is engaged in another interesting activity and that is the establishment of historical landmarks or signs by which points of major historical interest and value along State highways are marked. These markings are easily read by travelers on the highway. At present there are thirty-six such signs or monuments now installed and maintained by the Department. These signs contain brief instructive scripts indicating the historical significance of the spot marked. These markings are made possible by widened right-of-way or by widened shoulders, or in some instances by the development of a small parking area.

By reason of the authority vested in the Commission, to which reference has heretofore been made, the cutting, trimming or other treatment of trees within the right-of-way is prohibited without permit and regulation by the Highway Commission. In Oregon, power poles, telegraph poles, telephone poles and other instrumentalities needed by public utilities are given a free right to occupy the right-of-way of a public highway, but such use as we have just stated is under certain regulations and control of the Highway Commission with respect to State Highways.

Likewise, as we have said, the citizens of Oregon are required to protect all flowers and other vegetation growing within the right-of-way, or growing without the right-of-way for a specified distance.

Access to State Highways from abutting lands is regulated by the

statute mentioned which denies to an abutting owner the right to construct an approach road without the consent of the Highway Commission.

Within the authority vested in the Commission there have been constructed numerous off-the-highway parking areas and facilities thus making it possible for highway users to leave the highway and park with safety and convenience while they enjoy superb view afforded at chosen locations. The Highway Commission has recently adopted a program which includes, among other activities, the development of roadside picnic areas for the convenience, enjoyment and relaxation of highway users. This program was initiated in 1948 and since that date thirteen areas have been placed in use, seven are now under construction and four additional areas have been approved for construction. It is proposed that this program will be continued within reasonable bounds and until all of the major highways of the State have this road-user service. These areas in development are of comparatively simple design employing safe off-the-highway parking, picnic tables and garbage cans for the disposal of refuse. Where reasonably possible, water is made available and in some instances simple cooking facilities are provided.

Any consideration of roadside development in Oregon calls for recognition of areas and facilities provided by the National Forest Service and National Park Service. There are here in Oregon two National Park Service areas, both of which are provided with picnic and camp facilities for the use of the general public. The major portion of the mountains and forested areas of the State are under Forest Service jurisdiction and there have been established numerous campgrounds and picnic areas, all of which are made available to highway users. An incomplete compilation discloses a minimum of thirty-eight Forest Service public-use areas along our primary highways.

One of the most difficult problems in Oregon has to do with regulation or control of outdoor advertising. A law to which we have heretofore called attention makes it unlawful for any person, firm or corporation to erect or maintain an outdoor advertising sign within the limits of the right-of-way of a public highway or on the property of another without the consent of the owner of such property. The Highway Commission is vested with authority to remove advertising signs which have been erected within the right-of-way, but of course, with respect to land abutting upon the highway the owners of advertising signs can, in most instances, easily procure a permit from the owner of the abutting land. The objections to outdoor advertising signs are just as appropriate to signs on land abutting the highway as they are to signs within the right-of-way. It is hoped that by the enactment of a zoning law some of these evils and offenses may be overcome or controlled.

The State of Oregon enjoys a wonderful advantage and privilege by reason of having its western boundary marked and defined by the Pacific Ocean. Highway 101, which is a State highway and also a federal highway, follows in a general route the Pacific Ocean. That highway in length is 386.41 miles. The shore of the Pacific Ocean from the Columbia River on the north to the Oregon-California boundary on the south is 325 miles in length. Until recently the State Land Board was permitted to alienate parts of the shore of the ocean, but that authority has been removed and has been denied to any and all State agencies. Prior to the enactment of the recent statute 23 miles of the shore of the ocean or tide lands had been alienated. The Highway Commission has recently repossessed a substantial mileage of that alienated area.

The Oregon legislature has provided by statute certain regulatory measures and controls with respect to the shore of the ocean. (a) It has declared the shore of the ocean between ordinary high and extreme low tide to be a public highway. (b) It has provided that no portion of the shore of the ocean may be alienated. (c) It has provided that no sand, rock or other natural product of the ocean or beach other than fish or

wild life, agates, or souvenirs shall be taken from the beach without permit issued by the Oregon State Highway Commission. (d) It has made the rules of the road applicable to the shore of the ocean. (e) It has regulated the setting of bonfires on the shore of the ocean

The Highway Commission has purchased from private ownership areas which have been devoted to State parks and which comprise 48-1/2 miles of the 325 miles of the shore line. The Commission has been authorized by law to construct pedestrian paths and bridle paths from the Oregon Coast Highway to points on the beach, thus making it possible for members of the general public to reach and enjoy the beach at places where topography is such that motor vehicles can not be driven to the beach.

The Highway Commission is now engaged in the acquisition of a tract of land in Curry County which will cover a shore line distance of fifteen miles and an acreage of 1500 acres. This area will lie between the highway and the beach. A portion of this area is owned by an English syndicate, and the English syndicate just recently, by bargain and sale deed, conveyed to the State of Oregon for park and recreational purposes all surface rights to 370 acres of the syndicate's holdings and that conveyance was made as a gift. The syndicate has retained the subsurface rights because of mineral deposits which lie beneath the surface. In connection with the acquisition of the land from the English syndicate it may be interesting to cite the fact that when the execution of the deed was notarized the notary public, when stating the date of the expiration of his Commission, said "My Commission expires with my death."

The Highway Commission has, by appropriate letter recognized the splendid gift and service made by the English syndicate and since one of the Commissioners left recently for London he took with him the Commission's letter and presented it in person.

Oregon is a State possessed of much recreational value such as rivers, streams, mountains, valleys, water falls, forests, fishing, hunting and ocean grandeur. The Highway Commission has endeavored to bring all of these values and attractions within easy reach of the highway user. While making these places available to the tourist and the every day highway user, the Commission struggles to protect its highways by roadside development and control, by the planting and preservation of roadside vegetation and by providing rest stops for weary travelers. Evidence of the value and appreciation of the Commission's efforts are recorded in the ever-increasing volume of mail calling for travel information. So pressing has become this phase of our work that the Commission has established a Travel Bureau which employs a director and eight helpers who are kept busy answering mail and sending out requested information. Samples of some of such information has been delivered to the Research Council.

The Oregon Highway Commission will ask the 1951 Legislative Assembly to provide some new legislation which the Commission believes is essential if the natural values which Oregon possesses are to be adequately preserved, and if the highways constructed with the road users' money are to operate to full capacity.

One of the subjects which the Commission will offer for consideration is requested authority to control parking on highways. A second subject will be a request for the passage of a zoning law by which more effective control of outdoor advertising will be possible. A third bill which has been prepared and will be offered to the legislature is one which will restore to the Commission authority to sell bonds in the amount of sixty million dollars, the proceeds derived therefrom to be employed for the purpose of hastening proper reconstruction of our main highways so that the road user may obtain better service and greater safety. If the Commission is granted this authority there will be released from current revenues more money for roadside development and the improvement of park and rec-

reational areas.

What I have said is a feeble expression of the facts and conditions which prevail in Oregon. What we have done is not enough, but the spirit and emphasis back of our task, supplemented by our love for and our appreciation of Nature's gifts to Oregon, will make it easy to carry on to greater accomplishment.

MINNESOTA ROADSIDE SURVEY
PROGRESS REPORT ON ACCIDENT, ACCESS POINT AND ADVERTISING SIGN STUDY IN MINNESOTA

O. L. Kipp, Assistant Commissioner and Chief Engineer,
Minnesota Department of Highways

Minnesota, in cooperation with some 13 other states, actively participated in a study to determine the degree of relationship that exists between highway accidents and geometric design features. The study was initiated in 1947 in response to a joint request made by the National Safety Council and the Bureau of Public Roads. The compilation of data in the field and in the office, as well as the entering of information on tabulating cards, followed the procedures outlined by the Bureau of Public Roads. A duplicate set of tabulating cards was forwarded to the Bureau of Public Roads for an analysis which included similar information supplied by the other cooperating states.

In 1948, while the field work for this study was still in progress, the Bureau of Public Roads suggested that Minnesota include with this study an inventory of all advertising signs and access points along the routes comprising the original study. From this additional information an analysis of the effect of advertising signs and access points on highway accidents was to be made.

Although all of the rural mileage on U. S. 52 in Minnesota was originally selected as the study route, it was subsequently felt that its 370 miles did not adequately reflect the several predominant types of rural routes in the state. To overcome this deficiency and further enhance the value of the survey, an additional 140 miles of several rural trunk highways were added, increasing the study to a total of 510 miles.

The mileages of various types of roadway included in the expanded study were: 420 miles of two lane roadway, 31 miles of three lane, 27 miles of four lane undivided and 32 miles of four lane divided roadway. This paper, however will deal only with the two lane roads which constituted over 82 percent of the mileage studied.

The several roadway elements which were encountered on the 420 miles of two lane roadway and their frequency per mile are shown in Table 1.

TABLE 1

FREQUENCY OF ROADWAY ELEMENTS

Roadway Element	Frequency per Mile
Tangent	1 03
Curve	0 99
Intersection	1 52
Structure	0 13
Railroad Crossing	0 04

As would be expected, the tangent and curve sections occurred with approximately the same frequency: 1.03 and 0.99 respectively. Intersections of all types had a frequency of 1.52, structures 0.13 and railroad crossings 0.04. The frequency of the two latter elements were deemed insufficient to warrant detailed analysis at this time.

The tangent and curve elements, the only ones which are adaptable to linear measure, comprised 343 and 77 miles respectively of the two lane roads.

There also were 639 intersections of all types on these roads. Of these, 374 were of the junction type (T and Y) and 265 were of the crossing type. These were actual intersections with public roads and should not be confused with access points which will be discussed later.

The original survey called for a study of accidents which occurred during 1948, but preliminary tabulations revealed their occurrence on certain roadway types was insufficient to permit a complete analysis. It was therefore decided to include accidents occurring on these roadways in 1949 and, in order to present the accident data on the customary annual basis, it was necessary to average the 1948 and 1949 accidents.

Advertising signs, placed on roadsides for the sole purpose of attracting the attention of the motorist, were one of the roadside features studied. The survey disclosed that there were 4,069 advertising signs located along the two lane roads. This number does not include, however, those signs which were attached to or painted on buildings along the road.

These advertising signs varied greatly with respect to size. Nearly 49 percent had a surface area of less than 12 square feet. Included in this group were the multitude of small signs found along most rural highways with 57 of these being series signs, 41 of which were of the "Burma Shave" type. According to commercial display authorities, those small signs are the most difficult to control with respect to their location along the road because of their comparative low cost. Only 828 or approximately 20 percent of all the signs were of the large or "billboard" variety, having areas in excess of 72 square feet. The remaining 31 percent of the signs were of an intermediate size ranging from 12 to 72 square feet in area.

The shape of the signs was given consideration because of their possible conflict with highway markers and directional indicators. Of the ten categories of shapes used, the five most predominant were horizontally rectangular, vertically rectangular, square, round, and diamond shaped. By far the most popular were the horizontally rectangular signs which accounted for over 63 percent of all the signs.

Color, used to attract the motorists' attention to the message conveyed on these signs, was also noted. Because of the numerous color combinations used, it was necessary to differentiate between that used for the message and that used for the background. The colors used most frequently to convey the message were white and black. White was used for this purpose on approximately one-third of the signs and black was used on 23 percent of them; brown, green and orange being used on the remaining 44 percent of the signs. The most popular background colors were white, yellow, and red, in that order, although little preference was shown as to choice of these three colors. Other colors were used in a few instances, either to convey the message or to serve as background. Brown apparently was the least desirable of any color.

In considering the use of illumination on signs, it must be remembered that the study sections were rural in character and signs attached to or painted on roadside buildings were not included, consequently, most of the signs were of the non-illuminated type. Our study revealed that approximately 79 percent of the signs had no illumination. Reflectorized signs accounted for another 15 percent and the remaining six percent were illuminated by incandescent, neon or some combination of lighting.

Considering all of the physical aspects of these signs, it was interesting to note that out of the 4,069 signs only 21 used either red or green lights, or words such as "Stop", "Caution,", "Slow", etc. or an arrow as a sign or within a sign.

The proximity of signs to the center of the roadway is apparently influenced

to some extent by the practice of attaching the small signs to fences along the right-of-way boundaries. More than 90 percent of all the signs were located from 30 to 100 feet from the center line of the roadway, with the median distance for all signs being 51.6 feet. Only 15 signs were located 200 feet or more from the center line. It was of interest to note that 551 or 13.5 percent of all the signs observed were found to be located on the premises of establishments producing or merchandising the product advertised.

The frequency of signs per mile of tangent and curve indicated a preference for locating signs on curves. Although there were 3,133 signs on tangent sections and 936 on curve sections, the frequency per mile on curve sections was significantly greater than on tangent sections, being 12.1 as compared to 9.1.

A total of 620 signs located on tangent sections and 224 on curve sections were located within a distance of 200 feet from an intersection. The incidence of these signs will be considered when the variance of accident rates at intersections is later explored.

Access points were the other roadside features for which information was obtained during the course of the survey. For study purposes, any provision for vehicular access to the study roadway was considered an access point, and using this criterion a total of 4,257 such access points were tabulated. To provide a comparison of the relative importance of these access points, they were classified as to the kind of facility served. These facilities included farm dwellings, home units, fields, public roads, private roads, public buildings, manufacturing plants, cemeteries and churches, public parks, historic sites, combinations of the above and commercial roadside activities. These commercial activities included taverns, gas stations, cabin camps, motels, small and seasonal businesses.

Field entrances, facilities which provide little traffic service, were the most frequently encountered type of access point. The 1,463 observed along the two lane roads accounted for 34 percent of the 4,257 access points. The next in frequency of occurrence were public roads and to tabulate these points on a basis which would permit comparison with frequencies of other access points, a crossing type intersection was considered as two access points. A total of 1,018 or 24 percent of all access points were thus considered to serve public roads. Access points serving farm dwellings ranked third in the frequency of occurrence and accounted for 860 or 20 percent of the access points. Home units and roadside activities, which were fourth and fifth in sequence, numbered 474 and 337 respectively. The large number of access points serving farm dwellings or identified as field entrances reflects the predominantly agricultural characteristics of the area traversed by the study roads. With the exception of the public roads, which are usually thought of as intersections, very few of the access points were controlled with stop signs.

The angle of incidence was measured for all access facilities. Uniformity in recording these angles was insured by always measuring them either to the right or left from the center line of the roadway. For 78 percent of the 4,257 access points the angle of incidence varied from 70 to 110 degrees.

Visibility, often a contributing factor in accident occurrence, was evaluated for these access points. The visibility was considered restricted if obstructions did not permit an unlimited view of the study route from a point on the access facility 40 feet from the center line of the roadway. In this manner 401 or only about 10 percent of the access facilities were found to have restricted visibility. The causes for these restrictions were the customary ones such as banks, trees, brush, buildings or signs. There was little indication that the angle of incidence had any influence upon visibility at the access points.

Many other characteristics of rural highways were evaluated and tabulated such as traffic volumes, shoulder widths, kinds of terrain, surface types, surface widths, and operating speeds.

Time does not permit a review of the findings with respect to these other characteristics.

In making the compilation of accidents to be used for this study, all accidents which occurred on the study roadway, regardless of cause, were included. As stated previously, this was done for those occurring during 1948 and 1949. The resultant annual average for the two lane roads was 730 accidents.

The occurrence of these accidents with respect to the various roadway elements studied were: 393 on tangent sections, 119 on curve sections, 201 at intersections and only 17 at structures and railroad crossings. The frequency of accidents per mile on tangent sections is considerably lower than that for

TABLE 2

ACCIDENTS AT CURVES

Degree of Curve	Rate per Million Vehicle Miles
Less than 3	1 37
3 but less than 5	2 48
5 and over	3 86

curve sections being 1. 14 as compared with 1. 54 on curves. The 201 accidents assigned to intersections averaged but 0. 31 per intersection.

Accident rates per million vehicle miles of travel were computed for tangent sections of routes carrying specified traffic volumes. This rate was 1. 0 for the tangent sections having an annual daily traffic volume less than two thousand vehicles per day, while sections carrying two to four thousand vehicles per day had an accident rate of 1. 9 per million vehicle miles. Routes carrying more than four thousand vehicles per day had an accident rate of 1. 5 per million vehicle miles, but the mileage in this traffic volume group was relatively small.

Accident rates for curve sections of the study routes were computed for each degree of curvature. However, in order to reduce the fluctuations in rate which could be attributed to the variation in sample size, the data was grouped by degree of curvature increments. The accident rates for these groupings are shown in Table 2.

In order to make possible a logical analysis of accidents which took place at intersections, certain intersections with the accidents assigned to them were eliminated from consideration. One such group were the few intersections which had traffic volumes exceeding 5,000 vehicles per day. Also eliminated were those which had no provision for traffic control. All the remaining intersections had traffic volumes less than 5,000 vehicles per day and were traffic controlled.

These intersections were then classified according to type, whether

TABLE 3

ACCIDENT RATES FOR INTERSECTIONS*
BY PERCENT CROSS TRAFFIC

	Crossing Type		Junction Type	
	No	Acc Rate**	No	Acc Rate**
Less than 10% Cross Traffic	250	0.40	343	0 21
More than 10% Cross Traffic	8	3 20	14	1 16

* With controls

** Per million vehicles per year (intersectional volumes)

crossing or junction type. They were further classified according to the percentage of cross traffic. In Table 3 are presented the accident rate data obtained.

As might be expected, accident rates for crossing type intersections were higher than those for junction type in both cross traffic volume groups. The accident rates for intersections having more than ten percent cross traffic were several times greater than those for intersections having less than ten percent cross traffic.

The intersections having less than ten percent cross traffic were segregated and reclassified as to frequency of advertising signs located at or near these intersections. They were then grouped according to the frequency of signs and the accident rates for each group were computed. The results are shown in Table 4.

It is interesting to note that the accident rates for both types of intersections were considerably higher at intersections having four or more signs than at intersections where there were less than four signs.

TABLE 4

ACCIDENT RATES FOR INTERSECTIONS* BY FREQUENCY OF SIGNS

Sign Frequency	Crossing Type No	Crossing Type Acc Rate**	Junction Type No	Junction Type Acc Rate**
No Signs	103	0 31	146	0 15
1, 2 or 3 signs	111	0.32	155	0 20
4 or more signs	36	0.91	42	0 44

* With controls and less than ten percent cross traffic

** Per million vehicles per year (intersectional volumes)

An investigation was made regarding the accident rates for roadway sections along which were located access facilities serving commercial roadside activities. These sections were defined to include the portion of roadway within 300 feet of one or more of these activities. The 337 roadside activities created 177 such sections which included 25 miles of road. The average number of vehicles which traveled these 25 miles was not appreciably different from the average traffic volume for the entire 420 miles of two lane roadway.

Of the 512 accidents assigned to all tangent and curve sections on the 420 miles of two lane roadway, 81 or slightly less than 16 percent occurred on the 25 mile composite section which represented only six percent of the total miles studied. Accidents assigned to intersections were not included. Accident rates per million vehicle miles were computed for each roadway group and are presented in Table 5.

The accident rate of 3. 80 for road sections fronting these roadside commercial activities is significantly greater than the 1. 45 rate for the remaining sections of the roadway.

A comparison of intersection accidents on these 25 miles of road with intersection accidents on the remaining mileage definitely substantiates the variance found on tangent and curve sections. There were 69 accidents at the 134 intersections located within the 25 miles. Thus it was found that over 34 percent of the intersectional accidents occurred at only 21 percent of the intersections.

TABLE 5

COMPARISON OF ACCIDENT RATES ON ROAD SECTIONS WITH AND WITHOUT ROADSIDE COMMERCIAL ACTIVITIES

	With Activities	Without Activities	All Road Sections
Length in Miles	25	395	420
Number of Accidents	81	431	512
Million Vehicle Miles	21.325	297.375	318 700
Accident Rate	3.80	1.45	1 60

The foregoing discussion constitutes a brief resumé of the more important findings thus far in the Minnesota Roadside Study. The possibilities of evaluating the significance of the contributions made by roadside features and roadway characteristics to accident occurrence have not been exhausted.

The volume and variety of the information obtained in the course of this study had the initial tendency to overwhelm the analyst. The magnitude of the relationships which it was possible to develop forced those in charge of the study to devise new methods for handling the data and the result has been the adoption of a new system of arraying the information on tabulating cards. With the adoption of this system, further exhaustive analyses are now possible.

With the completion of these analyses, a comprehensive report will be prepared summarizing the results of the survey.

THE VOLUNTARY COOPERATION PLAN FOR ROADSIDE IMPROVEMENT IN NEW HAMPSHIRE

Lloyd V. Sawyer, Secretary,
New Hampshire Voluntary Roadside Improvement Association
Concord, New Hampshire

A friend of mine who operates a very successful tourist business in the White Mountains of New Hampshire, knowing that I was preparing this paper, recently handed me a significant clipping which he took from the Boston Post. It was written by the Reverend Clarence Fuller of the First Congregational Church of Melrose, Massachusetts. And may I add here that this clipping has a special significance for me, as the setting for this story is very near my home. The title of it is "Nature's Fulfillment."

> I stood at the edge of a brook in Franconia Notch last summer, and admired the beauty that was there. It was some distance from where the water comes off the mountain side, and here the brook was wide and shallow, the water hardly moving above the white sand. There were some signs of nature's fury. On the banks the gravel was washed out from under the roots, and some of the sand from the stream's bottom had climbed the bank.
>
> It was good to look at. Only one thing disfigured the loveliness of the picture There was a broken beer bottle in the middle of the shallow stream
>
> What thoughts you think!
>
> Men disfigure nature, but it is also men who give it significance It doesn't achieve its fulfillment until some human eye has looked upon it, until some man has used it for his own enrichment, or turned it to some benefit for his fellow men. Our sin is that we can so disfigure God's creation, inside and outside ourselves. Our glory is that we have been given the senses, and the ability, and the ideals, and the privilege of taking God's creation and using it for something that conforms with His will and purpose.

The parallel of this disfiguration of a beautiful picture along this mountain brook, and the disfiguration of another phase of God's creation, or roadside scenery, is very evident.

The problems experienced in New Hampshire as a result of the increasing use of roadside advertising are basically similar to those of other states. Largely rural in character, the State is richly endowed with natural scenic beauty which includes a seacoast, lakes and mountains. We have over 50 mountain peaks that are 4,000 feet or more in elevation, and 149,000 acres of lakes and ponds. New Hampshire is within easy reach of urban areas of the Northeastern States. Our recreational business has been extensively developed until it now represents our second largest source of income.

Because New Hampshire has so many tourist facilities, it logically follows that there is a recognized need for essential roadside advertising to acquaint our guests with business services offered for their convenience and comfort. But around the suburbs of our larger towns and cities, there has grown up a succession of small roadside establishments, many of which might be ruled out by sound zoning practices. In conjunction with these establishments, an ever lengthening parade of advertising reaches out into rural areas. And in our recreational areas, all too often, products advertised or services offered are not required by tourists.

This type of roadside use has irritated civic groups and solid business people of our State. It is strongly felt by increasing numbers of visitors and residents alike that continuation of such roadside practice will seriously depreciate the attraction of the natural features that have brought visitors to our vacation land. Within State and

Federal reservations and forested areas, roadside advertising and business is prohibited. But such places have become virtual islands in a sea of commercial roadside use. So it is time for us to make an accounting, to determine a course which can best benefit all.

Honorable Sherman Adams, our Governor, has long had the civic interest of a real conservationist. Since his election he has been the recipient of many complaints concerning our roadsides. Some emanated from people who criticized the Highway Department's toleration of advertising which trespasses within the rights of way. Others dislike the litter thrown from passing vehicles, and still others pointed to signs erected on private property adjacent to the road. Disturbed over these complaints, Governor Adams requested Commissioner of Public Works and Highways, Frank D. Merrill, ex-leader of "Merrill's Marauders" of World War II fame, to take action. The result was a threefold program as follows:

1. Enforcement and publicity given to a law forbidding the throwing of trash on highways.

2. Establishment of a permit system which allowed certain signs to be erected on highway rights of way under given conditions, but resulted in wholesale removal of all others.

3. A Voluntary Control Plan was set up with the cooperation of the N. H. Outdoor Advertising Association to administer signs erected "off" highway rights of way. It is this plan that I have been requested to describe.

Most of you are probably familiar with the general features of the Voluntary Control Plan. According to our records, it was prepared by the National Outdoor Advertising Association in 1948 when legislation to govern roadside advertising was pending in several of the States. It is sometimes said that it was put forth by the advertising lobbies to forestall legislation. It was presented in New Hampshire in 1948 but not considered favorably. In February of 1950 the plan was again proposed, and an agreement was made to offer the facilities of various State agencies as a means for putting the Voluntary Control Plan into action. A program was presented to us by the N. H. Outdoor Advertising Association. It has been known as the Tennessee Plan. After a study of certain information on the Tennessee Plan, we were told by other sources that the plan had never worked anywhere. But as we New Hampshire people are not too different from the folks from Missouri, we had to be shown.

To start the ball rolling, Commissioner Merrill authorized a spot survey of commercial occupancies and advertising over selected highways of the State. The survey was done on a 50-50 cost basis with the N. H. Outdoor Advertising Association during the month of April. We realized that a more accurate check could have been made in July or August because many signs had not been reerected after winter storage. Data from this survey was compared with that from a survey of the same highways made in August 1947 by the N. H. Outdoor Advertising Association.

Even at this early date, results were startling. Both commercial occupancies and roadside advertising had increased by great percentages and in approximately the same proportion.

On June 16 Commissioner Merrill called all parties interested in the consideration of such a study of roadside conditions to a meeting held in Concord. Responding to the call were representatives of the outdoor advertising industry, such as the beverage industry, hotel and cabin owners, small sign businesses, etc. Also present were representatives of civic groups which are currently seeking improvement, and representatives from the various State agencies concerned, including the Department of Public Works and Highways, Forestry and Recreation Commission, and the Planning and Development Commission.

Commissioner Merrill opened the meeting by explaining the reasons for our efforts. He commented that though there was some doubt as to the success of the Voluntary Cooperation Plan elsewhere, he felt we need not take the same attitude as to the probability of its success in New Hampshire. He

said that, at present, we had no other alternative in New Hampshire if we hoped for improvement, and that he felt that it was worth a good try. The educational values received while we were taking an account of ourselves would be in themselves worth the expenditure of the efforts.

After a bit of persuasion, the General accepted the Chairmanship of the Association. Immediately he suggested that we start the process of drawing up a code of ethics so that we would have a measure by which to evaluate conditions. There was much discussion about signs, and at times there was some evidence of a bit of heat being generated. But, in general, the conversations were considerate. It was concluded at this meeting that we did have some sick roadsides and that we should try some remedy. We adjourned resolved to meet again in sixty days at which time each member would bring in proposals for the new code of ethics.

A bit of humor has entered into our work at times. The first meeting was adjourned without any consideration being given to an organizational name. Taking a cue from the fact that it was advertising which precipitated the formation of the organization, and that control must be what we were after, letterheads were printed for the volumes of correspondence expected. These letterheads carried the name "Voluntary Association Control Outdoor Advertising." The first letter from each word spelled VACOA, much easier to say than the long title. Repercussions were not long in making their appearance. The code proposals presented by the N. H. Outdoor Advertising Association at the second meeting provided for the consideration of many other unsightly things along the roadsides other than advertising. The name VACOA was called a misnomer to say the least. One member said that this was undoubtedly another concoction of governmental alphabet soup, this time with a Republican flavor. So, the name was dropped at the suggestion of the representative from the Roadside Business Association. And on his recommendation we unanimously accepted the name of N. H. Voluntary Roadside Improvement Association.

At the second meeting held in September, the N. H. Outdoor Advertising Association produced a code, which in theory at least, could be applied by voluntary means to help our roadsides. It was presented to the meeting as the Minimum Voluntary Standards for Roadside Business Along Rural Highways, as accepted by their national association. The code gives consideration to roadside business in general and not advertising alone. The bulk of our discussion at the second meeting ranged around acceptance of each of these code items with slight changes.

The article in the accepted code which called for restraint from advertising in "areas of unusual scenic beauty" has provoked considerable discussion from the beginning. Determination of these so-called "scenic areas" was left to each of the Regional Associations of the State Planning and Development Commission. It was felt that these local organizations were best qualified to submit such proposals due to their greater familiarity with their own local scenery.

Perhaps it would be helpful here to familiarize you with our State Planning and Development Commission. The Commission's headquarters is in Concord, the State capitol. The entire State is divided into six areas, and each area has its own Directors and an Executive Secretary who actually is the key man in the conduct of affairs in each Region.

To each of these Regions, our Association's assignment of classifying the "areas of unusual scenic beauty" seemed a Herculean task. Many factors are involved, and each person's views are quite different as to what is actually "unusual." We have three typical kinds of scenery in New Hampshire ranging from the rugged mountain areas in the northern part of the State to the more central region of lakes where the mountains are not as high, down to the lowlands and the seacoast. Due to this difficulty in making decisions, only two of the regional secretaries were

ready to present their proposals at our third meeting held on November 28th.

During the intermission between the second and third meetings, realizing that civic representation in our effort was not up to expectations, I contacted many more groups. There was feeling that any falling off of interest by either side at this early stage would dampen the spirit of things so much that the plan might fail. The attendance of the advertisers was good. But where things have to be done from the cooperative standpoint, and all judgments are to be the result of frank discussions, give and take, success depends entirely on a balance. No one is going to give ground unless he is being pushed a little. When this balance is disrupted, one side will usually run out on the other.

Our Chairman, Commissioner Merrill, called the third meeting for November 28th. The attendance was better than at the second meeting and in much better balance. The salient topic for discussion was the decision on "areas of unusual scenic beauty." As I have said previously, two of the regions presented their proposals. It is our aim, according to the accepted code, to rid such scenic areas of irrelevant or undesirable signs and attempt to prevent any new installation. A reasonable attitude must be taken. The organization clearly realizes that we cannot declare an area scenic and get anywhere by trying to convince an orchardist, for example, that he should not erect a sign in front of his farm advertising that he has apples for sale. We realize that we wouldn't get far telling a man who has an inn "off" the highway that he should not put a directional sign at the intersection. It is our hope that we might be successful in making recommendations in such cases leading to signs which are not offensive. Excessive advertising and advertising not related to a business in the immediate vicinity, we feel, should be prevented and, where present, should be removed. This is the expressed will of the organized advertising industry in our State as represented within our Association. It is the will of the civic groups. This in itself is a good step. It is true that the advertisers represented in our Association probably will not be able, in all cases, to influence the independent sign painter or the business man who erects his own sign. But if we have the big companies cooperating, that will carry far in public opinion. That would be more than we have ever had before. We have six region associations in New Hampshire and if we can control no more than six scenic areas in each one, that alone will be something indeed.

The most important feature of this last meeting was the creation of a five-member committee to decide on the scenic areas within which advertising limitations would be attempted. It is known as the Scenic Areas Committee. Duties are to consider the Regions' proposals, to visit the areas, make decisions and then recommend the choices to the Association for action. The Chairman of this Committee has for years been a diligent worker in Garden Clubs and Women's Clubs for roadside improvement. Other members on this Committee are from: the N. H. Outdoor Advertising Association, National Roadside Business Association, Northeast Cabin Owners Association and the State Director of Recreation. The Committee will consider each of the six regions separately with the advice of their Executive Secretaries.

On December 8 the first Scenic Areas Committee meeting was held. Attempts to define an "area of unusual scenic beauty" and methods of classifying routes according to various factors were unsuccessful. The Committee concluded that though it was a time consuming task that all proposed sites as "areas of unusual scenic beauty" would have to be viewed by the Committee, and decisions made on "eye appeal" only.

The Committee members are from various sections of the State. They have traveled much and should be well qualified to make the type of decisions required. At this first Committee meeting, the decisions submitted by two Regional Secretaries were considered. Due to the Committee's knowledge of the areas involved, they

were able to make decisions on eight of the proposals. Recommendations by this Committee to the next Association meeting will be for the acceptance of four of the proposed areas and disqualification of four others. The remainder will be visited in early January.

To give the entire program State wide publicity, the Publicity Director for the Department of Public Works and Highways has attended all meetings and has reported all activities to the press. The recent meeting of the Scenic Areas Committee got State wide publicity in daily and weekly publications.

In an attempt to make the program as effective as possible, Commissioner Merrill has sent a copy of the Code of Ethics to the State Police, Highway Division Engineers and Highway Maintenance Patrolmen with the request that any violation observed should be reported to the Association Secretary. A complaint first comes to the Secretary and he, according to the merits of the report, channels it to a State agency, one of the Association member groups, or a Regional Secretary. Where difficulties in decision and results occur, each case will be brought before a meeting of the Association.

In summary I will enumerate some of the results of our efforts.

1. We have all gained a broader realization of the roadside problem through frank discussion.

2. Civic interests have gained a greater appreciation of the right of legitimate roadside business to advertise.

3. Through our across-the-table discussions with the advertisers, we feel that they have taken a clearer view that continued unrestricted roadside advertising could defeat its purpose.

4. We have all received a good education in just how valuable our roadside scenery is to us from an economic standpoint.

5. Concrete results, something that the eye can see, have not been forthcoming in great numbers. The program has taken considerable time to organize. It is more or less of a long time proposition and it is too early to cite an imposing list of improvements. In general: (1) N. H. Outdoor Advertising Association has received one complaint on a derelict billboard. They have promised quick action with pictures for future reference. (2) The Department of Public Works and Highways has three cases under consideration. (3) One of the Region Associations has two cases under consideration.

6. Cancellation of the administration plans for regulatory legislation for two years to see what can be accomplished by Voluntary Cooperation.

7. And may I say in conclusion that the most significant fact is that we are giving the Voluntary Plan a thorough try. We are sparing no time or expense in a full attempt to make it produce satisfactory results. To date the results would indicate a fair measure of cooperation.

DISCUSSION

A question was asked as to just what signs were permitted within the right of way in New Hampshire, Mr. Sawyer having stated in his paper that there had been criticism of the Department of Public Works and Highways' toleration of advertising which trespassed within the rights of way. Mr. Sawyer answered that they had not been able to eradicate all signs from this area, for instance, where a business establishment was so close to the right of way that there was no room for a sign advertising the business conducted on the premises unless it was placed on the right of way. New Hampshire has a law prohibiting signs in the right of way, but enforcement has been sporadic.

Mr. Burton Marsh, Director, Traffic Engineering and Safety Department, AAA, told of a conversation he had with a visitor from Switzerland who was astonished by roadside conditions in this country. The visitor referred to the economic importance of the scenery in Switzerland, and how impor-

tant they considered it that the roadside be kept free so that the tourist might get the full benefit of the scenery. Since, according to a statement made in Mr. Sawyer's paper, recreational business represents the second largest source of income in New Hampshire, Mr. Marsh wondered why the same viewpoint hadn't been developed in that State. Mr. Sawyer stated that they were aware of the importance of roadside control and of the need for legislation authorizing the Department of Public Works and Highways to exercise such control, but up to this time they had not been able to obtain such legislation. Several years ago, when such legislation was pending, the Legislature was beseiged by lobbyists working against its passage.

Professor P. H. Elwood, Head Department of Landscape Architecture, Iowa State College, remarked on the unequal representation on the Scenic Areas Committee, Mr. Sawyer having stated in his paper that three members on the Committee represented the roadside business interests, while only two came from the ranks of those interested in appropriate control of the roadside. Mr. Elwood expressed his opinion that this was not a very democratic form of representation. Mr. Sawyer said they felt it was to their interest to have more members representing roadside business. They have been accused of being unfair to the outdoor advertisers in his State, and are anxious to give them every chance to see what they will do. They are promoting the voluntary control plan to the limit and if it does not succeed, they feel they will be in a much better position to ask for appropriate legislation. In the meantime, a moratorium has been declared on such legislation.

Mr. K. B. Rykken, Manager, Highway Division, Department of Traffic Engineering and Safety, AAA, asked how long they intended to give the voluntary control advocates to produce results. Mr. Sawyer was unable to give a definite answer to this question, but stated that a two-year moratorium on legislation for control of the roadside had been declared. He remarked again that they had no alternative except to go along with the plan and to cooperate in every way they could. The Governor was back of the plan, and the State Department of Public Works and Highways was committed to taking an active part in the program.

A member of the audience mentioned the fact that the results to date did not seem impressive, and Mr. Sawyer agreed with this, although he did not think that the plan had been in operation long enough to prove anything one way or another.

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