Highway Reservations and Land-Use Controls Under the Police Power

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Acceleration of the highway program under the Interstate and other Federal-aid programs has heightened the problems of advance planning. Time lags between the planning of a highway project and its execution require intermediate control devices to protect the right-of-way before its acquisition. Although some police power controls are available for this purpose, they are largely centered at the municipal level and have not proved fully adequate. A more flexible control over land use adjacent to proposed highways, and based at the State level, deserves serious consideration.

• NATIONAL PLANNING for the Interstate highway system has projected highway needs considerably into the future. The rough outlines of the system have already been mapped, and at the State level a substantial portion of the highway network has been completed or is well into the planning stage. In the planning and construction of highways, however, to use an ancient maxim, time is of the essence. A considerable period often elapses between the planning of a segment of the Interstate system and its construction.

This paper explores some of the problems that must be faced when using police power techniques to protect highway right-of-way during this interim period. The effectiveness of these techniques has been curtailed by their limitation to the local government level, and by their fragmentation into specific and sometimes unrelated implemental devices. A new method of police power protection will be proposed, which will gain in effectiveness by treating the right-of-way problem functionally and by combining at the State level the best features of existing methods.

PROBLEMS OF POLICE POWER REGULATION

The problems of interim protection of highway rights-of-way are posed most dramatically by new locations for limited-access highways. An example of the most common difficulty is that of the developer who wants to build in the right-of-way. But other interim development decisions also affect the new highway. A large shopping center may locate at an interchange, potentially crowding the highway beyond its planned capacity, and distorting the development of land uses in the immediate area. Speculation may also occur in land within and adjacent to the right-of-way, bringing about a dramatic increase in land prices and thus in acquisition costs.

What protective devices are available to the State or the city at the time the highway is planned, assuming that the route is definite enough to warrant interim protection? Of course, highway right-of-way can be purchased in advance, and held until the time for construction. Is there an alternative under the police power? When considering the burdens and benefits of a police power approach, the relative advantages and disadvantages both to the public and to the private landowner must be carefully considered.

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What is needed from the public's point of view is a police power control that can bar any incompatible development both within and adjacent to the right-of-way, pending its acquisition. The community should also be authorized to control any interim speculation in land. Substantial advantages should derive from a regulation of this kind. Not only will acquisition costs be kept down, but the purpose of the highway will not be defeated by the growth of conflicting development. On a broader level, interim control over land use can help integrate the highway with the general community plan.

From the perspective of the private landowner, however, a control of this kind may appear to have several disadvantages. Compensation is delayed until the highway agency decides to condemn his land; in the meantime, he is forced to hold his property without realizing its full development potential. By the time of acquisition, the highway may have had a depressing effect on the value of his property.[1] The individual landowner also stands to gain. If his property adjoins the highway, in all probability it will increase rather than decrease in value. If his property is to be acquired for the highway, the statute can be drafted to discount both depreciation and appreciation due to the taking. In addition, an escape procedure can be devised that will take care of cases of real hardship. When public advantage is weighed against possible private disadvantage, effective interim highway protection under the police power appears well within the realm of constitutional possibility.

EXISTING POLICE-POWER TECHNIQUES

Municipal and county governments possess an accumulation of regulatory powers that have been used, with varying degrees of effectiveness, to reserve street and highway rights-of-way in advance of acquisition. These powers have grown up historically, however, and their dispersion among governmental authorities has been uneven. In very few States has reservation power been given to the State highway department. Most of this authority has been conferred on municipalities, and on counties in some States, with the result that coverage of the State highway network is uneven. If authority has not been conferred on counties, the highway network will not be covered outside municipal limits, and in some communities the authority that has been conferred may remain unexercised. In metropolitan areas, where planning and zoning authority may be exercised by dozens of municipalities, a patchwork of ordinances and regulations may inhibit effective controls.

Highway reservation powers also have diverse substantive origins, with the result that though their impact may be quite similar, their judicial treatment may be very different. These police power controls are briefly described.

Setback Ordinances

Municipal regulatory ordinances setting the distance of building setback from the curb line have a well-established history, and in many States antedate the adoption of comprehensive zoning. They have now been made part of the zoning structure and enjoy a secure constitutional position. Although early judicial decisions were unfavorable to setbacks, they have been approved everywhere, usually on safety considerations, since the favorable U.S. Supreme Court decision of Gorieb v. Fox.[2] For example, setbacks may be upheld because they preserve a line of sight, or because they are thought to aid in fire fighting, by keeping buildings apart. Although setbacks are held constitutional when they advance safety considerations, they are struck down if the courts think that they are being used to reserve front yard areas for possible street widenings. Nevertheless, these objectives are difficult to disentangle, and a setback that has been imposed for safety purposes may incidentally preserve future right-of-way in many communities.

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[1] See City of Plainfield v. Borough of Middlesex, 69 N.J. Super. 136, 173 A.2d 785 (L.1961), applying the well-established rule that restrictive zoning to hold down property values in advance of acquisition will be held unconstitutional.

[2] 274 U.S. 603 (1927).

Still, there are limitations on the use of setbacks for right-of-way reservation that inhibit their usefulness. If the setback is really being used with highway widening in mind, it will be deeper than usual so that the front yard after the widening will not be too shallow. This extra depth may alert the court to the setback's true purpose and may lead to a holding of unconstitutionality. In rural areas, where the urban safety aspects of setback control are not obvious, judicial reaction may also be adverse.[3] Administrative problems may be presented, especially at corner lots, where the imposition of setbacks on both frontages may so unduly restrict the remaining buildable area that the ordinance, as applied, is held unconstitutional. Finally, a setback is useful only for street widenings. It cannot be applied to new locations, where construction on adjacent frontages is not contemplated until the highway is acquired.

Subdivision Control

Practically all States now confer enabling authority on municipalities, and often counties, to regulate new subdivisions. Commonly, the subdivider is required to dedicate land for internal streets as one of the conditions to official approval of his subdivision plat. He may also be asked to donate right-of-way for street widenings, whether internal or adjacent to the subdivision.

The extent of the subdivider's obligation to dedicate is not fully clarified by the cases, however, and his liability to donate right-of-way for major highways is open to question. Most cases have upheld the imposition of reasonable dedications on the subdivider. In the case of internal streets, the dedication requirement codifies the common-law responsibility to afford means of egress, which the subdivider would have had to provide in any event. Dedications for street widenings are more difficult, but the suggestion has been made that the subdivider can be required to dedicate to the extent that his subdivision adds to traffic flow.[4] This last consideration limits the effectiveness of subdivision dedications in a highway program. Expressway dedications by individual subdividers are dubious, as the subdivision contributes only part of the traffic for which the expressway is designed.

The subdivider may be asked to reserve rather than dedicate right-of-way. In a typical instance, for example, a reserved strip will be deducted from the allowable building area, and this land will have to be held in private ownership until the highway agency is ready to proceed. A subdivision reservation imposes the uncompensated burden of delay on the individual lot owner, and has the same effect as a dedication on the developer because it effectively deprives him of part of his buildable area. Yet highway reservations under subdivision controls have been judicially upheld when they have been considered, on the ground that they are a necessary implement to effective planning.[5]

Although subdivision controls can be useful in requiring either the dedication or reservation of highway right-of-way, they face some administrative limitations. Subdivision regulations are not self-operating, and depend for their implementation on an application by the developer. In rural areas, where subdivision activity is low or nonexistent, subdivision control will not be too effective. Furthermore, subdividers in many areas escape the subdivision law through metes-and-bounds conveyancing and other techniques. Also, the owner of a large tract who can develop it without subdividing can escape regulation. Thus the man who divides a small tract to build two bungalows may need to have approval of his plans, whereas the builder of a large motel on a ten-acre tract may escape control altogether.

Yet there are many strengths in the subdivision control process. As it is particularly useful in undeveloped areas, where much new highway mileage will be built, it is an effective method for coordinating new development with the highway program. Some communities have made very good use of their subdivision control powers in undeveloped areas, combining dedications, reservations, and outright purchase of right-of-way in a manner that is fair to the affected landowner.

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[3] Schmalz v. Buckingham Township Zoning Bd., 389 Pa. 295, 132 A.2d 233 (1957).
[4] Ayres v. City Council, 34 Cal.2d 31, 207 P.2d 1 (1949).
[5] Krieger v. Planning Comm'n., 224 Md. 320, 167 A.2d 885 (1961).

Furthermore, the constitutionality of subdivision controls is enhanced by the fact that they require the subdivider to apply for approval. Although the argument cannot be supported analytically, the courts have been impressed with the fact that the subdivider is asking for a privilege, which may then be granted on conditions that could not otherwise be imposed. The legal strengths inherent in this procedure could be incorporated into other control processes.

Official Maps

Something more than one-half of the States now have regulatory legislation authorizing the official mapping of streets and their protection from encroachment before acquisition. These statutes derive from early American townsite legislation under which commissioners were enabled to plot the town and its streets and to take back deeds of trust from private owners, who by this method consented to the street dedications.[6] These methods proved cumbersome with advancing urbanization, and were supplanted in some States by 19th century statutes under which the municipality was authorized to reserve right-of-way in advance of construction and to prohibit any building in the street bed. No escape from these regulations was provided, and no compensation was payable for a structure built in the street in violation of the law.

With the birth of the planning movement, official map enabling legislation was adopted as implementary to the plan for streets, although under some statutes a street plan is not explicitly made a prerequisite to official mapping. Under the modern statutes the municipality, and sometimes the county, is authorized to adopt a precise plan of its streets (or highways). Following adoption of the plan, no building or improvement may be erected within the bed of the street without permission having first been secured from the adopting agency. Permits are not to be issued except in cases in which a failure to authorize the improvement would impose a hardship on the applicant.

Although the constitutionality of official map laws was questioned at first, and though there were some unfavorable decisions on official map legislation during the 19th century, all of the recent decisions have been favorable. No official map law that has been challenged has been held unconstitutional in the past 50 years.[7] The key to this change in judicial attitude lies in a change in the nature of official map laws. As no hardship provisions were contained in the early statutes, this fact often influenced the courts to hold them unconstitutional, on the ground that the law as written entirely deprived the owner of any beneficial use of that part of the property contained within the mapped street. With the addition of the hardship provision, however, this line of attack was blunted. The availability of relief in hardship cases foreclosed a frontal attack on the statute if a hardship variance had not been requested. At the same time, the authority to issue variances permitted a loosening of the prohibition on building whenever that prohibition would be unduly restrictive.

At the same time, opportunities for hardship variances might conceivably weaken the official map in practice. Although official maps have not been widely adopted, enough experience has accumulated in communities that have used them to demonstrate the effectiveness of the law.[8] Compliance has been high, and hardship variances have been rare. At the same time, official maps also have their limitations. Though hardship variances have not been widely granted, the few court decisions on the point have indicated that municipalities may be forced to be more lenient than the available evidence of existing practice indicates.[9] Especially in the case of highway reservations, which require large amounts of land, the chances of success for proving a hardship variance are considerable. To the extent that variances will have to be granted, they will defeat the purpose of the reservation, because a variance is simply a licensed encroachment on the reserved right-of-way. Another limitation on the official map is that it protects only the right-of-way of a proposed street. Interim regulation of adjacent land uses may be just as important in the period before the construction of the highway.

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[6] The classic treatment of official map laws is Kucirek and Beuscher, "Wisconsin's Official Map Law: Its Current Popularity and Implications for Conveyancing and Platting," 1957 Wis. L. Rev. 176.

[7] State ex rel. Miller v. Manders, 2 Wis.2d 365, 86 N.W.2d 469 (1957).

[8] Davis, Official Maps and Mapped Streets in the United States, July 1960 (unpublished thesis in Georgia Institute of Technology Library).

[9] See 59 Front St. Realty Corp. v. Klaess, 6 Misc.2d 774, 160 N.Y.S.2d 265 (Sup.Ct. 1957).

State Highway Reservation Laws

Very few States have given their highway departments the power to protect highway right-of-way before construction. In Michigan and Wisconsin, State highway departments have been given the authority to control new subdivisions along State highways, and in Michigan at least this authority has been used to compel dedications for highway rights-of-way.[10] Several other States have passed more comprehensive statutes, authorizing State highway departments to reserve land for highway purposes.[11]

Unlike the municipal and county official map acts, the State highway reservation laws are not based on the hardship variance principle. There are considerable differences in these laws, but most of them afford relief to the affected property owner by requiring the highway agency to purchase restricted property if a petition is filed requesting it to do so. Many of these laws contain a time limitation on the reservation as well. Though the constitutionality of these laws has not yet been conclusively tested, the purchase notice escape provision should be as effective as the variance in insulating the statute from attack. These laws are comparatively new, however, and little administrative experience has accumulated in their operation.

THE NEED FOR AN EFFECTIVE HIGHWAY RESERVATION STATUTE

Although existing police power techniques can be very helpful in reserving highway rights-of-way in advance of acquisition, none of them is singly effective in carrying out this objective. How can highways be effectively protected at the State level?

A prerequisite to effective highway reservation is a State highway plan. Many of the existing police power techniques that are used in the reservation of highway rights-of-way have been judicially supportable because they have implemented comprehensive planning at the community level. The courts can more readily see the necessity for imposing temporary burdens of delay and inconvenience on the individual property owner when control is warranted by community well-being, as expressed in a community plan. Likewise, a State highway plan can support the necessity of reserving highway rights-of-way.

On the basis of a highway plan, the State highway department should be authorized to establish highway conservation zones. These zones are the key to effective control of the right-of-way during the interim period before acquisition. Unlike the official map of streets, however, they would not be limited to the protection of the bed of the highway, but would cover adjacent areas on both sides of the right-of-way as well. A prototype for this kind of zone can be found in the statutes giving State highway commissions control over subdivisions along State highways. In most cases, the conservation zone would extend a reasonable distance on both sides of the highway, perhaps one-half mile each way, and would thus enable the highway department to control effectively the area in which the new highway could be expected to have an influence on land use.

The highway conservation zone would be a form of subdivision regulation, but it would accomplish much more. The permit requirement of subdivision control would be used as a means of enforcement, and no new development within the conservation zone could be carried out unless a permit for that development were obtained from the highway department. As the "development" subject to control would include any building, structure, or change in the use of land, the restrictions of the highway conservation zone would not be limited to new subdivisions.

Not only does the permit requirement give the highway agency a supervisory authority over the development of land within the conservation zone, but it secures a constitutional advantage for the law. An official map prohibits all development immediately on its establishment, and so the constitutional burden appears more severe. But no development is prohibited merely by the establishment of a conservation zone. A permit need only be applied for, and as the zone covers more than the projected right-of-way, absolute refusal of a permit could be expected only in a minority of cases. Even in

[10] Mich. Stat. Ann., §§ 26.451-26.467 (1953): Wis. Stat. Ann., §§ 236.12(2)(a), 236.13(1)(e) (1961).

[11] A good recent example is Wis. Stat. Ann., § 84.295 (Supp. 1962).

these cases, the landowner can be given an escape device that will insulate the statute against charges of unconstitutionality. Another advantage of the permit requirement is that, as in subdivision control, the permittee can be made to make reasonable land dedications and reservations as a condition to approval.

Existing escape devices all have limitations. The hardship variance of the official map laws is potentially self-defeating, even if administration has so far been stiff. Under the State highway reservation laws now in effect, the State highway department has no alternative but to purchase the land once a notice of purchase has been served by an affected landowner. An alternative approach is to couple the purchase requirement with a hardship test, and to compel the highway department to purchase restricted property only if the landowner suffers hardship because he has been prohibited from building in the highway conservation zone.

Hardship can be validated by relying on the market as a guide. A landowner who serves a purchase notice could be made to show that he has in good faith attempted to sell his property, but that he is unable to sell it for a sum comparable to the price offered for property similarly located, and which is not subject to restriction by a highway conservation zone. If there is a substantial discrepancy between the price offered for the restricted land and that offered for similar property located elsewhere, the department would have to purchase the property affected by the highway restriction. A test of market value depreciation is fair to the landowner, and finds ample judicial support in cases that have imposed a similar inability to sell requirement as the basis for hardship variances that are requested under zoning ordinances.[12]

The landowner who is subject to a building restriction in a reserved right-of-way may suffer uncompensable losses. The highway may not be built, or if it is built, his property may decline in value by the date of acquisition. None of the existing reservation techniques take account of this loss problem, although the potentiality for uncompensated losses is one of the factors that influences the courts against the constitutionality of a highway reservation law. Although adjustments to take care of interim losses may be difficult to make, they could be built into a State highway reservation law. For example, the law can provide, when the property subject to the reservation is condemned, that no account shall be taken of any depreciation in value which is attributable to the highway project. Conversely, any appreciation in the value of the property would similarly be discounted. And as an added protection against land speculation, which has an inflationary effect on land values, the highway department can have an option to buy any property that comes on the market after the conservation zone is established.

A control over new highways that is as comprehensive as the conservation zone will have a substantial impact on local land-use planning. Cooperation between the State highway department and local planning authorities will be needed, and though the requirements of local consent to highway location will vary, the suggestion is made that the State highway plan should be binding on municipalities and counties. In this way, the State highway network can be protected from local influences which may be narrowly based. Cooperation between State and local authorities should be possible and desirable, however, both in the planning of the highway network and in the administration of conservation zones. For example, the statute could authorize agreements of delegation under which the State highway department could delegate its responsibilities in the administration of the conservation zones to local planning authorities. Local administration would have to be subject to State standards, however, and State control over local administration would be reserved by giving the State highway department the authority to set the terms of the delegation and to terminate the delegation if local administration becomes unsatisfactory.

CONCLUSION

The Interstate highway system can make a positive contribution, not only to the transportation network, but to the planning and development of rural and urban areas.

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[12] Forrest v. Evershed, 7 N.Y.2d 256, 164 N.E.2d 841 (1959).

Much of this impact will be blunted, however, if ways are not found to protect highway right-of-way before its acquisition. Regulatory measures under the police power have a considerable role to play in providing this protection, and historically a variety of measures have been made available for this purpose, primarily at the local level.

Unfortunately, existing police power techniques have their limitations. In most States, authority to employ protective measures is limited to municipal and county governments. Additionally, many of these devices contain administrative limitations that hinder their effectiveness. A highway conservation zone is proposed, which would be implemented at the State level and which would permit strict control over land uses both within the highway right-of-way and in adjacent areas. Interim regulatory authority of this kind would make a positive contribution to the effectiveness of highway planning.

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