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Highway Law Revision Developments—1962

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Introduction

J. H. BEUSCHER, University of Wisconsin Law School

• THE LEGISLATIVE PROCESS has become so continuous and of such massive proportions that periodically it is necessary to step back and survey events with a comparative view in order to retain a proper perspective. The papers presented here have been selected with this need in mind and deal with two important elements of the total framework of highway law in the United States.

The first paper, by David S. Black, reviews the work of Congress during 1962 as it bears on Federal-aid and related highway programs. This Federal legislation performs a basic part of the total function of the law in these programs, and reflects an evolution of the public policy on which they rest. From time to time since the passage of the Federal-Aid Highway Act of 1956, new aspects and elements have been added to this basic law. And from time to time as the National highway program continues, more additions and modifications will be made. Thus it is of utmost importance to make periodic analysis and through this analysis understand the significance of such change. Mr. Black's discussion of the significant new provisions and concepts that Congress introduced into the Federal-aid law in 1962 is most timely.

The remaining four papers deal with the process of law revision. At present, a number of States are engaging in detailed study of their highway statutes in preparation for important legislative action to modernize their law. In the near future, many other States will undertake similar projects. The studies involved forcefully attest the conviction that the process of law revision may not be regarded as merely a matter of cutting and pasting. Indeed, the law revisor who enters the field of highway law must postpone recourse to his scissors and pastepot until he has considered long and deeply many complex questions regarding the form, substance, and interrelationship of the problems that accompany highway building in modern communities. He must view the law in action; and to do this he must work with engineers, economists, planners, administrators, and the public.

These papers on State highway law revision are addressed to problems of the technique of law revision. They examine the various objectives of law revision, and the important problem of making sure that the revisor is clearly instructed as to what he is asked to accomplish. They discuss various ways of organizing work on a body of statutes, which is not only massive in its physical proportions but also may have been built up over a considerable period of time. When authority is delegated to administrative officers, standards must be provided to guide them. Where does the law revisor look to find these standards? What techniques does he have to make sure that these criteria are clearly expressed in the law he writes? When a phase of highway building concerns more than one level of government, the law must furnish the framework for coordination. How can this be provided for? All of these are problems that must be worked out in the course of law revision.

The techniques of recent law revision studies in three States are described. Each went about its revision in a different way. Thus, these three case histories described by Mr. Wiley, Professor Lugar, and Mr. Mahin provide a basis for comparisons at many points. Some of these comparisons and some general comments about the nature and demands of the law revision process are presented in the final paper of the series contributed by Dean Nutting.

The Federal-Aid Highway Act of 1962

DAVID S. BLACK, General Counsel, U. S. Bureau of Public Roads

• THE FEDERAL legislation that forms the present body of law relating to the Federal and Federal-aid highway programs in the United States is now largely codified in one deceptively compact volume—title 23 of the United States Code. This collection of laws is, in fact, the result of a long and often painful evolutionary process which began about the turn of the century and which has drawn on the skill, intellect, and energy of thousands of dedicated and talented people in all of the States and in the Federal Government. And this process will continue long into the future.

The Federal-Aid Highway Act of 1962 and related legislation by the last session of Congress form only a tile or two in the whole mosaic of the law which affects the development of the finest system of highways in the world. This is not to minimize the importance of the most recent highway law but only to put it into proper perspective—for the labors of the recent 87th Congress did indeed produce a significant number of items of very substantial importance to the highway program.

The Act of 1961 which came out of the first session is now familiar. By this law Congress approved the current estimate of cost of completing the Interstate System as a basis of apportioning Interstate funds for fiscal years 1963 to 1966. The apportionment of the $2.6 billion Interstate authorization for the fiscal year 1964 was made on September 21, 1962. The Federal-Aid Highway Act of 1961 increased the Interstate System authorizations through fiscal year 1971 by a total of $11.56 billion. That act also provided for a 2-yr extension of time for the States to enter into agreements with the Secretary of Commerce for control of outdoor advertising adjacent to the Interstate System. Authority was further provided in the law for a State or political subdivision to use the airspace over or under the Interstate System for non-highway purposes under specified conditions. Title 2 of the 1961 Act increased certain of the highway user taxes to assure adequate revenues for timely completion of the Interstate System. These are only a few of the important accomplishments of the first session of the 87th Congress.

The 1962 Federal-Aid Highway Act is perhaps not so familiar to most yet; therefore, this paper proposes to examine some of the provisions of this most recent national highway legislation in a little more detail. The most important provision of the new law is without question the authorizations provided to allow the continuation of the ABC and public domain road programs. The Congress provided $950 million in highway trust fund authorizations for the ABC highway program for fiscal year 1964 and $975 million for fiscal year 1965. The President in his February 28, 1961, message on highways had recommended that authorizations for the ABC program be increased at a rate of $25 million each two years until the $1 billion level is reached. The Public Works Committee of both the House and the Senate, in considering the legislative history of the 1956 Act and subsequent highway legislation, observed however that the intent of Congress has been that there be a progressive increase of $25 million each year in funds authorized for the ABC program until the $1 billion annual level is reached.

The 1962 Act also provided authorizations for appropriations from the General Fund for the various Federal public domain road programs totaling $358,550,000 for fiscal 1964 and 1965. This was an increase of $103,050,000 over the last biennial authorization for these programs, and includes authorizations for a new category of public domain roads; that is, the roads and trails that will be selected by the Secretary of the Interior for development, protection, administration, and utilization of the public lands and resources under his control. The Secretary of Commerce will approve the location, type, and design of these projects and will supervise their construction. In the

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past, most of the roads have been constructed on Bureau of Land Management lands in forested areas by timber sale purchasers pursuant to requirements of their contracts. The standards of the roads they can provide have been inadequate, however, and full resource development has been impossible.

Appropriations for the Inter-American Highway were authorized in the amount of an additional $32 million for the completion of this 3,142-mi all-weather highway from Laredo, Texas, to Panama City. To protect the United States' investment in this highway, the law contains a proviso that no part of the authorization shall be obligated in any country until that country demonstrates to the satisfaction of the Secretary that it is capable of and willing to meet its commitment for maintenance under the agreements previously entered into with the Central American Republics. Congress also authorized the appropriation of $850 thousand to complete the Rama Road in Nicaragua which will connect with the Inter-American Highway and extend 155 mi east to Rama, a river port on the Escondido River flowing to the Caribbean. This highway is opening up for development a vast new area of Nicaragua and will connect the major population of the country with the inland deepwater port on the Atlantic coast.

The provision of the new law that has received perhaps the widest attention and was surely the most controversial item of highway legislation before the second session of the 87th Congress was that section concerned with the relocation of families and businesses displaced as a result of federally aided highway construction. This is now section 133 of title 23, United States Code. Briefly, the law provides two things.

First, before the Secretary's approval of any project for right-of-way acquisition or construction with Federal aid, the State highway department must give satisfactory assurance that relocation advisory assistance shall be provided for the relocation of families to be displaced. Second, those States that pay moving costs of displaced families and businesses are entitled to treat such payments as reimbursable project costs to a maximum of $200 in the case of an individual or family and $3,000 in the case of a business concern, including the operation of a farm or nonprofit organization. The allowable expenses for transportation in the case of a business cannot exceed the cost of moving 50 mi.

President Kennedy, in his message to Congress said this about relocation assistance:

> To move toward equity among the various federally assisted programs causing displacement, I recommend that assistance and requirements similar to those now applicable to the urban renewal program be authorized for the Federal-aid highway program.

The bill introduced in the House and referred to the House Public Works Committee contained language almost identical to the Urban Renewal law concerning relocation. It provided, in part, as follows:

> The Secretary, as a condition precedent to his approval under section 106 of this title, shall require the State highway department, through an agency or agencies acceptable to the Secretary, to assure that there is a feasible method for the temporary relocation of families displaced by acquisition or clearance of rights-of-way for any Federal-aid highways, and that there are or will be provided in areas not generally less desirable in regard to the availability of public utilities and public and commercial facilities at rents or prices within the financial means of the families displaced by the acquisition or clearance of such rights-of-way, decent, safe, and sanitary dwellings adequate in number to accommodate such displaced families and reasonably accessible to their places of employment.

In hearings on the bill before the Roads Subcommittee, considerable opposition to the measure developed. Controversy between the sponsors and the opponents of the bill concerned the basic philosophy of the legislation, its cost, the degree to which

highway construction might be slowed or stopped, its comparison to somewhat similar provision in the law since 1956 for reimbursement of the cost of relocating utilities, and the need for relocation assistance in terms of the numbers of families and businesses that would be affected. The bill as reported out of the House eliminated the requirement of assurance by the State highway department that decent, safe, sanitary dwellings would be provided, adequate to accommodate displaced families and accessible to their places of employment. It retained, however, the provision for State assurance of the existence of a "feasible method" for relocation of displaced families, as a condition precedent to project approval by the Secretary. Debate on the floor of the House on the measure centered almost entirely on the meaning and effect of this requirement and whether the Secretary of Commerce should have the authority to determine that a method to accomplish relocation was "feasible" before project approval. Representative Baldwin of California offered an amendment deleting the "feasible method" language altogether and substituting therefor simply the requirement that the State highway department give satisfactory assurance that relocation advisory assistance shall be provided for the relocation of families displaced by acquisition or clearance of rights-of-way for any Federal-aid highway. The "Baldwin Amendment" was adopted by a vote of 236 to 159. This version of the measure was also voted by the Senate and is now applicable to all projects approved after the effective date of the Act. The Bureau has published Policy and Procedure Memorandum 21-4.4 prescribing the procedures to be followed by the States in implementing the law.

As far as the reimbursement of moving costs is concerned, the law affects only those States that under their own laws can make the relocation payments. According to the latest information, nearly a dozen States have expressed statutory provision in some form respecting payment of moving costs. Certain other States have made payment for costs of moving or incidental to the moving of personal property from highway right-of-way as a result of constitutional interpretation, condemnation, or other legal order or proceeding. It is anticipated that most of the remaining State legislatures will promptly move to take advantage of the new provision.

As far as the advisory assistance requirement is concerned, this provision applies, of course, to Federal-aid projects in all States, irrespective of whether the State can legally make payments of moving costs. PPM 21-4.4 states the minimum requirements in this respect in part as follows:

> The State's relocation advisory service shall include as a minimum an office having as a major responsibility the provision of relocation assistance on a State-wide basis; a local subsidiary office shall be established for each project where there are 25 or more families to be relocated; on projects where there will be fewer than 25 relocations, relocation service may be rendered by individual contacts with the families by representatives from the central or other relocation assistance offices. Each office shall have listings of properties for sale, available rental properties, public housing projects and any other available replacement housing; information relative to services offered by and the addresses of other agencies operating in the general field of endeavor, such as:
>
> Social Welfare Agency
> Urban Renewal Agency
> Redevelopment Agency
> Public Housing Authority
> Chamber of Commerce
> Citizens Advisory Commerce
> Federal Housing Authority
> Public Loan Agencies
>
> The State relocation offices are expected to work closely with the Federal Housing Authority, real estate boards, multiple-listing services, builders, local public housing authorities, and others in obtaining information concerning available housing that

> is suitable in condition, price and/or rental range for the relocation of families, and shall make such information readily available to those requesting relocation assistance.

The total additional cost to the trust fund as a result of this new law cannot, of course, be predicted with assurance. In hearings before the House subcommittee estimates ranged as high as $200 million. Based on the maximum payments provided for in the bill, however, the cost should not exceed $75 million from the Highway Trust Fund to the end of the program in 1972. This figure is derived from data provided by the States themselves. The experience of the Housing and Home Finance Agency has demonstrated that an average relocation payment of about $65 is paid to families and about $1,150 to businesses. If these amounts, instead of the maximums authorized by the bill, are experienced, the cost will be only about one-third of the estimated $75 million.

Another item that ranks high on the list of the accomplishments of the 87th Congress is that relating to increased highway research and planning.

Beginning with funds apportioned for fiscal year 1964, 1½ percent of a State's total apportionment, which under prior law (§ 307(c), title 23, United States Code) was available for highway planning and research purposes or for highway construction, may now be used only for research and planning. This 1½ percent fund is no longer available for construction and if not obligated for planning and research purposes within the 2-yr period provided by section 118 of title 23 will lapse except that portion derived from the Interstate apportionment, which would in such event be reapportioned among the other States.

Congress provided an additional ½ percent of ABC apportioned funds for planning and research. If this additional sum is not used for these purposes, however, it is available for construction.

In the course of the bill's progress through the committee, this section underwent several changes. As originally conceived, the bill contemplated that the additional ½ percent of ABC funds would be used for research purposes only. Further, a committee amendment provided that the ½ percent funds if not used for research and planning would, instead of lapsing, become available for use by the Secretary of Commerce for research purposes. Neither of these provisions, however, were carried into the law as passed. Thus, the existing 1½ percent must be used for highway research and planning, whereas the additional ½ percent may be used for such purposes. Under the prior law, the States were encouraged to match the 1½ percent funds, but matching was not required. For fiscal year 1964, both categories of funds will be matched unless the Secretary determines the interests of the Federal-aid programs would be best served without matching. The Bureau of Public Roads and the Department of Commerce had under consideration for some time the need for expanding the dollar volume for highway research activities undertaken by or through the State highway departments with the aid of Federal funds and it is also in accord with recommendations contained in the President's transportation message. The additional ½ percent, together with State matching funds, will add almost $10 million annually to the $60 million now available annually from 1½ percent funds for research and planning.

Another of President Kennedy's recommendations dealt with planning in a more specialized sense; that is, the proposal on transportation:

> . . . effective not later than July 1, 1965, the Secretary of Commerce shall, before approving a program for highway projects in any metropolitan area, make a finding that such projects are consistent with comprehensive development plans for the metropolitan area and that the Federal-aid system so developed will be an integral part of a soundly based, balanced transportation system for the area involved.

The section of the bill dealing with this matter as introduced was in language substantially identical to that contained in the President's message. The Administration bill required either continuing planning or completed development plans for the metropol-

itan areas. The bill as reported out of the House Subcommittee on Roads, however, made some changes. The term "metropolitan area" was eliminated and the planning requirement was made applicable to "urban areas of more than 50,000 in population." Moreover, the committee bill required that, after 1965, approved projects must be based only on "continuing transportation planning" rather than on "completed plans." This language was incorporated in the bill enacted by the House and the Senate and is presently contained in title 23, United States Code, as section 134. The new law requires the following:

> . . . the Secretary shall cooperate with the States, as authorized in this title, in the development of long-range highway plans and programs which are properly coordinated with plans for improvements in other affected forms of transportation and which are formulated with due consideration to their probable effect on the future development of urban areas of more than fifty thousand population.

This language creates certain requirements with respect to transportation planning projects in these urban areas: (a) they must be sufficiently broad in scope to give full consideration to the number of people that will be moved by public transportation as well as the number of people that will move in private vehicles and the movement of goods; (b) they must be fully coordinated with general community plans; and (c) they must be organized so as to insure that the planning process will be closely coordinated with the policy-making and program administration. These planning studies that the legislation contemplates may, of course, be financed with 1½ percent funds if the requirements just stated are satisfied. The Bureau would not expect to approve 1½ percent financing without assurance that the urban project is fully coordinated with any studies financed with Housing and Home Finance Agency 701 planning assistance funds.

In addition, the requirement that highway plans and programs be coordinated with plans for the improvement of other affected forms of transportation, as specified in the second sentence of the new section, is interpreted to mean that, in the event the agreed-on plans indicate the desirability of special provisions for transit operation, the designs for highway facilities should be developed accordingly. This might mean special provisions for bus turnouts and for transfer points in connection with freeways or arterial street construction, or in some cases, provision for rail transit in the medians of freeways.

The provisions of the new law just discussed are those probably of greatest immediate interest. The second session of the 87th Congress, however, was quite prolific and produced a number of other changes in the highway law and in the enactment of new laws bearing on the Federal and Federal-aid highway programs.

Section 103 of title 23 previously contained a limitation that, except under special circumstances, effectively prevented the expenditure of Federal-aid secondary funds for the construction of secondary highways in urban areas. This provision was amended to remove the limitation and thereby permit increased flexibility in financing improvements on Federal-aid secondary routes. A number of States have found it difficult to improve these urban extensions because of the high priority for the use of urban funds on arterial street improvements. This has resulted in improvement of secondary routes up to urban boundaries and the inability of the State to finance further improvements where needed in the cities. The Senate Public Works Committee Report on this matter points out the hardship created in the outlying sections of the larger urban areas in which there is rapid suburban expansion and in smaller cities where the urban extensions of secondary routes do not carry sufficient traffic to merit high priority on available urban funds.

Although the law does contain provision [section 104(c)] for the limited transfer of funds from primary or secondary apportionments to the class of urban funds, this has not been adequate to provide the needed financing of the secondary extensions.

P. L. 87-58, better known as the Public Works Acceleration Act, was approved September 14, 1962, and is intended to provide useful work for the unemployed and

underemployed through initiating or accelerating needed public work in designated communities which are eligible by reason of their being redevelopment and substantial labor surplus areas. The President authorized the allocation of $900 million for expenditure in connection with direct Federal and Federal-aid public works projects. The funds are allocated to the heads of the Federal agencies responsible for such programs. So far, $400 million has been appropriated, and of this amount two allocations totaling $362.2 million have been made by the President to the various Federal agencies. Of the President's initial allocation of $165 million, the Department of Commerce received $9 million which was earmarked for expenditure on 34 direct Federal highway projects, 33 of which are forest highway projects and one is a defense access project. Most of these have been advertised and work is under way. Of the nearly $200 million subsequent allocation, the Bureau of Public Roads has received for expenditure an additional amount of a little more than $6 million for more highway construction which is expected to be approved shortly.

The Department of Commerce Appropriation Act for 1963 (P. L. 87-843) contains an appropriation of $2 million out of the general fund for bonus payments to be made to the States for the control of outdoor advertising adjacent to the Interstate System in accordance with section 131 of title 23. Bureau of Public Roads procedures, whereby the States that have entered into agreements with the Secretary for advertising control may claim their ½ percent bonus, are in the final stages of preparation and should be published soon. At the present time, 17 States have enacted laws and entered into the required agreements that qualify them for the bonus. The most recent addition to this list was Virginia which signed an agreement with the Secretary on November 20, 1962.

P. L. 87-851, the Work Hours Act of 1962, codified a variety of existing 8-hr laws, made a requirement of payment of time and a half for work in excess of a 40-hr week, and extended the provisions of the law to include those Federal-aid programs that require payment of minimum wages as prescribed by the Department of Labor. Heretofore, the 8-hr laws were applicable only to Federal contracts. This extension of application applies only to contracts for highway construction on the Interstate System because it is only with respect to Interstate projects that Federal wage standards are applicable.

In the field of highway safety, improvements (P. L. 87-359) were made in the law concerning the National Driver Register Service. Also by P. L. 87-637 the Secretary of Commerce is directed to prescribe and publish specifications for hydraulic brake fluids to be manufactured, transported, or sold in interstate commerce for use in motor vehicles.

Though it was originally intended that this paper present some predictions concerning the upcoming sessions of Congress, the legislative program of the Department of Commerce is still not in final form so that any such prognostications would be premature. However, there may be some activity by Congress in the field of urban mass transportation and in the area of criminal law to strengthen the provisions of title 18 of the United States Code relating to frauds perpetrated in connection with the Federal-aid highway program. Nevertheless, nothing more can be said at this time because the program is too indefinite at the moment to permit speculation. The opening session of the 88th Congress should prove an interesting one in the field of highway law and its efforts should be productive of additional improvement. The upcoming session will not be concerned with the fiscal problems involved in either ABC or Interstate authorizations and Congress will therefore have the opportunity to concentrate on some technical improvements in the highway laws which should facilitate the Bureau's administration of the Federal and Federal-aid programs.

Also, State legislatures will convene in all but three of the States this year. It is hoped that progressive highway legislation will be vigorously pursued to strengthen, improve, and modernize the highway laws at the State level, where the highways are actually planned, designed, and built. The partnership between the States and the Federal Government, if it is to remain healthy, must rest on a framework of laws that keep pace with the needs of a dynamic program. Much of the responsibility for this task rests with the highway lawyers who must constantly evaluate the laws with which they work and point the way to change where change is needed. This year is

the only real chance most will have until 1965 to see tangible results of such efforts. One may expect to see changes in contracting requirements, in eminent domain law, in advertising control, in administrative law. It is hoped that highway legal counsel will play some role in effecting these changes so that they will constitute a step forward.

A Perspective for State Highway Law Revision Studies: New Mexico

H. S. WILEY, Planning Director, New Mexico State Highway Department

• THE NEW MEXICO highway laws study was only the first essential step toward ultimate revision of the highway code. It is considered by the department to be merely a tool with which to work toward the broader objective.

The study of the State's highway laws was performed by highway department employees, using the 1½ percent research funds available under Federal aid. It was a research project under the Planning Division, but attorneys from the department's legal section were used. It is sometimes difficult to persuade people in other divisions of a State highway department that these research projects are worthwhile. If immediate results can be seen, they are all for it. But if it is a project that will take several years to do, sometimes they are not persuaded that it should have a priority over some other jobs that are demanding to be done. This laws study was one of the latter type, and before it was finished three different attorneys worked on this project because other jobs came up that appeared more urgent. Eventually, a lady attorney, Shirley Zabel, was found who was extremely capable and did an excellent job of reviewing, rearranging, and recommending improvements in the highway code.

The mere mechanics of embarking on this study presented a number of problems. After casting about for the most practicable form in which to assemble the material, it was decided that greatest flexibility and maximum utility would be achieved by having typed on file cards each relevant statute or part thereof. The cards were then catalogued under appropriate topical headings with necessary cross-references. Duplicate cards were made for the various subject headings to which the law applied. Each card bore the subject heading under which it was originally filed to make possible its correct replacement in the file after it had been withdrawn for study.

This arrangement of the material brought together all existing law bearing on a particular subject and provided the necessary links to related material. Not only was this a useful and logical way to organize the material for purposes of analysis; it served equally well as a pattern for the published report.

The format of the report was governed entirely by utilitarian considerations. The material is printed on one side of the sheet only and bound in looseleaf form to make possible subsequent additions in their proper place. The law is printed in the left-hand column and all annotations appear in the right-hand column, directly opposite the provisions of the law to which they are applicable. Running heads indicate the four principal parts of the collection, dealing, respectively, with Highway Authorities, Property Acquisition and Disposal by Highway Authorities, Highway Construction and Design, and Highway Use.

Provisions relating to highway revenues were not included in the study. Furthermore, references to motor-vehicle code provisions and Federal statutes and regulations were selective and were not intended to be exhaustive. Only as these had some immediate reference to the law with which the department was concerned were they considered. For example, the motor vehicle code and motor vehicle registration law are administered by another State agency and so are not directly within the highway department's field of responsibility.

To facilitate the arrangement of the statutes under appropriate headings without useless repetition, it was necessary in many instances to divide sections so that various portions appear in different parts of the collection. Moreover, the sections of an act do not always appear in proper sequence, their position being governed by relevance to

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the topical headings. It was believed that this arrangement of the material would provide the simplest means of locating any New Mexico legislation relating to a specific highway problem. A full index of subjects with page references is an additional guide to particular items.

Annotations of the statutes are concerned mainly with obsolescence, ambiguities, or inconsistencies in existing highway law, possible conflicts with the State constitution, other State laws, and Federal laws and regulations, and recommendations for substantive changes in the highway law to solve such problems. The basic research for the annotations included detailed study of court decisions with respect to the statutes, to determine what interpretations had been made of the law. Attorney General decisions, Federal acts and regulations, and certain administrative decisions were also reviewed for their relevance and effect.

To illustrate how obsolete some of the laws were, in one instance an old law was found that the department did not even know existed. It provided that on certain projects no structural steel should be used. Obviously that law has been broken for many years. It was passed in the early days of Ponderosa Pine promotion, and because there are large forests of Ponderosa Pine in New Mexico it was natural for the legislature to urge the use of this material for all structural purposes. The law also provided that no other timber should be considered as being of equal or greater strength than Ponderosa Pine unless extensive tests were made to prove its superiority.

Another old law authorizes the legislature to create State highways. Today, the better view is that the State highway commission is the best agency for making these decisions. The law provides that when the legislature creates a State highway it must extend into more than one county. As a result of this, many of the roads that were put on the State highway system in the early days were extended for many miles over other State highways or over local roads or even imaginary roads to cross a county line in order to meet this requirement. This had the effect of padding the system.

Several years ago, a study of the State highway system found that there were almost 2,000 mi of these primitive trails or non-existent roads that had no real function in the highway system. The commission took action to eliminate these segments from the State highway system, but later it was ruled by the Attorney General that the commission had no legal authority to eliminate these roads which the legislature had put on the system. Fortunately, however, the Attorney General pointed to another section of the law providing that if the commission found that there were insufficient State road funds to maintain all State highways the commission could revert to county control of those roads for which they could not provide. Following this, the commission concluded that it did not have sufficient funds to maintain about 2,000 mi of highways, and this mileage was accordingly taken off the State system under the provisions of this law.

It became increasingly apparent during the preparation of this tool for highway code revision that it should be in the hands of someone familiar not only with highway law but with State law in its entirety, the provisions of which often govern highway administration. Coupled with imagination, such broad knowledge enables the researcher to assemble all relevant material and thereby guard against making recommendations for changes that would not be tenable unless the governing provisions were also amended.

From a practical point of view, the researcher who makes the highway laws study should also have a hand in drafting new legislation for review and action. No one will be better acquainted with the innumerable details of existing law or the pitfalls presented by apparently desirable changes.

Another inescapable conclusion of the New Mexico highway laws study is the need for participation of all public and private sectors of the State's citizenry in drafting an adequate highway code. This is a task far beyond the power of any one section, department, or agency. The work that has been done is only the first step along a rocky road.

Some apprehension has been expressed by department attorneys that perhaps this sort of thing should not be attempted unless the climate is right; unless there are legislative leaders who will work closely with the project. There is always a danger that

unless the entire revision is understood and accepted by the legislature only a part of it will be enacted, and this may simply take the highway department out of the frying pan and put it in the fire. The laws study has tried to present a revision that makes sense in its entirety, and when the time is right, hopefully it can be persuasively presented to the legislature.

Procedure for West Virginia Highway Laws Revision

MARLYN E. LUGAR, Professor of Law, West Virginia University

• THE WEST VIRGINIA Highway Laws Study is being made under an agreement between the West Virginia State Road Commission and West Virginia University, the proposal for the study having been made at the request of the State Road Commission in cooperation with the U.S. Bureau of Public Roads. The study has been conducted primarily by the members of the faculty of the College of Law of West Virginia University.

The West Virginia Highway Laws Study is the only one to date in which the faculty of a law school has assumed a major responsibility. For the past five years members of the faculty of West Virginia University have, and now are, engaged in various research projects for the West Virginia State Road Commission under agreements between that agency and the University. Therefore, it was natural to turn to the College of Law when the State Road Commission felt the need for research and drafting concerning the highway laws. Further, except for a few years after World War II, there has been no summer session in the College of Law and members of the faculty have continuously had the opportunity of doing research and drafting for interim committees or agencies of the West Virginia Legislature. Accordingly, the proposal, research, and drafting for the West Virginia Highway Laws Study has been done by attorneys with rather extensive experience in law revision.

The West Virginia Highway Laws Study was conceived with objectives and procedures basically different from those in many other States. This was for several reasons. First, the West Virginia highway laws had been recently revised in a rather basic manner. In 1951, the Legislature had made a rather comprehensive study of the laws pertaining to motor vehicles, including provisions for administration, registration, anti-theft, licensing of operators, traffic regulations and laws of the road, and financial responsibility of owners and operators. At that time, four new chapters were added to the Code, being approximately 200 pages in length in the Acts of the Legislature. In addition, in 1957 the Legislature considered further extensive changes in the highway laws, and passed fourteen acts concerning motor vehicles and three acts concerning roads and highways; these acts were about 54 pages in length. In view of this history of legislation, it was feared that the Legislature might not be receptive to extensive modification of the highway laws at this relatively early date.

In fact, the first proposal for this research contemplated that the study would not be undertaken unless the 1962 Regular Session of the Legislature adopted a resolution calling for the appointment of a legislative committee to work with the faculty of the College of Law in carrying on its study of the highway laws. A resolution to this effect was presented to and adopted by the House of Delegates. This resolution was also presented to the Senate, but was not adopted by that body due to the last-minute pressure of legislative business. However, no opposition to the resolution was encountered.

Nevertheless, because the resolution was not adopted by both houses, representatives of the State Road Commission and of the Bureau of Public Roads attended a joint meeting of the Legislature's interim joint Committee on Government and Finance and the West Virginia Commission on Interstate Cooperation held on April 3, 1962. As a result of this meeting, these interim bodies of the Legislature appointed from their membership a Subcommittee on the Public Road Program to work and cooperate with the Highway Laws Study staff, with the understanding that the staff would make progress reports to this subcommittee and seek from the members thereof suggestions as the

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study proceeded. Thus, the West Virginia Highway Laws Study looked initially to the objective of enactment of any proposed revision of the highway laws.

A second reason existed for not seeking a comprehensive revision of the West Virginia highway laws at this time. Representatives of the Bureau of Public Roads and of the State Road Commission had recognized that there are within the State law certain deficiencies that should be corrected expeditiously so that the most efficient use of Federal and State funds can be accomplished in the construction and maintenance of State highways. These defects were viewed as "brush fires" which needed to be extinguished before a more comprehensive revision of the highway laws was undertaken. This probability was also recognized in the proposal that was the basis for the research agreement; a rather comprehensive study was outlined in the proposal, but it was recognized therein that the suggested areas of study might be "too numerous" and that they should be examined with "the view of eliminating some of the suggested areas" inasmuch as the duration of the study was to be "relatively short." The agreement contemplated that only five members of the law faculty would work full time from June 1 until September 15, 1962, and on a part-time basis from that date until December 31, 1962. The two faculty members serving as co-directors of the project were to continue on a part-time basis to appear before committees of the Legislature considering the proposed legislation and to complete the reports on the project after the 1963 Legislature adjourns. Except for secretarial assistance, no other staff members were contemplated or used except that a third-year law student served as a research assistant for 2½ months during the summer of 1962.

During the first month of the study, the staff made a detailed examination of the present highway laws of the State and of the Federal statutes under which funds might be received by the State in aid of highway construction. As to State laws, this study included not only the statutes and cases decided thereunder but also the opinions of the Attorney General of West Virginia and of the State Road Commission concerning these statutes. In this manner the staff became familiar not only with the present State highway laws but also with many problems heretofore encountered by the State Road Commission under the present law. Other problems faced by the State Road Commission became apparent through study of the Commission's Legal and Right of Way Division Operation and Procedure Manual. In addition, during this first month, written digests of all the State statutes and opinions of the Attorney General and of the State Road Commission dealing with highway matters were started. During the period of the study, these digests were completed, and thereafter a detailed index to these statutes and opinions was prepared. Incidentally, a more efficient use of the staff's time might have been made had this index and the digests been available when the study was started. It was anticipated that the index and digests would be available for the major part of this study because the proposal provided for the part-time work to start on January 1, 1962. However, the agreement was not executed until May 9, 1962.

During the first month of the study, the staff also obtained reports concerning other State highway laws studies and brochures summarizing the highway laws of other States. Among the source materials available were the Council of State Governments' Suggested State Legislation Programs; Reports of the Committee on Condemnation and Condemnation Procedure, Section of Local Government Law of the American Bar Association; publications of the U. S. Bureau of Public Roads; and numerous Highway Research Board Bulletins. These last bulletins were particularly helpful. Reviewing all this material gave the staff an insight into the problems that had arisen in other jurisdictions, the solutions attempted, and the results accomplished thereby, both in the courts and in other practical operations. However, no specific West Virginia problem areas were studied during this time with the exception of one that the representatives of the Bureau of Public Roads and of the State Road Commission had indicated as requiring very detailed study; namely, the acquisition of property and property rights for future highway purposes. The experiences of the Federal government and of other States in this area were analyzed and summarized in five papers for future use in the highway laws study.

Thereafter, on June 29, 1962, the staff met with members of the Legislative Subcommittee on the Public Road Program and representatives of the Bureau of Public

Roads and of the State Road Commission. The meeting was well attended. Among the members of the Legislature in attendance at this meeting were the Majority Leader in the Senate and the Speaker of the House of Delegates. An excellent picture of what would be involved in a comprehensive review, evaluation, revision, and codification of the highway laws of a State was presented by David R. Levin, representing the Bureau of Public Roads. In addition, he discussed the major problem areas which are confronting State highway departments. Henry C. Bias, Jr., Director of the Legal and Right of Way Division of West Virginia State Road Commission discussed the specific problems causing most of the difficulties for the Commission.

The matters that had been presented were discussed at length from the viewpoint of whether the Highway Laws Study staff should point toward comprehensive revision and codification of the State laws or toward examination of the basic changes that should be made in the existing statutes to make the State highway program more efficient. The members of the Legislature present advised that the latter course should be followed because a comprehensive revision would have little chance of being enacted into law in view of the fact that only a few years ago the highway laws had been twice extensively revised. It was decided to follow this advice.

This decision to concentrate on the difficulties with which the State Road Commission is presently confronted focused attention on the specific problems that had been discussed by Mr. Bias. The range of points that he had discussed was rather extensive. They varied from the need for greater discretion in the State Road Commissioner in fixing the speed for motor vehicles on highways, through the need for greater control in the development of subdivisions adjacent to highways, to the more detailed and complex problems encountered in condemning property for highway purposes. The greatest number of current problems fell within the last area, including the difficulties both in the condemnation procedure and in the substantive law concerning acquisition for future use. As already indicated, it had been anticipated that these problems would be involved in this study. Accordingly, the papers prepared in advance of this meeting on the experiences of the Federal government and of other States in these areas were distributed. Included in these papers were discussions concerning the statutes of other States authorizing acquisition of land for future highway use, the techniques that had been used in other States for financing acquisition of land for future highway use, a justification for acquisition of property for future highway use, and an itemization of the points that should be considered in drafting legislation that would authorize acquisition of property for future highway use. In addition, the material distributed summarized the points for consideration in determining whether the condemnation law, both substantive and procedural, as it presently exists in West Virginia, should be revised. Because administrative condemnation would be a basic change in West Virginia condemnation law, a paper dealing specifically with this kind of condemnation was presented. These papers and the problems which had been raised by Mr. Bias were discussed, and directions were given to the Highway Laws Study staff to draft proposed legislation covering certain specific points and such other related points as the experiences in other States might indicate were desirable.

At this meeting the members of the legislative subcommittee suggested that an effort should be made to get publicity for the highway laws study so that public acceptance would more likely be assured for any legislation proposed as a result of the study. All persons present agreed that this should be done. Thereafter, representatives of the news media were notified of and given an opportunity to attend the meetings at which progress reports concerning the study were made; several feature articles concerning these reports have appeared in newspapers with statewide circulation.

Following this meeting the co-directors of the study divided the problem areas and drafting assignments not only between themselves but also between the other members of the staff. In making this division, each member of the staff was assigned problems that fitted into related areas and thus each member of the staff has become in a sense a specialist concerning the highway laws in that area.

On July 9, 1962, a meeting of the Legislative Subcommittee on the Public Road Program was held. The co-directors of the Highway Laws Study appeared before this subcommittee and made a report concerning the earlier meeting with representatives

of the Bureau of Public Roads and of the State Road Commission. Special emphasis was given to the problems related to condemnation and those related to control and jurisdiction over State highways within municipalities. The views of the representatives of the Bureau of Public Roads and of the State Road Commission were summarized. As a result of this meeting, the Highway Laws Study staff obtained additional suggestions from the members of the Legislature for use in preparing drafts of proposed legislation in the problem areas already under study. Furthermore, the members of the Legislature suggested additional points for investigation and study by the staff.

On July 25, 1962, another meeting of some of the members of the Legislative Subcommittee on the Public Road Program and of representatives of the Bureau of Public Roads and of the State Road Commission was held. At this meeting a draft of a proposed statute dealing with the power of the State Road Commissioner to acquire property, or rights or interests therein, for State highway purposes was presented for study and criticism. This draft greatly broadened the powers of the State Road Commissioner, including special reference to acquisition for future highway purposes and correcting the difficulties heretofore encountered by the commissioner in acquiring property for highway purposes. This draft embodied the grant of that which had been found useful in other States and presented questions of constitutionality as to some of the authority granted; a special report on the constitutional aspects of such additional authority was presented at this time. During this meeting the staff was directed to make certain specific changes in the draft.

At the same meeting the condemnation law was discussed in detail. Benjamin Ritchie, an attorney in the Legal and Right of Way Division of the State Road Commission, pointed out what in his opinion were specific faults that had been found in the present condemnation law. Some of these points dealt with substantive law and others with procedural law. This introduced a special problem for the Highway Laws Study staff because procedural matters are controlled in West Virginia courts by rules promulgated by the Supreme Court of Appeals, both under the inherent power of the court and under specific legislative recognition of the power of the court to regulate procedural matters. It was decided that a meeting should be arranged with the members of that Court to discuss this matter. The legislative members in attendance expressed the view that any changes in the condemnation law, substantive or procedural, should apply to all instances of condemnation and not be limited to eminent domain proceedings instituted by the State Road Commissioner. Furthermore, it was decided at this meeting that administrative condemnation should not be proposed for this State.

No drafts of proposed legislation, other than that already mentioned, were presented at this meeting. However, a number of memoranda on problems that had already been mentioned were presented and discussed. These memoranda dealt with the present law in West Virginia as related thereto and with the laws and experiences of other States relating to the same problems. After discussing these memoranda, varying directions were given to the staff. In some instances, proposed legislation was to be drafted; in some cases, additional studies and reports were indicated; and in other instances, further thought was to be given to the matter from a policy viewpoint in view of the additional information that the memoranda had provided the representatives of the Bureau of Public Roads and of the State Road Commission.

On August 13 and 14, 1962, the West Virginia Commission on Interstate Cooperation and the West Virginia Legislative Joint Committee on Government and Finance met. One of the co-directors of the Highway Laws Study appeared before these two bodies and reported in detail the progress that was being made. In addition, he distributed to all the members present the memoranda and drafts of proposed legislation on specific problems that had been prepared as of that time.

On September 6, 1962, a meeting was held with members of the Supreme Court of Appeals, and they were presented with a draft of proposed Rule 71A for the West Virginia Rules of Civil Procedure. This rule was prepared by the Highway Laws Study staff, and it embodied procedural changes to eliminate the difficulties that the State Road Commission had encountered in eminent domain proceedings. The majority leader of the West Virginia Senate, representatives of the Bureau of Public Roads and of the State Road Commission, and one of the co-directors of the Highway Laws

Study were present at this meeting. The members of the Supreme Court of Appeals were receptive to considering the promulgation of the rule but suggested that it should be first approved by both the State Bar Committee on Civil Rules and the West Virginia Judicial Council.

On the following day members of the Legislative Subcommittee on the Public Road Program, representatives of the Bureau of Public Roads and of the State Road Commission, and members of the Highway Laws Study staff met to consider the progress made since the last meeting of this group. Minor changes were made in the draft concerning the authority of the State Road Commissioner to condemn or otherwise acquire property for road purposes. In addition, a draft concerning changes in the substantive law as to condemnation was considered and a few changes therein were directed. This was also true of the draft of proposed Rule 71A. Other problems heretofore mentioned by representatives of the State Road Commission were discussed, memoranda on some of them being presented, and policy decisions thereon being sought. Some such decisions were made and others were deferred. A few problems not heretofore mentioned were referred to the study staff for investigation and future reports.

The next meeting was held on September 20, 1962. No members of the legislative subcommittee were present. During the first part of the meeting, representatives of outdoor advertising concerns were heard, and their comments were referred to the Highway Laws Study staff for investigation and report thereon. Representatives of the Bureau of Public Roads and of the State Road Commission made comments during the second part of the meeting concerning drafts of proposed legislation heretofore presented by members of the Highway Laws Study staff. The staff was directed to make changes in the drafts as suggested at this meeting.

At the next meeting, on September 28, 1962, representatives of the Bureau of Public Roads and of the State Road Commission were present. Drafts of proposed legislation were presented and approved; other drafts of proposed legislation were presented and discussed, and changes therein were suggested. Some of the drafts of proposed legislation approved at this meeting embodied changes in earlier drafts, as directed at earlier meetings; other drafts approved merely embodied changes in the law to meet difficulties heretofore encountered by personnel of the State Road Commission. Several new matters were presented for consideration at this meeting; some were held in abeyance for future policy decisions, and others were held not to be meritorious for further consideration.

Another meeting was held on October 16, 1962, dealing with the specific proposals concerning the procedural and substantive law as to condemnation. In addition to those normally present at these meetings, the State Road Commissioner and an Assistant Attorney General of the State were present. No suggestions for any changes in the proposals were received at this meeting. Representatives of the news media were present, and the meeting received detailed news coverage.

Pursuant to the suggestion of the Supreme Court of Appeals, a meeting of the State Bar Committee on Civil Rules and of the Judicial Council was held on October 25, 1962. Representatives of the Legislature, of the State Road Commission, and of the Highway Laws Study staff were also present. In addition, an attorney with extensive condemnation practice was present at the invitation of the chairman of the State Bar Committee. With the approval of members of the Legislative Subcommittee on the Public Road Program, and of representatives of the Bureau of Public Roads and of the State Road Commission, not only was proposed Rule 71A distributed and explained to those present at this meeting but also were the other proposed changes in the condemnation substantive law presented. A number of suggested changes in the proposals were made at this meeting; all of them were adopted and embodied in the proposals.

The next meeting was held on November 5, 1962, with representatives of the Bureau of Public Roads and of the State Road Commission being present. The State Road Commissioner was present. At this meeting, proposed changes in the law other than those pertaining to condemnation were discussed; some modifications therein were made, and as modified the proposals were approved. Reports were made on some matters

that had been under consideration for some time; after discussion, the Highway Laws Study staff was directed to draft proposed legislation to embody the ideas approved in the meeting. Several new matters that had recently caused the State Road Commission difficulties were discussed, and the staff was asked to investigate the legal problems involved and to draft proposed legislation if this seemed necessary to alleviate the difficulties.

On November 15, 1962, the West Virginia Commission on Interstate Cooperation and the West Virginia Legislative Joint Committee on Government and Finance met. The State Road Commissioner and other representatives of the State Road Commission were present. One of the co-directors of the Highway Laws Study reported on the status of the study and distributed drafts of the proposed changes in the law along with explanatory statements concerning the proposed changes. Some of the proposed changes were discussed, and the members of these two bodies who were present made suggestions as to changes in the proposals that were discussed. The remainder of the proposals were discussed at a meeting of these two bodies held on December 10, 1962; not only was the State Road Commissioner present at this meeting but also five of the seven members of the State Road Commission were present. In addition, representatives of the Bureau of Public Roads and of the State Road Commission were in attendance. Again members of the two bodies made suggestions as to changes in these proposals, especially in the proposals concerning the sale of real property held by the State Road Commission and the regulation of access to State highways.

After the December 10 meeting, the Highway Laws Study staff revised the proposals to embody the changes that had been suggested by the members of the Legislature at the November 15 and December 10 meetings. The proposals, as revised, were drafted in bill form by the staff for introduction in the 1963 session of the West Virginia Legislature which is convening today, January 9. Even though an attempt was made to keep the number of bills to a minimum, the proposals as a result of the study are embodied in 18 new sections for the highway laws and the amendment of 37 existing sections thereof, the bills embodying these proposed changes being approximately 47 legal-size pages in length.

After the bills embodying the proposals that have resulted from this study are introduced in the Legislature and are referred to appropriate committees of the Legislature, the co-directors of the Highway Laws Study staff will be available to appear before these committees to explain the proposals and answer any questions that may be asked. One of the co-directors is preparing a chart showing the following items in separate columns: (a) the language in each statute proposed to be amended or a statement that a new statute is proposed, (b) the wording of each proposed statute, and (c) an explanation of the reasons for the proposed statute. This chart will aid the State Road Commissioner and his staff in explaining the proposed legislation to the members of the Legislature, representatives of the news media, and others. After the Legislature adjourns, this chart will be made a part of the final report on the study, and at least one column will be added to show what disposition the Legislature made of each of the proposed statutes and the effect thereof as related to the proposal.

One of the co-directors will make appearances during this month before the State Bar Committee and the Judicial Council concerning proposed Rule 71A dealing with condemnation procedure.

Whether the procedure followed in seeking revision of the West Virginia highway laws will be successful remains to be determined.

A Perspective for State Highway Law Revision Studies: Wyoming

MASON MAHIN, Assistant Director, Laws Division, Automotive Safety Foundation

• GOOD LAW has a direct bearing on the ability of government to perform effectively in the highway transportation field. Efficient highway planning, construction, operations and maintenance all depend on adequate law. This means simply that without the kind of law that makes for efficient highway administration, the people of any given State cannot get full return per dollar of expenditure for road purposes. In view of the large sums being spent currently for highway modernization, there is real need to get one's money's worth out of every tax dollar.

It is a tribute to the ability of many highway administrators that they have been able to do as well as they have in the face of legal inadequacies. Because good administration has been able in some instances to operate despite the handicaps of inadequate law is no justification for perpetuating legal obstacles when problems are identified and remedies are at hand.

Moreover, under inadequate legal mandates that affect the expenditure of public funds, even the best administration cannot insure economy in such expenditure. This is particularly true under a poor highway classification plan which, without regard to primary needs, may allow the wasteful dispersion of road funds. Another example in this category is an antiquated land acquisition policy which complicates, delays, and makes more costly the acquisition of right-of-way, and thus serves neither the highway agency, the public interest, nor the private land owner.

The complete recodification and improvement of Wyoming highway law was initiated by a mandate from the Wyoming legislature to the Legislative Council. To carry out this directive, the Council appointed a six-member Highways and Transportation Committee from its membership and asked the State Highway Commission to request the Automotive Safety Foundation to make the study. A contract was entered into between the Commission and the Foundation, with financing provided by 1½ percent Federal-aid highway research funds. A study of this character, under the policies of the U. S. Bureau of Public Roads, is eligible for such financing. As a nonprofit organization, the Foundation agreed to conduct the study with reimbursement only for out-of-pocket costs.

Before agreeing to undertake this work representatives of the Foundation discussed its philosophy and approach with members of the Legislative Committee and the highway officials concerned. This was done with the aid of a slide presentation developed and used on other occasions to explain the views and a suggested plan of procedure. In essence, this material pointed out the need for legislative sponsorship, which is essential in a study that eventually needs legislative implementation. This condition had, of course, already been met in Wyoming.

Unless one begins under the general sanction of the legislature and the direct auspices of one of its committees, the chances of success are very limited. Most legislatures meet for 60 or 90 days. During a busy legislative session the individual members cannot be expected to go through a complicated recommended code, understand all its ramifications and pass on it. A legislature must rely on the judgment of one of its committees which has had an opportunity to observe the study process closely and become familiar with the proposals made and their purposes and objectives.

Second, the Foundation recommended that the study be a joint enterprise in which the U. S. Bureau of Public Roads and all levels of State government having highway responsibilities would participate. This arrangement for intergovernmental cooperation was urged for two basic reasons: (a) the development of a modern integrated high-

Paper sponsored by Special Committee on Highway Laws.

way program requires close and harmonious interrelationships between all levels of government; and (b) the judgment and experience of the responsible officials is necessary in drafting an effective and workable legal tool. This condition was unanimously agreed to and advisory committees were later formed representing all such interests.

In addition to a committee of State highway officials, there were excellent advisory committees representing both the cities and counties. They consisted of men who were naturally concerned about their local road system but were also mindful of statewide considerations. Officials of the U. S. Bureau of Public Roads also participated in committee discussions, as did legal counsel from the attorney general's office.

Finally, it was agreed that the study would be published in such a format as to enable the legislature and the public readily to ascertain the changes in the law proposed and the reasons therefor. The finished study, which has been published, fully reflects that agreement.

By its very nature, highway law is little understood by, and has little dramatic appeal to, the average citizen. Yet, in the final analysis, it is the public that should be the most interested party and is the chief beneficiary of adequate law. The end product, therefore, must be clear and comprehensible to facilitate public understanding and help generate public support.

Now these three points represent no mysterious or magic formula—they are simply a common-sense but essential approach that helps to enhance the success of a long, arduous, but important, technical project.

So much for the general approach. The techniques involved and also some of the proposed basic recommendations (which have general applicability though geared to Wyoming's specific needs) can now be discussed.

With regard to methodology, the existing Wyoming highway law was rearranged into functional categories. As finally developed it was organized into eleven chapters. These included Legislative Intent, Definitions, Administration, Highway System Classification, Land Acquisition, Control of Access, Federal Aid, Contracts, Traffic Operations, Finance, and Miscellaneous Law.

The initial steps in the study process removed inconsistencies, ambiguities, duplications, obsolete provisions and sections repealed by implication. This was followed by a review of the substantive law in relation to court decisions and opinions of the attorney general's office. These opinions or decisions were not questioned, but an attempt was made to find out whether the highway department agreed as to the policy of these interpretations. If they did not agree it was pointed out that this was the time to change or clarify these opinions and decisions by legislation.

In evaluating the substantive law, the findings of the special legal research reports developed by the Highway Laws Committee of the Highway Research Board within recent years were used as a basic guide for changes in the Wyoming statutes.

In addition, a Wyoming engineering needs study completed in 1960 also served as the basis for legislative changes, though a formal statewide engineering needs study is not a necessary prerequisite to the recodification and improvement of highway law. However, a law improvement program must be conducted in close cooperation with the State and local administrative and engineering officials concerned if it is to be productive. In either case, great reliance must be placed on the judgment, experience, and recommendations of the officials with management responsibilities. Thus, in all of the several steps of the Wyoming study, decisions were reached after full consultation and discussion with all study participants.

In other words, the highway law is simply an engineering law. A good highway law should permit the engineer and the administrator to perform their jobs in an efficient manner. The highway lawyer cannot sit in his office and determine an engineering need without finding out what the engineer thinks about the law. For example, the State highway department's bridge engineer often knows more about how the State's bridge laws work out in practice than anyone else, and the lawyer is well advised to talk to this engineer before he makes up his own mind on whether that law is adequate in its present form. Furthermore, this sort of contact gives the lawyer a fine opportunity to straighten out misconceptions about what are legal problems and what are merely administrative problems that can be solved without changing the statutes.

The format used merits some mention because it was designed to show exactly what was done to the existing law. In addition to a general Foreword which summarized the major changes proposed, each chapter includes a general statement explaining more specifically the proposals recommended in that area of law and the purposes behind them.

A three-column arrangement was set up in each chapter: the first column contains existing law as rearranged; column two shows the text of the proposed code as related to the sections of law covered in column one; and column three explains the specific changes proposed, if any, in the existing statutes and the reasons and source for such changes. Indexes are also included to provide ready access, both to the sections of the present law and the proposed code, as organized in the study.

Finally, some of the major changes recommended may be discussed. A legislative intent statement was drafted as the first chapter of the new code. A number of States, in recent years, have seen fit to adopt such declarations of legislative intent when revising and updating their highway codes. Such statements have been found useful as general guidelines to administrative officials and in helping the courts interpret legislative purpose when ambiguities arise in the law.

In light of some recent indications of irregularities in a few States, they are also a reminder that the legislature expects highway administration to be conducted under a strict code of ethics.

North Dakota, which revised its highway law in 1953, following a full-scale study similar to the one conducted in Wyoming, was perhaps the first State in recent years to incorporate a comprehensive statement of legislative intent in its highway code. To refer briefly to that report in connection with the meaning attached to the legislative intent statement,

> Under the proposed declaration, the legislature says, in effect, to designated highway officials: We are placing a high degree of trust in your hands and are giving you individual and joint responsibilities for constructing, managing, improving and preserving the roads and streets of this state; in carrying out this responsibility your primary objective shall be to provide, within the limits of available funds, a unified system of adequate highways that will serve the best interests of all our people; within the restrictions imposed upon you by law, the planning, construction and maintenance of our road facilities is left to your wisdom, judgment and integrity.

The Wyoming law was lacking in the definition of basic highway terms, a condition that was found not peculiar to that State alone. This was remedied by incorporating a complete set of definitions as recommended by the American Association of State Highway Officials.

To insure an integrated highway network, the State Highway Superintendent was made responsible for coordinating the total highway and street program.

Authority was given to the State Highway Commission to furnish engineering services to counties and municipalities and to join with other units of government, including the Federal government and other States, in conducting research and testing.

Counties are required to establish highway departments and employ county engineers.

The highway classification plan proposed, as recommended by the engineering study, is perhaps the most important element of the suggested new highway code.

State primary and secondary systems are established, including urban extensions, under the jurisdiction of the State highway agency. A county road system is provided for with responsibility vested in the respective counties, as is an arterial street system under the jurisdiction of the several municipalities. Selection of the prescribed road systems by the appropriate officials and the standards for their selection are specified.

Right-of-way acquisition authority is broadened to enable all levels of authority to acquire land for future, as well as present use. Additional authority is given to counties and cities to enable them to acquire excess land, as well as property containing

road materials, previously vested only in the State.

In addition, though not a part of the proposed code, an amendment to existing eminent domain statutes is suggested to improve procedures for acquisition of land for highway purposes.

Taxation and finance problems were outside the scope of the technical law study. But at the request of all the officials concerned, the formula covering distribution of State aid to counties and cities was revised and, to carry out the proposed classification plan, counties and cities would be required to use such aid exclusively on the county road system and the arterial street system.

These are, very briefly, some of the major policy changes recommended. The Wyoming Legislative Council, which met in mid-November, considered the study and has given its fullest endorsement to the study recommendations. Three bills have been drafted to implement the recommendations proposed and will be introduced during the current session of the legislature. There is every expectation that they will be adopted.

The mutual feeling of all who cooperated with the Foundation in developing a modern highway code for Wyoming can perhaps best be expressed by referring to the Wyoming report, which points out that by the adoption of the proposed recommendations by the legislature the following obtain:

> Legislators will be provided with an orderly guide for future legislation
> Highway officials will be given clear-cut authority and responsibility for efficient management
> The court's problems in interpreting the law will be reduced
> And, the public will obtain increased value for every highway tax dollar through the efficiencies and the economies resulting from an up-to-date body of law.

For the benefit of those States contemplating highway law studies, re-emphasis is given to the importance of (a) having a legislative committee in one's corner, (b) utilizing the joint approach, and (c) publishing findings and recommendations in a clear-cut manner. Ultimate success in a program of this kind depends largely on these ground rules.

The concept of close cooperation between the committee and all study participants was pointed up in a statement by Senator Rudolph Anselmi, Chairman of the Highways and Transportation Committee:

> To assure widest possible participation in the study of the highway laws, the Committee and the Council staff frequently met with the Wyoming Highway Commission, personnel of the Wyoming Highway Department, appointed representatives of Wyoming municipalities and counties, the Wyoming Attorney General and his staff, together with the staff of the Automotive Safety Foundation. Also, representatives of the U. S. Bureau of Public Roads participated. The combined thinking of these individuals is reflected in this report, "A Modern Highway Code for Wyoming."
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> On July 1, 1962, the Highways and Transportation Committee agreed to accept this report. However, this is not to be construed as an endorsement by the Committee of the recommendations proposed. The report will be submitted to the Legislative Council at its fall meeting at which time decisions will be reached on the recommendations to be made to the Legislature at the 1963 session.

As previously mentioned, the Legislative Council at its meeting in November, approved the report in its entirety and will submit it to the 1963 legislature to support adoption of the proposed bills that have been drafted.

A Perspective for Law Revisors

CHARLES B. NUTTING, Dean of the National Law Center and Professor of Law, George Washington University

• THIS PAPER offers a few comments on the problems of law revision in a somewhat wider context. The term "revision" is used here in a broad sense. As distinguished from codification, revision is creative and demands much more of the lawyer and researcher.

Of course, the first task is taking inventory and this means codification in a sense. It may be a long and difficult process. If one is dealing only with State materials, it may be tedious but not impossible. As one descends to the local level, however, difficulties mount. At one time the author was concerned with the collection and subsequent revision of the public health ordinances of a large city. It was discovered that the city had a box devoted to public health. Whenever an ordinance dealing with the subject was passed, it was put in the box and this was the only record maintained. To the extent that local authority is involved in highways, comparable situations have undoubtedly arisen.

Codification may be important because it forces a consideration of history and reveals the various ways in which law makers deal with social, economic, and political problems. In the compiling of highway legislation, a pattern develops similar to one observed in other fields. It has been seen in such widely diverse areas as public health, oil and gas regulation, and the creation of corporations. Usually the beginning of legislative treatment of a problem involves a series of minute, highly detailed provisions directed toward a narrowly defined situation. Various stages are gone through until the end result is apt to be a broad, general statute usually vesting considerable discretionary power in an administrator or a board. The basic policies involved are determined by the statute and the detailed rules are provided by administrative regulations. To the extent that any problem demands continuing supervision and regulation, this approach is much more effective than that involving detailed statutory enactments.

Another similarity that may be noted from the three previous discussions is that in almost every field there are areas of obsolescence. This is a difficult problem to handle, and, of course, it is not unique to highway law. For example, in the area of public health the codes of many of the States recite at great length all sorts of communicable diseases for which there must be a quarantine. Yet many of these diseases no longer exist or require quarantines because of various wonder drugs that have been developed. In its way this is the sort of situation that afflicts the highway codes.

Undoubtedly the compilation of highway laws in any jurisdiction will reveal numerous instances of conflicting and obsolete legislation. For example, in Nebraska, before the passage of the 1955 act, it was said that there was a "disorganized mass of archaic law." This is true largely because no problem stands still. Legislation adequate in the days of the Model T is unlikely to be effective in an era that has placed America on wheels and imbued every citizen with the desire to be somewhere else in the shortest possible time. Undoubtedly, the techniques of highway construction have changed greatly, just like those in the building of sanitary facilities. The recognition and elimination of conflict and obsolescence is, then, one of the great benefits of statutory revision. No modern regulatory program can be carried on under archaic laws. Law must reflect the best and most advanced technological information available and it must be flexible enough to continue to reflect this information as conditions change. In the highway field this has been fully realized in at least three studies. Nebraska has been mentioned. Thorough analysis of the highway laws of New Mexico has revealed deficiencies in existing statutes. In Wyoming, a modern highway code has been prepared which seems an admirable document.

Paper sponsored by Special Committee on Highway Laws.

Perhaps it is assuming too much, but an examination of these studies seems to reveal the type of cooperative effort among lawyers and representatives of other professions that is essential. Statutory revision is not something to be done in a slapdash manner. It requires detailed and thorough consideration of substantive problems and policies as well as mere drafting technique, although the latter is extremely important. It requires mutual respect and understanding among all participants, lawyers and non-lawyers alike.

There has been much emphasis on the necessity of communication. This is seen in the descriptions of the various conferences held in the Wyoming and West Virginia studies. These are clearly essential not only from the political standpoint but also from the standpoint of doing an intelligent job of law revision. No law should operate in a vacuum, but this kind of law particularly cannot operate in a vacuum if it is to be successful. This means not only conferences with the citizens and politicians but also a continuous and intimate cooperation among the technical people that are involved. This sometimes is difficult because of the way that lawyers and engineers approach their work. Engineers must have precision and accuracy in constructing tangible works. The lawyer also strives for a type of precision and accuracy, but must do it in dealing with human beings with all of their variations. Different approaches are characteristic of every field in which technical subject matters that also require a framework of law are handled.

Some years ago, in a lecture at the University of West Virginia Law School which was subsequently printed ["Lawyers and the Legislative Process." 54 W. Va. L. Rev. 287, 295 (1952)] the author stated the matter in this way:

> If.....a problem arises which demands technical knowledge and governmental action for its solution, it seems obvious that the skills of the lawyer must be brought to bear on it. He must, however, be a special kind of lawyer. I should say, first, that he must be trained in the technical aspects of legislation in the sense that he must know something of the rules of drafting and must understand the particular constitutional problems of his jurisdiction. But this is only the beginning. Above all else he must be sympathetic with the purposes of the program in which he is called upon to participate. He must have at least a modicum of respect for the wisdom and judgment of the other professional men with whom he works. He must have patience enough to convince them that constitutional requirements, particularly those of definiteness and certainty, really mean something and that it is important to express ideas with clarity and precision. He must be critical enough to help the experts think through their own problems but tactful enough to avoid discouraging them.

Taking inventory, eliminating obsolescence, preserving flexibility and understanding technical problems, then, are all parts of the revisor's task. There is, in addition, an element that is becoming more apparent but which in the past has been sadly neglected. This is the environment of legislation. In part this relates to problems of highway use and construction as they are affected by increasing population and urbanization. Louis R. Morony has discussed these matters in connection with limited-access highways and the acquisition of right-of-way for future use and has pointed out a number of other problems of this general nature. This type of consideration can surely be extended even further.

A highway is more than a ribbon of concrete or asphalt. It is more than a transportation facility. It is a social institution that intimately involves many aspects of life. As one who has ventured timidly into the field of city planning, the author is aware of the influence of highways on the development of urban areas. Many problems

are raised, some of which involve value judgments and the expression of preferences. In the City of Washington, for example, there is currently a running controversy between groups that have been locally identified as the bird watchers and the road builders. The former fear the destruction of the parks and forested areas by throughways, and the latter are concerned with the ever-mounting needs for transportation from and to the suburbs. Similar problems may emerge in the apparent determination of the highway officials of the State of Michigan to cover the tip of the Southern Peninsula with concrete. Last summer the author was appalled by the slaughter of wild life which seems to be occurring along the new superhighways of that State. Along other roads one may note the complete destruction of vegetation caused by chemical sprays. And so it goes. Further evidence that the society is so interconnected is that when one talks about highways—and these things are very important to the society and to the economy—one must think of them not only as means of transportation but also with their other implications for the community.

But the picture is not all dark. For one thing, the program of this meeting shows in itself a realization of the point of this paper. A session dealing with community values as affected by transportation has been scheduled at this very time. The highway and its neighbors will be discussed this afternoon. Roadside development is a topic for later consideration. It would seem that the Highway Research Board is a leader in its realization of the interrelationship of these problems.

It is also a pleasure to report that a session of the 1962 meeting of the American Society of Planning Officials was devoted to highway planning cooperation. Lest the strictures of Michigan highways be taken too seriously, it may be added that the Director of the Planning Division of the highway department of that State stressed the policy of cooperation with local communities in the designing of road systems.

One not entirely disinterested suggestion in conclusion: Statutory revision as well as completely original drafting can be accomplished very effectively in a university setting. There are many advantages in having work of this sort done by a university through its law school. That in a university there are not only the resources of the law school but also other skills that can be tapped, and that there is a relatively detached atmosphere in which to do this sort of work are great advantages. It is hoped that, as the process of statutory revision continues, there will be greater utilization of the facilities of the many law schools that stand ready to serve.

PART II

Reservation and Acquisition of Highway Rights-of-Way

8 Reports

Introduction

LOUIS R. MORONY, Director, Laws Division, Automotive Safety Foundation

•The most prominent feature of the highways now being built across the country is the long ribbon of asphalt, flanked and bridged by imposing structures, and landscaped with foliage. This is an impressive view, but it is not a complete one. And lest one yield to the temptation to become preoccupied with it, he should occasionally turn from this view of the highway itself to look at the highway in its surroundings. The papers presented herein deal with what might be called problems on the fringe of the main activity of highway construction. They arise incidental to the acquisition of right-of-way, the construction of highways, and the operation of highway systems. When individual instances of these problems are encountered they are likely to appear small in terms of the money involved and the effort needed to solve them. Yet they occur often, and their aggregate impact is substantial; therefore, they cannot be ignored.

From another viewpoint these papers may be said to deal with problems of the co-existence of highway systems and their neighbors. This, also, makes them worthy of attention. No highway system exists for or by itself. It is a facility designed and constructed to serve the community. It must be fitted into the life of the community and the pattern of the community's other facilities. Adjustments must be made by all concerned, and the laws provide a framework for this adjustment. If they are good laws they facilitate this process; if they are not good laws in this sense what needs to be done to improve them should be determined.

By focusing attention on these problems of co-existence the papers presented perform a valuable research function. Describing a problem is the first step toward solving it. From the work that has gone into these papers it is possible that new and important research needs will be identified for both the highway lawyer and his counterpart who represents other interests and activities within the community.

Jurisdiction to Regulate Utilities On Highway Right-of-Way

JAMES E. THOMSON, State Counsel, Iowa State Highway Commission

The development of controlled- or limited-access highways has moved highway authorities to institute new standards for utility location on these facilities. This has involved either increased regulation of existing and new utility lines or their prohibition or removal from within such highways. The foremost example is the AASHO Policy on the Accommodation of Utilities on the National System of Interstate and Defense Highways.[1]

This development has been marked in Iowa by a serious challenge to the authority of its Highway Commission to comply with this AASHO utility policy.

In 1958, the Iowa Power and Light Company (IPALCO) applied to the Iowa Commerce Commission for a franchise, which it subsequently received, to locate a 161,000-kv electric transmission line along 21 miles of Interstate 80 and 35 north and west of the City of Des Moines. This line was to be hung from 32-ft crossarms each supported by double poles 15½ ft apart. After unsuccessfully opposing IPALCO before the Commerce Commission and later in district court, the Highway Commission was recently successful in obtaining an Iowa Supreme Court decision[2] holding that the Highway Commission had the exclusive authority under its controlled-access law to regulate or prohibit the location of such utilities on the Interstate System.

This paper reviews the factual background and legal basis of this Iowa decision to place it in perspective in relation both to existing utility regulation on controlled- or limited-access highways, and to any reasonable extension of such control by various highway departments.

In 1930, the Iowa Supreme Court established that the Iowa Commerce Commission and not the highway authorities had the sole jurisdiction to determine whether power lines would be located on the rural public highways of Iowa.[3] That court somewhat prophetically stated:

> The fact, if it be a fact, that in the onward march of commerce conditions may arise in the future under which a larger use of the highway demands the further removal of these poles, or their entire removal from the highways, under existing statutory powers or under future legislation under the reserve powers of the state, is a question with which we are not now concerned...

Not until 1955 when the Iowa legislature enacted the model controlled-access law was there any basis for increased Highway Commission jurisdiction.[4]

During this 25-year period, limited-access facilities came into existence in other States. Parkways and toll roads were probably the first of such to appear.[5] Utility lines located above ground were obviously incompatible with parkways. Many toll road authorities had the right to charge utilities for the use of their right-of-way and

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Paper sponsored by Special Committee on Highway Laws.

[1] AASHO, 1959.
[2] Iowa Power & Light Co. v. Iowa State Highway Comm., 117 N.W.2d 425 (Oct. 16, 1962).
[3] Iowa Railway & Light Co. v. Lindsey, 211 Iowa 544, 231 N.W.461 (1930).
[4] Iowa Acts, 56th G.A., ch. 148 (1955); now Iowa Code, ch. 306A (1962).
[5] See D.R. Levin, "Public Control of Highway Access and Roadside Development." Public Roads Admin., pp. 6-9 (1947).

most had the power to regulate strictly any utility facilities that might desire to locate there.[6] Apparently utilities did not have any extensive installations on toll roads, for as one toll road attorney explained, their regulations were so strict that utilities preferred to locate elsewhere.

As early as 1944, proposed standards for a system of National interregional superhighways provided that "the erection of electric light, power, and telephone lines within the right-of-way... except those necessary for the service of the highway or its pertinent facilities shall be discouraged." Those recommendations were the same for underground facilities, but these were to be preferred to those above ground.[7]

Some States, such as Kentucky in 1957 and 1958,[8] imposed new, strict limitations on the maintenance of utility facilities on all of their limited-access highways.

By 1958 some substantial sections of the National System of Interstate Highways had been constructed in many States, including Iowa. Although the interim policy was generally a prohibition of new utility facilities, no final standards for the system had been formulated. The AASHO Committee on Planning and Design Policies developed a proposed policy during the year. It was finally adopted as a standard by letter ballot of the States on July 30, 1959, and by the Bureau of Public Roads shortly thereafter. This "policy" required the exclusion of utility lines along the right-of-way of the system within the control of access lines except in very exceptional circumstances.

IPALCO received its franchise to locate on the Interstate prior to the official adoption of the AASHO policy by either the States or the Bureau. It was determined to locate on the Interstate, not only because of the initial right-of-way savings and ease of access for maintenance, but also because the location was strategic to its plan for providing electrical power for the future projected growth of the metropolitan area of the City of Des Moines. The Interstate would serve as a power line right-of-way for the completion of the north and west sides of a transmission power grid or belt around the city. The metropolitan area of Des Moines had historically been growing both west and northwest and this was being accelerated by the establishment of the Interstate. The alternative to the use of this highway as right-of-way involved many difficult location problems for the company, including legal restrictions on residential proximity.

IPALCO contended that prohibition of its utility lines would be unreasonable because the supporting poles would be located so far from the traveled lanes on the 300-ft right-of-way as to make the danger of collision very remote; that their line crews never had had any accidents working on highways; that serious power outages were uncommon; and that little difficulty was expected with maintenance.

In support of the reasonableness of its position, the Highway Commission submitted that the location of the transmission line on the Interstate System and its use as a utility service road would be detrimental to the complete access and interior traffic control features embodied in its design; that the great traffic volume expected on the section in question (up to 29,000 vehicles per day by 1975) together with the high legal speed limits (65 mph at night and 75 mph during the day) made any non-highway use a potential hazard; that the establishment of such restrictions and policy on a system designed to carry up to one-fifth of the Nation's traffic volume was a prudent application;[9] that the foreseeable future use of the highway for additional traffic lanes, if utility lines were established, would increasingly aggravate other safety problems

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[6] "Reimbursement of Utilities for Relocation of Facilities Along Highways." National Highway Users Conf. Research Dept. Bull., p. 6 (Oct. 1956).

[7] "Interregional Highways. A Report of the National Interregional Highway Committee, Outlining and Recommending a National System of Interregional Highways." 78th Cong., 2d Sess., H.R.Doc.No. 379, p. 165, 173 (1944).

[8] Patterson, M., "Kentucky Extends Its Utility Policy to Cover All Limited-Access Highways." American Highways, 37:12-13 (July 1958).

[9] U.S.Cong. & Admin. News. 85th Cong., 2d Sess. S.Rep.No. 1407, pp. 2368-2369. Interstate System to comprise about 1.5 percent of the Nation's mileage and carry about 20 percent of its highway traffic.

such as pole collisions; and that the line would interfere with the extensive landscaping program already undertaken on the right-of-way for erosion control, safety, and aesthetic design.[10]

Many of the trees that the Highway Commission had already planted were of a variety that eventually would have had to be cut back in keeping with the power company's policy of trimming all foliage within 16 ft of such highly charged lines. The power company countered that there were kinds of trees and shrubs that could be planted that would not interfere.

Basically, there were three legal issues in IPALCO's declaratory judgment action brought by it against the Highway Commission to determine its rights under the Commerce Commission franchise: (a) whether the controlled-access statute established jurisdiction in the Highway Commission to regulate the accommodation of utilities on the Interstate System; (b) whether in the event that the Highway Commission had jurisdiction, a prohibition of such line was a reasonable exercise of its discretion; and (c) whether the Iowa Federal co-operation statutes together with the Federal statutes and regulations empowered the Highway Commission to enforce prohibition of such utility line location. The Supreme Court decided the case in favor of the Highway Commission on the basis of the first two issues; while commenting on the Federal co-operation question, it did not find that issue necessary to determine.

The court held that the controlled-access law did establish authority in the Highway Commission to "regulate" utility location on the Interstate System because such statute was both a special and a later enacted one. Because it could not be reconciled, it superseded the statutory general authority of the Commerce Commission over utility location on highways generally. The court found that the use of the word "regulate" in two different locations in section three of the controlled-access act gave the Highway Commission "the right to 'regulate' first the building and maintenance of the highway; and second, traffic after it is in operation."[11] It noted that the legislature had not stated that the highway authority might regulate the facility "except for the right of the Commerce Commission to grant franchises to public utilities for the building and maintenance of transmission lines."

In 1959, a utility reimbursement law was enacted in Iowa under which the Highway Commission could cause and pay for the relocation or removal of utilities from within public highways determined by it to be necessary for construction of the Interstate System.[12] A consideration of this law strengthened the court's belief that it had correctly interpreted the intent of the legislature. It thought it absurd that the Highway Commission would have the right to remove existing facilities from within the right-of-way of the Interstate while not being able to prevent new ones from locating there.

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[10] "A Policy on Landscape Development for the National System of Interstate and Defense Highways." AASHO pp. 11-15 (1961); Walker, R.T., "Preliminary Report on Landscape Design Factors and Their Influence on Highway Safety." HRB Roadside Development 1961, pp. 49-53 (1961).

[11] Iowa Code §306A.3 (1962).

"Authority to Establish Controlled Access Facilities

"Cities, towns, and highway authorities having jurisdiction and control over the highways of the state, as provided by Chapter 306, Code 1954, acting alone or in cooperation with each other or with any Federal, State, or local agency or any other state having authority to participate in the construction and maintenance of highways, are hereby authorized to plan, designate, establish, regulate, vacate, alter, improve, maintain, and provide controlled-access facilities for public use wherever such authority or authorities are of the opinion that traffic conditions, present or future, will justify such special facilities... Said cities, towns and highway authorities may regulate, restrict, or prohibit the use of such controlled-access facilities by the various classes of vehicles or traffic in a manner consistent with Section 2 of this act." (Emphasis Supplied)

[12] Iowa Acts, 58th G.A. ch. 205 (1959).

Because the Highway Commission had the power to control the accommodation of utility facilities on the Interstate, the court found that it was proper for it to either issue regulations controlling such installations as had been done,[13] or to refuse to locate such facilities without formal regulations.

The court stated that the refusal of the Highway Commission to permit utility facilities along and on the rights-of-way of the Interstate System was a proper exercise of its discretion. To the contention of the utility that its lines would be along the outer edge of the highway and would be of no inconvenience to anyone, the court said:

> Interstate Highways, in fact all highways, are subject to increasing traffic burdens; it seems certain that in the foreseeable future it will be desirable to widen many of them and so use a greater part of the right-of-way for carrying traffic; and, again, the presence of utility poles along the right-of-way adds considerably to the hazards when the driver on the highway loses control of his vehicle, or for any reason is diverted to the shoulder or generally untraveled portion of the right-of-way. Collision with a heavy pole is always a dangerous possibility under such circumstances.

The court's decision is in accord with the administrative law principle that decisions committed to the discretion of an agency of the State will not be disturbed by the courts unless they are manifestly arbitrary or unreasonable.[14]

IPALCO had argued very strenuously that the intent of the controlled-access law could not have been to give the Highway Commission the power to regulate or prohibit its line because any highway authority in Iowa was authorized to establish controlled-access facilities; and the Highway Commission had already declared most of the highways under its jurisdiction as such facilities. To this the court pointed out that they were dealing only with Interstate Federal highways, and its decision applied only to it; however, the court admitted that "logically it appears the same reasoning would apply to any controlled access road."

Although the court did not find it necessary to pass on the Federal co-operation questions, it did indicate that the Federal co-operation section of the Iowa controlled-access law[15] seemed broad enough to permit the Highway Commission to enter into agreements with the United States, that the latter's regulations would govern such matters as the construction of utility facilities along and on the Interstate System. The court did not determine whether there were such regulations in effect at the time of the project agreement or whether they had been adopted later and now governed. The court found a basis for a logical argument that the regulation in effect in 1959 was broad enough to bar utilities.[16] It further stated:

> Inevitably the Federal government, which furnishes the greater part of the funds for the construction of Interstate highways, will assert the right to control in essential details of construction and operation. In its amicus curiae brief it asserts the right, in fact the duty, to withhold payment of road funds to the state and to deny approval of future projects if its regulations, specifically those which it contends prohibit construction of utility facilities along rights-of-way are violated. No one needs be surprised at this attitude.

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[13] See Appendix for text of regulations.

[14] Porter v. Iowa State Highway Commission, 241 Iowa 1208, 44 N.W.2d 682 (1950); Reter v. Davenport, Rock Island & Northwestern Railroad Company, 243 Iowa 1112, 54 N.W.2d 863, 35 A.L.R.2d 1306 (1952); See also 2 Am.Jur.2d, Ad.Law, §§651,652.

[15] Iowa Code §306A.7 (1962).

[16] 23 C.F.R. §1.11(c) (in effect from 2-21-57 to 5-11-60).

Because the AASHO utility policy is now officially an Interstate System standard[17] and because the Bureau now has a new and more appropriate regulation[18], the interpretation of Federal Interstate project agreements by the courts to require utility compliance in the various States should be assured.

The increasing construction of highways built to standards and for purposes similar to the Interstate System will require additional consideration in the future by various State highway departments of an extension of control and regulation of utility highway accommodations. The departments, unilaterally, now have varying degrees of jurisdiction ranging from full control to a very limited or uncertain authority, and often depending on either the type of utility or the particular highway location.[19]

In those States now having apparent authority in their highway departments to regulate utilities, the IPALCO case should serve as a precedent of a reasonable exercise of the discretion of an administrative agency.

Among the many States having specific controlled-access legislation some have statutory language enough similar to the Iowa and model controlled-access laws that the IPALCO case should be of assistance in supporting an interpretation that the highway department has the power reasonably to regulate or restrict utilities and their maintenance on such facilities.[20]

A logical possible extension of utility highway regulation could be achieved by joint AASHO and Bureau of Public Roads action adopting utility accommodation standards for other federally-aided fully controlled access highways other than the Interstate.

Any consideration of widening the scope of highway utility regulation will have to balance the safety and general welfare of the traveling public against the benefits to the utility and general public of utility location on the highway. The conclusion of an author of a study on the benefits to utilities from highway location in this regard was the following:

> ...we find the balance of net monetary benefit to utilities a significant combined utility and non-utility benefit from utility use of the highways. The advantages outweigh the disadvantages generally with exceptions where the existence of utility lines on the highways seriously affect (1) the safety of highway users, (2) the costs of highway construction or maintenance, (3) the flow of traffic, and (4) the aesthetics of the landscape.[21]

In conclusion, it would appear reasonable to expect a further increased regulation or restriction of utility accommodation on at least those controlled-access highway facilities designed completely for the motorist and bearing high volumes of traffic at rapid speeds.

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[17] P.P.M.No. 40-2(6) (issued Sept. 30, 1959, B.P.R.).

[18] 23 C.F.R. §1.23(b), §1.23(c) (effective May 11, 1960).

[19] "Relocation of Public Utilities Due to Highway Improvement." HRB Special Report 21 (1955). See table of State statutory and constitutional provisions concerning occupancy of State highways by public utilities, pp. 85-136.

[20] But see R.P. Garbarino, "Limited Access Highways and Public Utility User." 3 Vill.L. Rev. 489 (June 1958). This article was cited by IPALCO in support of its argument that controlled-access laws were not intended to give highway authorities control over utility regulation or restriction on such highways. It submits various reasons in support of its thesis. However, it is based to a great extent on the language of the Pennsylvania statute and situation.

[21] Blensly, R.C., "Benefits to Utilities from Rural Highway Locations in Oregon." HRB Special Report 75, pp. 52-59 (1962); see also C.E. Nelson, "Economic Implications of Utility Use of Highway Location in Utah." HRB Special Report 75, pp. 33-51 (1962).

Appendix

RULES AND REGULATIONS PERTAINING TO FULLY CONTROLLED ACCESS HIGHWAYS

Non-Traffic and Special Uses

Section 1. For the purposes of these rules and regulations a fully controlled access highway is defined as a highway or street especially designed for through traffic, and over, from or to which owners or occupants of abutting land or other persons have no right or easement of access, light, air, or view by reason of the fact that their property abuts upon such fully controlled access highway or for any other reason, including, but not limited to, those highways or streets which are part of the Interstate Highway System.

Section 2. Ingress and egress to fully controlled access highways shall be by use of public road entrances and exits. No other ingress or egress shall be allowed to any person or vehicle to, from, or across said highway right-of-way to or from abutting lands, except that with written approval of the Iowa State Highway Commission (and the Federal Bureau of Public Roads when necessary) access from abutting lands to the right-of-way of a fully controlled access highway may be made at those points needed to construct, service, and maintain necessary crossings for public utilities, drainage facilities, and other public services, or for any uses of the right-of-way as may hereafter be specially authorized by the Iowa State Highway Commission.

Section 3. No motor vehicles not used for necessary highway maintenance shall be driven or stopped upon the non-surfaced portions of a fully controlled access highway except as provided for by the regulations of the Iowa State Highway Commission.

Section 4. No motor vehicle not used for necessary highway maintenance shall be driven or stopped upon the surfaced shoulders of a fully controlled access highway except for emergency reasons.

Section 5. The use of any portion of the right-of-way of fully controlled access highways for the purpose of constructing or servicing utility facilities thereon is prohibited unless specially authorized by the Iowa State Highway Commission pursuant to Section 7 hereof, except that necessary public service and utility crossings may be constructed or maintained as follows:

(a) Motor vehicles may use frontage roads and the unsurfaced portions of the right-of-way of fully controlled access highways to construct and service necessary public service and utility crossings provided they obtain ingress and egress thereto from other than the surfaced portions of the fully controlled access highway at such points and by such routes as may be specified by the Iowa State Highway Commission.

(b) In the event that it is impossible to reasonably construct and service necessary public service and utility crossings with the motor vehicle movements herein allowed, additional use of the right-of-way of fully controlled access highways may be allowed by permit issued by the Iowa State Highway Commission provided all reasonable provisions for the safety of the general traveling public are incorporated therein.

(c) In disaster emergencies where such ingress or egress as outlined in Section 5(a) above is temporarily impossible, the surfaced area of the right-of-way of fully controlled access highways may be used to approach the distressed lines or facilities, and the surfaced shoulders may be used for temporary parking, provided all reasonable provisions for the safety of the general traveling public are made, including prior notification of the Iowa Highway Patrol and the Maintenance Department of the Iowa State Highway Commission.

(d) Where utility lines or public service facilities are so damaged as to constitute a danger to the life or property of the general traveling public, access to the same may be by the most expeditious route and where necessary in such event, temporary

parking on the surfaced shoulders of the fully controlled access highway will be permitted, provided due care is exercised for the safety of the traveling public. Notice of such situation shall be given to the Iowa Highway Patrol and the Maintenance Department of the Iowa State Highway Commission as soon as reasonably prudent under the circumstances.

Section 6. In regard to necessary crossings for public utilities, drainage facilities, and other public services, designation of points of access thereto and routes therefrom and permits required therefor shall be obtained by application to the Maintenance Department of the Iowa State Highway Commission at Ames, Iowa. Said application shall set forth the name of the applicant, the type of public service or utility crossings involved, the exact location thereof, and such other information and specifications as may be required by said Maintenance Department in connection with such application.

Section 7. No structure of any type or public utility facility which is not authorized by the Iowa State Highway Commission as a part of the highway design for the safety and convenience of the general traveling public using a fully controlled access highway shall be constructed or placed thereon, except necessary public service and utility crossings, or except as hereinafter provided. Other uses of the highway right-of-way that are not a part of such highway design and that are not otherwise provided for herein may be authorized under circumstances where: (1) an application is made to the Iowa State Highway Commission, Ames, Iowa, which sets forth the type of such other use of the right-of-way desired, the specifications of any structures or facilities necessary thereto, and the desired location therefor, together with any other relevant information that may be thereafter requested by the Highway Commission; (2) the Iowa State Highway Commission finds and determines that such occupancy, use, or reservation is in the public interest and will not impair the highway or interfere with the free and safe flow of traffic thereon; and (3) permission for such use where granted will be on such terms and conditions as the Iowa State Highway Commission may prescribe for the safe use of the highway.

Impact of the Highway Program on Railroad Property Rights

WALTER L. YOUNG, Chief Engineer, Norfolk and Western Railway Company, Roanoke, Va.

• The Highway Program initiated by the Federal Highway Act of 1956 involves the acquisition of private property for public use in amounts far in excess of any other peacetime program. Not only the volume of property to be acquired but the dollar value exceeds anything experienced before. The 41,000-mile Interstate System alone will require about 1,150,000 acres.

Amendment V of the Constitution says, in part, "No person shall...be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation." Over and over again, in judicial proceedings involving the taking of private property for public use, judges have charged juries in these or similar words: "The fair value of property is that value which is agreed upon by a seller who is willing to sell but does not have to sell; and a buyer who is willing to buy but does not have to buy." Figures available from the Bureau of Public Roads, as of August 31, 1962, show that Federal and State funds thus far authorized for the acquisition of necessary property for the Interstate System total $3,116,000,000 of which $2,593,000,000 are Federal funds. (These totals include some advance purchase of right-of-way.) With the System thus far about one-third completed, it is evident that the "fair value" of necessary property will total no inconsequential amount.

To those who have not had personal contact with railroad-highway negotiations for real property desired for the highway program, the complications involved are generally unappreciated. There are two main categories of railroad property to be considered: (a) railroad property required or desired at railroad-highway intersections and necessitated by the construction of a grade separation structure; and (b) property either owned by the railroad or of interest to the railroad lying immediately adjacent to railroad right-of-way and available for industrial development.

It must be realized that the property involved in a railroad-highway negotiation is usually owned in fee simple and the railroad has clear title and property rights to such property, just as any other private property owner would have. The taking of such property warrants the same consideration as would be accorded the owner of an industrial plant, an office building, or a private home. Though there are exceptions, in most instances the railroads do not ask for or receive such consideration and usually grant the Highway Departments such properties "for a dollar and other valuable considerations" or grant the Highway Departments "easements" over the railroad properties for highway purposes. Exceptions are in cases where the needed right-of-way involves crossing of storage and classification yards, freight or passenger terminal yards, and similar situations. These latter conditions require special treatment and consideration, for obvious reasons.

The problems that confront the railroad when a highway structure spans an ordinary railroad track may be examined, while keeping in mind that between the railroad right-of-way property lines the railroad has fee simple title to the property and is entitled to use that property in such manner as to serve its transportation obligations. In equity there is no reason why the railroad should not require the highway structure to clear these railroad right-of-way lines completely, without obstruction of any kind on railroad property. As a practical matter, however, the railroads generally do not insist on this, realizing that such clearance can

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involve complicated structural design for the highway facility. They do and will, however, insist that the design of the structure allow them adequate freedom for the movement of railroad rolling stock, necessary off-track maintenance equipment, provision for adequate drainage, space for additional trackage to be installed in the future, and space for possible passing tracks required by the installation of centralized traffic control for the movement of trains. Although justification for such requirements may not always be clear to the highway engineer, they are fully warranted in the mind of the railroad engineer and must always be considered and weighed carefully by him in negotiations with Highway Departments.

Another aspect of this particular situation shows the reasons for the railroad attitude in such matters. In recent years Highway Departments, for economy, and in some instances for structural reasons, have more and more resorted to the use of so-called "spill-through" abutments where highway structures span railroad right-of-way. In some cases, such types of construction present no problem to the railroad; in other cases, they present serious problems. In all cases, they encroach on railroad property to a considerable extent and forever substantially restrict the available space for future track construction and maintenance operations. In areas of high rainfall, with resulting scour and erosion of the earth fill, they can and do create serious drainage and maintenance problems, and expense for the railroad. Hence, there are frequently strong objections to such types of construction by the railroad.

Another illustration of problems arising quite often under today's conditions is the one where a new Interstate Highway is constructed underneath the tracks of an existing railroad, in which case the tracks are supported by the grade separation structure. Because of the requirements of the standards of the Interstate System, such structures are frequently quite long and, in most instances, present State procedures require the railroad to assume the maintenance cost of the new structure. This can run into substantial figures. Where no crossing at grade previously existed, under Bureau of Public Roads procedures, the railroad is not required to contribute to the cost of construction. Prior to such construction, railroad maintenance involved only track, ballast, and drainage. Such maintenance costs are inconsequential as compared to the cost of maintenance of a modern, new Interstate structure of this character. Quite naturally and understandably, the railroads object to paying these additional maintenance costs; more and more they are insisting that such maintenance, from the ballast down, be borne by the Highway Department.

To move to the second topic mentioned, some people are not aware that practically all railroads have highly organized and efficient industrial property development divisions, the sole purpose of which is to bring new industry into areas utilizing property adjacent to railroad right-of-way. The obvious reason is the development of new sources of freight to be moved by rail. Literally, millions and millions of dollars of new industries are so located each year through the work of these railroad industrial departments. Much of the property so involved has been acquired by the various railroads, over a period of years, to preserve it for this particular use. Other industrial developments occur on privately owned property so located through the efforts of the railroad industrial departments. The location of limited-access highways adjacent to railroad rights-of-way precludes such development and, in the case of the Interstate System, precludes the extension of industrial spurs by the railroad to serve industry located on the opposite side of the limited-access highway from the tracks. For these reasons the railroads, wherever practical, encourage the Highway Department to use new locations sufficiently removed from the railroad right-of-way to allow future industrial development to be served by both rail and highway. The fact is that such location, and subsequent industrial development, not only offers new and needed freight tonnage to the adjacent railroad but also provides a lucrative new tax source to the governmental agency concerned. There are other advantages to the railroads and the public in preserving industrial sites which could be enumerated, but these adequately show the possible and actual impact on the railroad by the current highway program.

There is another railroad-highway situation frequently arising which is causing much concern to the industry; namely, the ever-increasing demand for the creation of new highway crossings at grade. Statistics show that the industry is being required

to open such new crossings at grade as fast as, or even faster than it is eliminating existing crossings. It is perfectly natural that the railroads resist the construction of new hazards. More often than otherwise the railroads are helpless to prevent such new crossings because, if resistance is offered, the matter is usually brought before the State Regulatory Commission, or the new crossing sought by condemnation procedure. This is mentioned only to emphasize that the position of the railroads may here be contrasted with the position of the State highway departments, should the railroad seek to construct a new crossing at grade on the 41,000-mile, limited-access, Interstate Highway System. The Highway Departments are in a preferred position in such an instance in that, by their limited-access laws, they are able to prevent the construction of such new crossings of the Interstate System, whereas the railroads enjoy no such privileged position.

Tenant Relocation and the Highway Program

J. ALLYN PRESTON, Supervisor, Legislative Reporting Service, National Highway Users Conference

• For the first time in the history of Federal-aid to the highway program, Federal funds will be used to finance payments for tenant relocation. Following on the heels of the President's request for such payments, included in his message to Congress on transportation,[1] the Federal-Aid Highway Act of 1962,[2] approved on October 23, 1962, authorizes specific relocation payments not to exceed $200 to an individual or family or $3,000 to a business concern, including a farm or nonprofit organization.

The new law provides that relocation payments, made by the States, are to be considered a part of the total cost of constructing the Federal-aid highway system.[3] A further limitation provides that, in the case of a business, nonprofit organization, or farm, the allowable expense for transportation shall not exceed the cost of moving 50 miles from the original location of the organization.

It is estimated by the Bureau of Public Roads that the relocation payments provided by the new act will impose an additional cost of $75 million on the Highway Trust Fund to the end of the program in 1972.[4] Earlier, the Bureau of Public Roads estimated the additional cost of tenant relocation at $50 million—$45 million for relocation aid to those displaced by the Interstate System and $5 million to those displaced by the regular Federal-aid primary, secondary, and urban programs.[5] In view of the one-third increase in the Bureau's estimate, even the $75 million figure may well be conservative.

In addition, the law provides that the Secretary of Commerce shall require State highway departments to provide satisfactory assurance that "relocation advisory assistance shall be provided"[6] for families displaced by highway construction. This provision was added by the adoption of an amendment offered by Representative Baldwin of California and replaced a provision that authorized the Secretary of Commerce to require State highway departments to give assurance that "one or more feasible methods" of relocation assistance be provided by the State.

To obtain credit for monies expended in providing relocation aid, the State highway departments are to maintain records indicating the amount of payment made to the relocated person, the distance moved, and the date the move was effected. The States are permitted to make fixed payments to individuals and families in lieu of actual expenses (not to exceed the limit of $200 set out in the Federal-Aid Act), but such fixed payments must have the prior approval of the Bureau of Public Roads.

Paper sponsored by Special Committee on Highway Laws.

[1] "The Transportation System of Our Nation." Message from the President of the United States to Congress, House Document No. 384 (April 5, 1962).

[2] House bill 12135, introduced by Mr. Fallon of Maryland. Approved as Public Law 87-866 on October 23, 1962.

[3] The Federal government pays 90 percent of the cost of the Interstate System and 50 percent of the cost of the regular Federal-aid primary, secondary, and urban programs.

[4] Statement of Rex M. Whitton, Federal Highway Administrator, Bureau of Public Roads, U.S. Department of Commerce, before the Subcommittee on Public Roads, Committee on Public Works, U.S. Senate, held August 7-8, 1962, p. 32.

[5] Letter of Rex M. Whitton, Federal Highway Administrator, Bureau of Public Roads, U.S. Department of Commerce, reprinted in the Hearings on the Federal-Aid Highway Act of 1962 before the Subcommittee on Roads of the Committee on Public Works, House of Representatives, held April 17-18; May 1-2, 1962, p. 226.

[6] House bill 12135, supra.

BACKGROUND

The concept of using highway funds for tenant relocation has received much attention since the enactment of the accelerated Federal-State highway program in 1956. To understand this background, it is necessary briefly to examine recent trends in the taking of real property by right of eminent domain by the Federal government and the States.

The power of eminent domain has been generally defined as the right or power to take private property for public use.[7] "Eminent Domain is an inherent and necessary attribute of sovereignty, existing independently of constitutional provisions and superior to all property rights. The exercise of the right is in effect a compulsory sale of the owner's interest in the property, the individual's rights yielding to considerations of public welfare."[8] Because of the dual sovereignty of the Federal government and the various States, this power can be exercised directly by the State, or the State may delegate this power to particular agencies, corporations, or natural persons. This power has also been granted to particular classes of agencies or corporations, such as railroads.[9] Yet the government may not take property without compensating the owner for his loss. The necessity for making compensation, in the case of Federal taking, is founded on the 5th Amendment of the U.S. Constitution and, in the case of State taking, on similar provisions of State constitutions. In addition, on the State level, the right to compensation has been recognized by the courts as a fundamental right founded on "natural justice."[10] Whether private property has been taken without just compensation is a matter for the determination of the courts on the facts of each case.

The question of what factors should be considered in making compensation came before the U.S. Supreme Court in 1943.[11] In considering the plight of a property owner whose land was needed for the relocation of a railway line, the court followed two earlier decisions[12] in holding that just compensation for property taken under the right of eminent domain does not go beyond the fair market value of the property. Here the court would not allow an inflated value caused by anticipation of a new land use. This fair value standard, sometimes referred to as the "willing seller-willing buyer" doctrine, has set the standard for compensation for eminent domain taking. Thus, the property owner must look elsewhere for compensation for such items as loss of future good will, business interruption, personal inconvenience, frustration of business plans, tenant relocation expenses, and other related losses suffered because of the necessity to move.

One form of expansion on the fair value standard has come in the nature of legislative enactment. In 1951, a Federal law was enacted by Congress to allow compensation, within a ceiling of 25 percent of fair value, to owners and tenants whose property is taken for specific military construction projects for expenses and losses incurred as a direct result of moving.[13] Then, in 1956, the enactment of the Housing Act of 1956 saw the inclusion of provisions for relocation—not to exceed $100 in the case of of an individual or family, or $2,000 in the case of a business concern—for those who were displaced by urban renewal projects.[14] In view of this precedent, it is now surprising that there should be increasing demand by those relocated by highway projects for compensation above and beyond the fair market value of their property.

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[7] Glover v. State Highway Commission of Kansas, 147 Kan. 279, 77 P.2d 189.

[8] 29 C.J.S. 777.

[9] 4 Tiffany, Real Property, §1252.

[10] 29 C.J.S. 898.

[11] United States v. Miller, (1943) 317 U.S. 369, 87 L.Ed. 336.

[12] Whither v. Buckley 20 How. 84, 15 L.Ed. 816 (1858); and Sweet v. Rechel 159 U.S. 380, 40 L.Ed. 188 (1895).

[13] Act of September 28, 1951 (65 Stat. 336, 364); and Act of July 14, 1952 (66 Stat. 606, 624).

[14] Act of August 7, 1956 (70 Stat. 1091, 1100). These original payments have been amended so that, at present, payments of $200 are made to individuals or family units who must relocate because of a Federally-aided urban renewal project. Payments of $3,000 or, if greater, the total certified actual moving expenses are made in the case of business relocation. Act of July 12, 1957 (71 Stat. 294, 300); Act of September 23, 1959 (73 Stat. 654, 673); and Act of June 30, 1961 (75 Stat. 148).

As a result, at least in part, of compensation given in instances of land taken for military and urban renewal purposes, measures were introduced in the 84th, 85th, and 86th Sessions of Congress to provide assistance ranging from payments to recompense for loss of business good will to financial assistance in establishing the displaced tenant on a site comparable to the one he was forced to vacate. A bill introduced last year would have provided relocation assistance to persons whose property is taken by any agency of the Federal government[15] and other bills have been introduced to provide relocation assistance to those whose property is taken for urban mass transit systems.[16] Just before adjournment of the Second Session of the 87th Congress, additional Federal legislation was introduced which would have increased the relocation payments to those who must relocate because of urban renewal projects[17], and another measure would have provided compensation for direct loss of property of business concerns relocated because of urban renewal programs.[18]

Because of the divergency in methods of taking real property by the Federal government, an attempt has been made to provide uniformity in this area. On August 24, 1961, the House Committee on Public Works voted to establish a bipartisan committee for the purpose of "ascertaining whether existing practices are unfair either to the property owner because of underpayments or to the general taxpayer because of overpayments."[19]

In a speech before the American Association of State Highway Officials on October 9, 1961, the select subcommittee chairman, Representative Clifford Davis of Tennessee, stated that it was estimated that the study will require about 2½ years to complete. In addition to studying acquisition of real property for highways, airports, and urban renewal programs, the subcommittee will study the acquisition of real property for Federal projects by the Departments of Justice; Defense; Interior; Agriculture; Post Office; and Health, Education and Welfare and also land taken by the Atomic Energy Commission, Veterans Administration, General Services Administration, Federal Aviation Agency, and the Tennessee Valley Authority.

Also before the subcommittee is legislation recommended by the General Services Administration which would authorize reimbursement to owners and tenants for moving expenses, losses, and damages in amounts not to exceed 25 percent of the value of real property acquired. Chairman Davis has indicated that the present piecemeal method of property acquisition is inefficient and wasteful and expressed the hope that the subcommittee will provide a comprehensive and impartial study of Federal and Federally-assisted land acquisition programs.

During the committee hearing on the Federal-Aid Highway Act of 1962, the opinion was expressed that action on the tenant relocation provisions should be postponed pending the findings of the subcommittee.

STATE RELOCATION PAYMENTS

Relocation payments to those moving because of highway projects are presently made in 18 States,[20] according to the latest figures furnished by the Bureau of Public Roads. Of these, 7 have statutory provisions permitting payment[21] and 11 make payments pursuant to State constitutional interpretation, condemnation, or other legal orders or proceedings. Many States in this latter group do not pay relocation costs as such, but only pay costs of detachment and reattachment of fixtures, for actual damage

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[15] H.R. 12602, introduced by Mr. O'Brien of New York on July 18, 1962.

[16] S. 3615 reported favorably by the Senate Committee on Banking and Currency on August 7, 1962. H.R. 11158, introduced by Mr. Multer of New York on April 9, 1962.

[17] H.R. 13324, introduced by Mr. Lindsay of New York on October 3, 1962.

[18] S. 3808, introduced by Senator Javits of New York on October 12, 1962.

[19] News release of select subcommittee on real property acquisition (Aug. 24, 1961).

[20] Colorado, Connecticut, Georgia, Iowa, Kansas, Maryland, Michigan, Minnesota, Nebraska, New Mexico, New York, Oklahoma, Rhode Island, Tennessee, Utah, Virginia, Wisconsin, and Wyoming. Hearings on House bill 12135, supra, pp. 53-54.

[21] Connecticut, Maryland, Minnesota, Nebraska, Rhode Island, Tennessee, and Wisconsin. Hearings on House bill 12135, supra, pp. 53-54. New York should also be included because of a new law passed this year. See footnote 23.

to personal property incurred by necessity to move and for personal property that is left in old dwellings or businesses when the tenant or owner relocates. According to a recent survey by the Bureau of Public Roads, 9 States paid costs of moving personal property from owner's residence, 11 for moving personal property from tenant's residence, 16 for moving personal property from owner's business property, and 15 for moving personal property from tenant's business property. In addition, there are indications that in 3 States,[22] one or more of the precedings costs could be paid.

A new law approved in 1962 in New York provides relocation payments not in excess of $300 be made to a resident owner displaced by highway construction to cover costs of moving household equipment and furniture to his new residence.[23] In addition, Governor Rockefeller has indicated that he will back a measure to provide an allowance for moving expenses up to $3,000 for business concerns in the forthcoming State legislative session.[24] Two other States have authorized tenant relocation payments on a local level.[25]

Of the 28 States[26] that have constitutional amendments prohibiting the diversion of highway funds for unrelated projects, only one, Minnesota, has a statute that provides payment for tenant relocation. This statute, however, does not allow an unconditional flat payment, but allows a maximum of $200 per family unit and $ 500 per business when allowed as a taxable cost by a court after a jury trial. Only 6 of the 28 States[27] allow payment additional to the fair value of the property taken, and many of these payments cover only the removal of fixtures or allowances for personal property that is damaged or destroyed because of relocation. Thirty-two States are said to make no relocation or related payments.[28]

EXTENT OF RELOCATION ASSISTANCE

Because Congress has provided that the States must assure the Federal government that relocation advisory assistance is extended to families displaced by highway construction, questions have arisen as to just what form this assistance will take and how much additional burden will be placed on funds available for highway construction. At this early stage, an easy and complete answer is not clear; however, certain information is already available.

Just what such aid will constitute as far as the State highway programs are concerned is indicated in a policy and procedure memorandum from the Bureau of Public Roads to the various State highway officials.[29]

After saying that the States may receive Federal reimbursement for relocation costs where permitted by State law, the memorandum continues that, as a condition precedent to receiving aid, the States shall submit to the Bureau detailed information concerning the relocation advisory service it intends to provide. This service shall, however, include as a minimum an office having statewide responsibility for such a program, and local subsidiary offices shall be established for every highway project where there are 25 or more families to be relocated. These offices are to maintain listings of properties for sale, available rental properties, public housing projects, and any other available replacement housing. In addition, information concerning services offered

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[22] Indiana, Maine, and North Dakota.

[23] Senate Int. No. 2897, ch. 1001, Laws of 1962, approved April 30, 1962.

[24] "Governor Offers Aid on Relocation." New York Times (Oct. 18, 1962).

[25] Maryland (Baltimore) and Rhode Island (Providence).

[26] Alabama, Arizona, California, Colorado, Georgia, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Texas, Utah, Washington, West Virginia, and Wyoming.

[27] Colorado, Georgia, Kansas, Michigan, Minnesota, and Wyoming.

[28] Alabama, Alaska, Arizona, Arkansas, California, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maine, Massachusetts, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Vermont, Washington, and West Virginia.

[29] PPM 21-4.4, p. 3 (Nov. 9, 1962).

by other agencies active in the housing field (such as the Urban Renewal Agency, Redevelopment Agency, and Federal Housing Authority) are to be available.

The State highway departments are also responsible for publicizing this relocation advisory service and are to offer the program for discussion at all public hearings concerning its activities held subsequent to November 15, 1962. The State highway department is also responsible for providing individual notice with full details on assistance available to families occupying property to be acquired.

This memorandum was issued only a month after the approval of the Federal-Aid Highway Act of 1962 and that a more comprehensive plan may well materialize as time goes on.

Another indication of the form of relocation assistance may be had from a study of the programs of the Urban Renewal Administration and local agencies, such as the New York Port Authority, which has already had extensive experience in aiding those relocated because of public projects.

The relocation section[30] enabling legislation for Federal participation in urban renewal programs is much the same as the relocation provision of the Federal-Aid Highway Act of 1962.

Under the Federal Urban Renewal Program, 89,858 families, individuals, and business concerns have received assistance under the Housing Act of 1956 at a total cost to the Federal government of $13,672,462 for moving expenses from passage of the 1956 Act to December 31, 1961.[31] This figure does not indicate an accurate total cost, as many urban renewal projects are in the planning stage and actual relocation payments have yet to be made for programs already planned. In addition, these payments have only been authorized since 1956 and have not been made to families relocated before that date.

A more comprehensive picture of the nature of relocation advisory service can be gained from an examination of two previous programs which have not been connected with the Federal-aid highway program but have nevertheless been concerned with property acquired for highway purposes. Both were conducted by the New York Port Authority.[32]

The first program, begun in 1952 and completed in 1955, concerned land taken for the approaches to the third tube of the Lincoln Tunnel and necessitated the relocation of 817 families, or approximately 5,000 persons. The second program, begun in 1957 and completed in 1959, concerned land taken for the approaches to the lower level of the George Washington Bridge, and necessitated the relocation of 1,818 families, or approximately 8,000 individuals. Generally, the procedures were the same for each project, and the payment schedules were almost identical.

As soon as the project was inaugurated, the Real Estate Department of the Port Authority began an extensive public relations campaign to acquaint citizens with the relocation program. In addition, a relocation office was opened in the area where the project was to be constructed. Notice was given to tenants and owners of buildings to be acquired that they would receive bonus compensations if they desired to relocate voluntarily. The schedule of bonus payments was as follows: $200 if the tenant vacated within 60 days after receipt of notice to vacate; $175 if the tenant vacated within 60 to 90 days after receipt of notice to vacate; $150 if the tenant vacated within 90 to 120 days after receipt of notice to vacate.

Tenants who arranged for another place to live were also paid a redecorating expense of up to $210, depending on the number of rooms in the new apartment, and a moving expense of $25 per room.

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[30] Act of August 7, 1956. Supra. See footnote 14.

[31] Relocation from Urban Renewal Project Areas, published by the Urban Renewal Administration of the Housing and Home Finance Agency.

[32] "Lincoln Tunnel Third Tube—Report on Tenant Relocation Program" Department of Real Estate, New York Port Authority (Feb. 1, 1955); "Washington Heights Tenant Relocation Program." Department of Real Estate, New York Port Authority (Oct. 14, 1959).

If the tenant desired the assistance of the Port Authority in acquiring a new dwelling or place of business, such assistance was forthcoming in the following manner: The relocation office contacted real estate brokers who were paid a commission of $150 for each apartment a broker made available and into which a tenant was relocated. The broker was paid an additional $100 for redecorating the apartment or, if the broker had no facility for redecorating, the Port Authority undertook this work itself. In addition, each tenant was paid $100 to assist in defraying his moving expenses.

The budgeted figure for the direct cost of the relocation project in connection with the third tube was $400,000 or about $311 per tenant. At the peak of the program the administrative staff of the local office consisted of 10 persons. The expenses directly related to relocation for the George Washington Bridge project totaled $972,433 or an average cost of $535 for each family involved. A staff of 21 persons was needed in connection with this program.

No mention is made of commercial tenants in connection with the Authority's report on the Lincoln Tunnel third tube project, but the report on the George Washington Bridge project indicates that 109 commercial tenants were relocated. Because of building vacancies in nearby neighborhoods, no special consideration was given to these tenants, which consisted largely of small, individually operated retail stores, but most received compensation for the value of their trade fixtures.

It has been necessary to relocate 12,718 for expressway construction in the City of Chicago during the period between January 1, 1948, through 1961.[33] Costs of tenant relocation advisory assistance are charged against the highway fund and persons are aided through local organizations such as the Tenant's Relocation Bureau. Relocation assistance consists of personal contact with families to be relocated. The Relocation Bureau works with landlords and local real estate firms to find new housing.

CHANGE IN ATTITUDE TOWARD RELOCATION

From the foregoing, it is clear that there is a growing concern for those relocated both on the part of the Federal government and the States. This concern on the Federal level is apparent from the relocation provisions of the Housing Act and the new Federal-Aid Highway Act and, if this trend continues, it may soon be that aid will be given to all who are displaced by projects financed, in part, from Federal funds.

On the State level, the 18 States that presently make relocation payment appear in the minority. Yet this figure can be somewhat misleading for the following reasons: Although a State may make no relocation payments or allow the cost of moving personal property to be introduced as evidence in a condemnation proceeding, the State's actual practice in taking property by eminent domain may amount to substantially the same thing. For instance, the State may take a home or business establishment and, subsequent to the taking, allow the tenant to remain on the premises at a reduced rent or even rent free. When this occurs, the tenant has the use of State property while not compensating the State fully for this use. In effect, the tenant receives an advantage at the taxpayer's expense.

Similarly, refinements in the definition of real property may have the same effect. At least one State, Michigan, defines heavy equipment and machinery as part of real property for which compensation must be paid.[34] Normally such items would be legally defined as personal property and the owner would receive no compensation from the State when it is taken.

In addition, a State may make relocation payments where there is no apparent authority for it to do so. This situation develops where a municipality makes relocation payments to its residents and is subsequently reimbursed for such expenditures by the State. Where such a relationship exists, the relocation payments are considered a part of the total highway construction costs for which the State is responsible. In

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[33] Report of the Department of City Planning, City of Chicago, 2d Quarter, p. 10 (1961).

[34] Based on material supplied the National Highway Users Conference by the Select Subcommittee on Real Property Acquisition of the House Public Works Committee.

such a case, the residents of one community may receive aid; residents of another community in the same State may not.

Now that Federal funds are available for tenant relocation purposes, it is quite likely many States that do not have provision for providing relocation funds will enact legislation that will permit them to share in the Federal assistance. Massachusetts provides a case in point.

In a message to the Massachusetts Legislature,[35] Governor Volpe has proposed legislation that would provide the following relocation assistance:

> The moving expenses of the occupants of buildings displaced by highway construction and other exercises of eminent domain shall be reimbursed by a minimum payment of $25 and a maximum of $200 for dwelling units. Business occupants shall be entitled to a minimum of $100 and a maximum of $5,000 for such expenses.
>
> The cost of such reimbursement shall be charged to the agency and project causing the relocation.
>
> The State Housing Board will promulgate fixed scheduled and procedures governing the administration of these reimbursements.

In addition, several bills have been introduced in the legislature which would effect the Governor's suggestions.[36]

There are other indications of relocation activity in highway construction. The Virginia State Highway Department has said that it will provide relocation assistance to all persons displaced by the Federal-aid highway program in Virginia.[37] This service is to include the listing of available rental and sales properties and referrals to existing services such as local housing bureaus and chambers of commerce. An amendment to the New York City Charter has created a new Department of Relocation, which will provide the service formally under the direction of the Department of Real Estate.[38] In addition, the relocation problem has been cited as a grave threat to the freeway programs in Washington, D. C.[39]

ALTERNATIVE SUGGESTIONS

There have been many objections to the use of Federal and State money for tenant relocation payments and assistance. Many of these are out of date in view of the approval of the Federal-Aid Highway Act of 1962. On the other hand, there certainly seems to be some merit in the argument that the relocation of tenants is somewhat removed from highway construction and that such relocation consumes funds that would provide additional miles of highways. Relocation expenses could be avoided, runs the argument, if systematic planning was used to a greater extent.

On the State level, California has minimized the problems of relocation by planning highway routes in advance. This systematic planning of highway rights-of-way acquisition gives affected owners and tenants an adequate period of time to make necessary relocation arrangements. Taking issue with those who are of the opinion that relocation or bonus payments are necessary to expedite highway construction, California highway officials feel that "tenant relocation has been no problem whatever in expediting the highway construction program in densely populated areas."[40] In fact, the feeling is that financing tenant moving expenses out of funds collected from highway users through motor fuel taxes, license fees, and other revenue raising devices might not be quite fair to the highway user. One highway official put it this way:

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[35] Message of Governor John A. Volpe to the General Court, Senate Document No. 682 (March 21, 1962).

[36] H. 443, S.30, S.34, S.35, S.36 of the 1962 legislative session.

[37] Washington Post (Nov. 15, 1962).

[38] New York Times (Nov. 9, 1962).

[39] Congressional Record, daily ed. (July 13, 1962).

[40] G.T. McCoy (State Highway Engineer, California), "Tenant Relocation Without Bonus Payments." American Highways (April 1958). The estimate was based on a $500 bonus payment for each family relocated because of a highway project.

> With regard to the "objective of humanitarianism and justice", there may be some question on moral grounds, and considerable question on legal grounds, as to whether highway funds, collected from highway users for highway purposes, can justifiably be expended for bonus payments for tenant relocation. After all, the state also has a considerable moral obligation to the highway user that he receive the most highway for his gasoline and motor vehicle tax dollar.[41]

Although there is no way of actually estimating the amount by which tenant relocation payments boost costs of highway construction, California officials claim that, if California had paid an incentive bonus to each family unit relocated by highway construction in the 1959 fiscal year, it would have increased the State's highway construction costs by $2\frac{1}{4}$ million in that one year alone.[42]

There has been opposition to a program of relocation assistance in other quarters. One highway official, when asked what preparations his department had made for relocation advisory assistance, said that his State had experienced no problem with relocating families for highway construction and expressed the fear that undertaking such aid would just create difficulty where none had existed before.

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[41] Ibid.
[42] Ibid.

Effect in Florida of Requiring Condemnor to Pay Condemnee's Entire Litigation Expenses

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• When condemnor and condemnee cannot agree, the unavoidable trial costs the owner substantial sums in attorneys' fees, appraisers' fees, and the other expenses of any litigation. Does the owner receive "just compensation" when he recovers the full value of his property but must spend part of it to pay the litigation expenses he was powerless to avoid?

The answer has been that, because costs and fees were never allowed under the common law and the sovereign is not liable for costs unless it consents, the constitutional requirement that just compensation be paid does not require payment of any costs or fees and none are recoverable unless clearly provided by statute.[1]

This historical answer is too pallid to last indefinitely and, like the doctrine of sovereign immunity, its future is doubtful unless there be some more convincing reason for a rule of law which on its face appears unjust. Making condemnor pay all of condemnee's litigation expenses is like cutting off a head to cure a cold. This conviction is based on actual experience with the new concept in the only State that has tried it.

In 1892, a Florida statute required that condemnor pay "all costs of the proceedings"[2] and in 1907 the legislature added "including a reasonable attorney's fee for the defendant to be assessed by the jury."[3] In 1950, it was held that "all costs" included appraisers', engineers', and photographers' fees and charges.[4] In 1959, it was held, on authority of the earlier case, that an attorney's fee assessed by the appellate court as well as all appellate costs were payable to condemnee, unless he appealed and lost. This conclusion, it was said, was implicit in the constitutional requirement for just compensation even if there had been no statutory authority.[5] In 1962, it was held that costs, including appraisers' fees, incurred by defendants unable to agree on the apportionment of an award after trial must also be paid by the condemnor.[6]

In Florida, therefore, condemnor pays all the litigation expenses incurred by condemnee irrespective of the outcome. No other jurisdiction has gone so far.[7] The consequences have been revealing.

Assuming he is offered no more than condemnor's appraisal, the property owner in Florida cannot lose by going to trial and he might gain. Attorneys and appraisers interested in employment are tempted to encourage property owners to reject an offer and go to trial. The owner, assured that his litigation expenses will be paid by condemnor, has no reason to reject the advice. The first consequence, therefore, was a sharp reduction in the ratio of properties acquired by purchase, from over 90 percent

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[1] Dohany v. Rogers, 281 U.S. 362, 50 S.Ct. 299, 74 L.Ed.904, 68 A.L.R.434; Nichols, "Eminent Domain." 3rd ed., vol. 1, §4.109.

[2] §1558 R.S. 1892.

[3] Ch. 5707, Laws 1907; presently §73.16 Florida Statutes.

[4] Dade County v. Brigham, Fla. 1950, 47 So.2d 602; 18 A.L.R.2d 1221.

[5] Jacksonville Expressway Authority v. Henry G. DuPree Co., Fla. 1959, 108 So.2d 289, 293; 69 A.L.R.2d 1445.

[6] Orange State Oil Co. v. Jacksonville Expressway Authority, Fla.App.1962, 143 So.2d 892, 895.

[7] HRB Special Report 59, 44-48 (1960). Although 13 other States allow attorneys' fees, all but Oregon are either nominal or limited to instances of abandonment. The allowance of costs in Oregon is dependent on whether the award of the Court exceeds the award of viewers.

before 1950, to less than 20 percent by 1957.[8] This, in turn, led in one instance to a jury trial involving 90 parcels of land owned by different defendants represented by 29 attorneys before one judge and jury for the right-of-way for one road.[9] Two other similar trials were required for the right-of-way for this particular road.

In the trial just described, the owners received nothing more than condemnor offered, the verdicts falling between the opinions expressed by condemnor's two experts. Though the verdict was affirmed, it is safe to say that no one felt this was a model for just or equitable land acquisition, and the occasional owner with a genuine issue as to value was submerged in a flood of opportunists and all came away empty-handed. The taxpayer's bill for staging this circus was substantial.

In a small north Florida county, where the court in the interest of justice elected to order separate trials, the volume of eminent domain litigation soon occupied one-third of the entire trial docket with resultant delay to all litigation. This solution proved intolerable.

Because the owner's attorney's fee and expert witnesses' fees are related to the time and effort expended and cost is no deterrent, the trial tends to become a marathon limited only by the patience of the judge and the obvious impatience of the jury. It is not uncommon for the trial of five parcels, regardless of value, to take two weeks. In one instance, two weeks were spent selecting a jury.

Although these extremes cannot prove the point, they do illustrate two facts: (a) when the owner's litigation expenses are paid by his adversary and his advisers get more as they litigate longer and harder, litigation increases; and (b) when more then one-half the property required by the public must be litigated in court, either the judicial structure is choked beyond endurance by the added burden or the court in self-defense so accelerates the litigation that justice can become an accident. In practice, therefore, the intended objective of assuring the owner just compensation is not attained but actually is threatened.

The next consequence of imposing all of condemnee's litigation expenses on condemnor was to increase condemnor's acquisition costs by not less than 30 percent of the initial appraised value of the required property.[10]

The breakdown of this additional cost can be illustrated with an average parcel. The following figures are actual averages from experience over the past four years. The parcel was initially appraised at $7,814. At trial, the higher of two appraisals submitted by condemnor was $8,306. Because the owner's expenses are recoverable, he offered at least two experts and two were needed to meet him. The verdict was $8,716. The owner's proof, it is noted in passing, sought $19,650. The jury awarded the owner's attorney a fee of $739. It is difficult in this climate to find attorneys experienced in this field willing to testify that more modest fees are reasonable. They may be defending the next trial. The owner spent $461 for expert witnesses, photographs, surveys, and what not, of which the trial court assessed $360 against condemnor. The expense to condemnor in litigation expenses excluding the time of its employees was $213. Counsel's time and the time of condemnor's right-of-way engineer and others added $158.

The foregoing figures do not include all of the cost to condemnor of litigating. Of the parcels tried, 14 percent were appealed at very considerable additional expense. No effort is made to estimate the public's additional expense in the time of the court, jurors, or the delay in acquisition.

The net effect, therefore, is that the public spent at least $10,186 to acquire a parcel initially appraised at $7,814. Of this additional $2,372 spent by the public, the owner received $902, less the difference in costs incurred by him ($461) and the costs recovered ($360), or a net benefit from litigation to the owner of $801, 10 percent more than the initial appraisal. The other $1,571 went down a rat hole, so far as both the owner and the public are concerned.

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[8] All figures given come from the records of Dade County (Greater Miami), which has 20 percent of Florida's population.

[9] Dratch v. Dade County, Fla.App.1958, 105 So.2d 171.

[10] This and the following figures are based on the records of Dade County's acquisition of $14 million worth of right-of-way for 32 projects over the past four years.

Is the additional $801 recovered by the owner actually a more just value for his property or does it merely reflect the difficulty of keeping juries from some degree of compromise?[11] If the verdict is more just, does the amount involved warrant the extraordinary cost to the public? The verdicts returned indicate strongly that a lack of confidence in the integrity and accuracy of condemnor's valuations is totally unjustified. A policy that encourages rather than discourages litigation must be based at least in part on the premise that the public agency cannot be trusted to make a just offer. It is difficult to believe this premise is sound. On the contrary, it is a fair generalization that public appraisals tend to exceed the market simply because public employees have less incentive to save money than to avoid friction with disappointed citizens.

The independent appraiser employed by a public agency is rarely under pressure to limit his value. He knows that a tight estimate will provoke arguments, bitterness, litigation, and difficult cross-examination. A more generous estimate tends to avoid, or at least ease, all these pressures and is likely to please the agency negotiators who probably had a hand in selecting him for employment. The taxpayers can never know whether he was tight or generous in his estimate. Which course is he likely to follow? Invariably he will resolve all doubts in favor of the owner. It is a fact that the most valuable use to which property can be put is for it to be condemned by the public.

There is far less reason to suspect the fairness of government dealing with its citizens than there is to suspect the fairness of insurance companies or the defendants in other civil litigation. Why, then, should litigation be financed and thus encouraged when the government is involved, but not when private interests only are involved?

It is said that public policy requires that the property owner be placed on an equal footing with his government in condemnation cases. The government's resources are unlimited and the owner is like a pebble before this wave. However, the third consequence of requiring government to finance the defense is that it does not equate the parties, it quite literally puts the government at the mercy of the property owner.

The owner can employ the very best attorney and experts available, because the only limit to their compensation is the amount of time and energy they are willing to spend. They cannot fail to be paid. Government operates under budgets and can rarely afford to employ the best, reluctant as one may be to admit it. At trial, therefore, the owner holds the high cards. His superior advocate represents a litigant who usually has nothing to lose and everything to gain. He controls the extent and, therefore, the expense to the government of the litigation. The owner holds the high cards at the bargaining table as well. Is the public interest truly served by putting the government at the mercy of its individual citizens?

The final consequence, in practice, of making condemnor pay all of condemnee's litigation expenses is to nourish very directly an industry of lawyers, appraisers, surveyors, engineers, photographers, and the like who will be paid by condemnor if condemnee will let them take his matter to court. The vast majority of these people do not let their personal interest becloud their ethics or their sense of duty to their clients. The few that do create a cancer disproportionate to the numbers of individuals involved. They are as difficult and costly to eradicate as the ambulance chaser. Almost invariably they do nothing for the owner who employs them, other than undermine his confidence in his government and its courts.

The completely reputable and highly skilled attorneys employed by condemnees create a less obvious but graver problem. Because their rate of compensation is limited only by their ability to persuade or overwhelm a jury, there is every tendency to attract the very best attorneys and experts to the condemnee's side. Because they are advocates, their enthusiasm for their client's cause can warp their sense of justice. They are not intimidated by established precedent. Because they are, by the process of selection, the cream of an influential group, it is but a matter of time before their views become those of the courts and, to a lesser extent perhaps, the legislature.

The author cannot quarrel with the fact that courts tend to reflect the views of lead-

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[11] Twelve of 32 juries returned verdicts identical to the evidence for all parcels tried. The other 20 juries compromised to some degree on at least some parcels.

ers of the bar. They should. One can only marvel at what has happened to the law of eminent domain in Florida since the leaders of the bar were induced to the side of the condemnee.

In 1950, it was held, as already noted, that "all costs" in a statute then 58 years old required condemnor to pay not only all taxable court costs but all expenses of litigation, a legislative intent theretofore completely unsuspected and a holding virtually without precedent.[12]

In a series of decisions from 1958 to 1959, it was held that an owner may recover a value for property based on uses prohibited by existing restrictions,[13] nullifying the effect of two earlier decisions.[14]

In 1959, it was held that interference with ingress, though other access was available, constituted a taking[15]; this, despite the deliberate omission of a constitutional prohibition against damage without compensation in Florida.[16] This decision blunted, if it did not reverse, at least two prior decisions.[17]

In 1959, it was held that an owner may recover moving expenses, though the opinion concedes that this is against the clear weight of authority elsewhere and is without statutory authorization in Florida.[18]

In 1961, the granting of a new trial was affirmed merely because the judge was shocked by the verdict, though it was within the range of proof and the trial itself was admittedly free from error.[19] This decision abandoned at least one prior decision.[20]

In 1962, it was held that condemnee can compel production before trial of all opinions and data in the hands of condemnor's experts though condemnor cannot have access to condemnee's experts. The court acknowledged that this was directly contrary to the rule that governs all other civil litigation in Florida.[21]

In 1962, it was held that condemnor must pay all litigation expenses incurred by defendants in a private squabble over apportionment of an award after trial[22] though condemnor has no interest in nor control over this litigation.

Illustrative of the concern for the property owner (represented by the ablest counsel that condemnor's money can hire) is the following passage:

> The powerful government can usually take care of itself; when the courts cease to protect the individual—within, of course, constistitutional and statutory limitations—such individual rights will be rapidly swallowed up and disappear in the maw of the sovereign.[23]

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[12] See note 4 supra. Compare Inland Waterway Develop. Co. v. City of Jacksonville, Fla. 1948, 38 So.2d 676.

[13] Board of Com'rs. of State Inst. v. Tallahassee B. & T. Co., Fla. App. 1958, 100 So.2d 67, cert. den. 101 So.2d 817; Fla.App.1958, 101 So.2d 411; Fla.App.1959, 108 So.2d 74; Fla.1959, 116 So.2d 762; Swift & Company v. Housing Authority of Plant City, Fla.1958, 106 So.2d 616.

[14] City of Miami Beach v. Hogan, Fla.1953, 63 So.2d 493; Yoder v. Sarasota County, Fla. 1955, 81 So.2d 219.

[15] Florida State Turnpike Authority v. Anhoco Corp., Fla.1959, 116 So.2d 8, 16.

[16] Selden v. City of Jacksonville, 28 Fla. 558, 10 So. 457,462, 14 L.R.A.370 (1891).

[17] Weir v. Palm Beach County, Fla.1956, 85 So.2d 865; Lewis v. State Road Department, Fla. 1957, 95 So.2d 248.

[18] See note 5 supra.

[19] Bennett v. Jacksonville Expressway Authority, Fla. 1961, 131 So.2d 740.

[20] Edwards v. Miami Shores Village, Fla. 1949, 40 So.2d 360. See also comment by another court in Bainbridge v. State Road Department, Fla. 1962, 139 So.2d 714, 719.

[21] Shell v. State Road Department, Fla. 1962, 135 So.2d 857, 860.

[22] Orange State Oil Co. v. Jacksonville Expressway Authority, Fla.App. 1962, 143 So.2d 892, 895.

[23] Jacksonville Expressway Authority v. Henry G. DuPree Co., Fla. 1959, 108 So.2d 289, 293, 69 A.L.R.2d 1445; compare the observation of another court, Bainbridge v. State Road Department, Fla. App. 1962, 139 So.2d 712,717.

This remark, it must be remembered, is made in the only State where the entire cost of litigation incurred by the owner must be paid by the public.

Also illustrative of the degree to which an able and dedicated court has been moved by a policy that attracts the strongest advocates to the defense of property owners if the fact that one most able justice, in dissenting from a decision favoring the owner, was moved to explain that this signaled no change as to his sympathy:

> In almost every case where the question was at issue, I have upheld the rights of the landowner in such proceedings.[24]

The end is not yet in sight. Implicit in many decisions is a rejection of the market value concept of compensation in favor of a special value to the owner concept.[25] One must anticipate that mental anguish, inconvenience, and sentimental value will in time be added to the public's bill in Florida. The author cannot demonstrate that the recent developments in Florida condemnation case law are attributable solely to the fact that condemnee's litigation expenses are paid by condemnor, but this fact was certainly the major cause.

It may be too soon to conclude that Florida is wrong and the rest of the country is right. However, the balance of public interest and private interest reflected in the established eminent domain procedures and precedents in this land has stood the test of time well. Any tampering with such tested scales should be approached most cautiously. The Florida experiment in requiring condemnor to finance all of condemnee's litigation expenses has demonstrated the danger of disturbing the tested balance. If the suspected malady required treatment, the cure was ineffective, very expensive, and it has produced and will continue to produce harmful side effects that are far more serious than the assumed malady.

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[24] Bennett v. Jacksonville Expressway Authority, Fla.1961, 131 So.2d 740, 745.

[25] E.g., Jacksonville Expressway Authority v. Henry G. DuPree Co., Fla.1959, 108 So.2d 289,292. Compare Nichols, "Eminent Domain." 3rd ed., vol. 4, §12.22; Orgel, "Valuation Under Eminent Domain." 2nd ed., vol. 1, p. 74.

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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Techniques of Land Acquisition for Future Highway Needs

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•RESERVATION of future highway rights-of-way by police power controls is a highly useful technique in keeping the costs of right-of-way acquisition relatively low; however, there are some situations in which it is not available. Where a future right-of-way is shown on an official map and an owner of mapped land shows that he cannot earn a fair return on the land unless he develops it in some fashion, a permit for development must issue to comply with due process, if the tract is left in private ownership. The only way development of land in such circumstances may be forestalled is for the government to acquire the development rights. Probably this is most simply done by taking title to the land. If the owner refuses to sell or give the property to the public, the government must rely on its power of eminent domain to obtain the title.

In some areas imposition of police regulations to reserve future rights-of-way may be politically unfeasible. Voters may decide the government, rather than private persons, should shoulder the risk and inconvenience of owning land that, practically speaking, cannot be developed, even though this reduces the cost savings passed on to the taxpayers. In that case, the only way in which the government may prevent further development of the future right-of-way is to acquire title. Again, if the property cannot be obtained by negotiated purchase or gift, it is only through eminent domain proceedings that the government may acquire title.

One example of the vital importance to the taxpayer that the State forestall such development comes from Maryland. In planning a highway around Washington, D. C., the State Roads Commission took an option in 28 acres of land needed for the right-of-way at $7,000 per acre. Three years later, with the option near expiration, the Commission found that the property adjacent to the land under option had in the meantime been rezoned from residential to industrial use and was selling for $1.00 per foot (about $49,000 per acre). Furthermore, the adjacent land was expected to sell for twice as much and to be covered with improvements as well when the anticipated date of starting the highway's construction arrived some six to eight years later.[1] Without considering improvements, if the adjacent land is taken to be similar to the 28-acre tract, acquisition costs would have been only one-seventh to one-fourteenth what they were going to be without advance acquisition, had the right-of-way been acquired when the option was acquired. When improvements to the land are drawn into the picture, the savings that could be achieved by advance acquisition become even more dramatic.

The government's right to take property for public use—its right of eminent domain—is said to be inherent in a state or nation, but is exercised only for a public purpose and is allowed only by statute.[2] Compensation must be paid the owner for the property taken, including compensation for any loss in value caused by the condemnation sustained by those portions of the tract left to the private owner.[3] In determining whether eminent domain is available for use in acquiring right-of-way for a future highway, certain questions immediately arise. Is there a statute expressly giving authority to exercise the power or implying such authority? Is taking land for a future highway a public purpose? Is it equally easy to show the public purpose exists when the land has previously been reserved through police regulations for right-of-way purposes, as when

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[1] Example given in address by Joseph D. Buscher, Special Assistant Attorney General of Maryland, at AASHO annual meeting, Denver, Colorado, October 9, 1961.

[2] 3 American Law of Real Property (Casner ed. 1952) §13.17.

[3] 18 Am. Jur., "Eminent Domain", §§128, 270.

it has not? If the authority exists and right-of-way for a future highway is taken, how is the value of the property taken measured? Is it possible to retain for the public the land values that will be created by the public improvement when it is built? Similar questions arise where negotiated purchases of the land are possible. And whether future right-of-way is purchased or condemned, how may States raise the money to pay for it?

The following discussion considers first the States' power to acquire highway rights-of-way materially in advance of construction. Essentially this updates the 1957 study of Highway Research Board Special Report 27, "Acquisition of Land for Future Highway Use." The discussion then moves to how the acquisitions are financed, and closes with some suggestions for reducing acquisition costs. An appendix presents the results of interviews with Ohio officials regarding the administration of that State's advance acquisition program which uses pension funds to pay the acquisition costs.

In summary, the power of advance acquisition is ever becoming more firmly established, assuming careful planning of highway needs precedes the acquisition. How far in the future construction may constitutionally be contemplated probably depends on the circumstances of each case, considering such matters as whether the right-of-way is for Interstate or ordinary highways, whether it will be protected by appropriate police power controls and whether it passes through rural, suburban, or urban territory. Acquisition in some States is financed by revolving funds; in others, by borrowing against future tax receipts. In Ohio, various State pension funds are used to pay for advance acquisition. The Washington legislature recently authorized use of pension funds for this purpose also. Suggestions for reducing costs include use of installment payments of compensation, elimination of equitable servitudes as compensable property interests in certain situations, elimination of excessive payments of severance damages, and public development of the land values created by the highway.

LEGAL POWER

Explicit Statutory Power

Ordinary State Highways.—A 1957 study found that statutes in 15 States explicitly authorized acquisition of land for future highway use,[4] defining "future" to be at least two years between acquisition and the start of construction.[5] In 1962 six additional States were found with such explicit statutory authority[6] and none of 1957 group of States had repealed theirs. In addition, North Carolina explicitly allows consideration of savings in right-of-way costs by advance acquisition in allocating acquisition responsibilities between State and local authorities for projects in and around cities.[7] Details of some statutes comparable to those shown in the 1957 study[8] are given in Table 1. In two more States, Kansas and North Carolina, the State highway commission may purchase (but not condemn) an entire tract of land for highway purposes if the commission finds this will best serve the public interest, even though not all the tract is immediately needed for State highway purposes.[9] Minnesota gives its highway commissioner similar power, including power to condemn.[10] This may be helpful in acquiring strips for future highway widening.

The language indicating futurity in some statutes (last column, Table 1) differs

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[4] Highway Research Board, "Acquisition of Land for Future Highway Use" (Special Report 27, Washington 1957), p. 24 listing Arkansas, California, Colorado, Florida, Idaho, Louisiana, Maryland, Nebraska, Nevada, New Jersey, New York, North Dakota, Oklahoma, Virginia, and Wisconsin. This special report is hereafter referred to as the 1957 study.

[5] Ibid. at 44, n. 135.

[6] Alaska Comp. Laws Ann., (1958 Supp.), §14A-1-42; Burns' Indiana Stats. Ann., §36-2947; Mich. Stats. Ann., §9.1097(13a); Rev. Codes of Mont. Ann., §32-1615; New Mex. Stats. Ann., §22-9-41; Wash., Laws, 1961, c. 281.

[7] Gen. Stats. of N. C., §136-66.3.

[8] Note 4, supra, at 27-29.

[9] Gen. Stats. of Kan. Ann. (1961 Supp.), §68-413; Gen. Stats. of N.C., §136-19.

[10] Minn. Stats. Ann., §161.23.

TABLE 1

STATUTES OF FOUR STATES SPECIFICALLY AUTHORIZING ACQUISITION OF PROPERTY FOR FUTURE HIGHWAY USE

State	Body Authorized to Acquire	Permissible Methods of Acquisition	Maximum Type of Interest to Be Acquired	Determination of Necessity by Whom	Power to Lease in Interim	Power of Sale	Language Indicating Futurity
Indiana	State Highway Department, §36-2947.	Purchase, donation condemnation or otherwise.	Such land, right or easements as may be reasonably necessary, §36-2947.	--	--	Yes §36-2950 also exchange §36-2951	It has become necessary to make highway plans and programs... for a reasonable time in the future... The department may acquire such land, right or easements as may be reasonably necessary or needed within a reasonable length of time to carry out the highway plans and programs for future location, relocation construction... of a highway system. §36-2947.
Michigan	State Highway Commissioner, county road commissions, incorporated cities and villages, §9.1097 (13a).	Purchase or condemnation, §9.1097 (13a).	Fee simple, §8.13(1).	Public corporation or State agency, §8.14	Yes, §9.1097 (13a)	Yes §9.1097 (13a)	May acquire... in advance of actual construction programing private property situated within the rights-of-way of any highway projects planned for future construction... and may expend for the advance acquisition of right-of-way... §9.1097(13a).
Montana	State Highway Commission, §32-1615.	Purchase or any other lawful manner including condemnation. But cannot condemn property for purpose of exchange for other property, or for parks adjoining or near a State highway, §32-1615.	Fee simple, excluding oil, gas and mineral rights.	State Highway Commission, §32-1615	Yes, §32-1615	Yes. Must sell to owner from which first acquired if he meets highest bid. May exchange if owner from which acquired does not demand sale, §32-1616	Commission shall have the power... to acquire... any lands... it deems reasonably necessary for present or future State highway purposes... The authority... includes authority to acquire for reasonably foreseeable future needs.
Oklahoma	State Department of Highways, Tit. 69, §46.	Purchase, donation or condemnation, Tit. 69, §46.	Lands or such interests therein as in its discretion are necessary.	Department of Highways	--	Yes, Tit. 69, §159.1	The Department of Highways... is... authorized to acquire... lands... necessary for... establishing, constructing and maintaining State highways... in determining the amount of land required, or width of right-of-way necessary... the Department of Highways shall take into consideration the present and probable future needs in connection with maintaining and reconstructing said highways, and the prevention of traffic congestion and hazards.

from State to State. The courts have not yet interpreted the phrases involved. It is conceivable that when they do, differing degrees of liberality in allowing advance acquisition will be established for the several States. Indiana and Montana, essentially, speak of acquiring land "reasonably necessary" within a "reasonable length of time" to carry out highway programs made for a "reasonable time in the future." Repeated use of the qualification "reasonable" perhaps suggests a more conservative authorization than that given in Michigan, which simply speaks of getting land "within the rights-of-way of any highway projects planned for future construction."

In another sense, Michigan is the more rigid because advance acquisition applies only to land within the right-of-way. Oklahoma sounds the most conservative, not only confining the authorization to "necessary" lands, but requiring the Highway Department to use the following criteria in determining what land is necessary: the present and probable future needs in connection with maintaining and reconstructing said highways, and the prevention of traffic congestion and hazards.

On the other hand, except for the Michigan restriction to land within the right-of-way, the courts of these States may evolve standards of advance acquisition that are essentially the same. No legislature intends to authorize unreasonable advance acquisition; all highway departments must consider the criteria mentioned by Oklahoma in formulating reasonable programs of future highway construction. At this time it is hard to foretell future court decisions. Because the problems of high land acquisition costs are common to all States it may be suggested that, lacking some more positive evidence of legislative intention to restrict administrative discretion, courts should construe all these statutes liberally to accomplish the legislatures' purpose—to provide an effective tool for reducing right-of-way acquisition costs.

A few cases in addition to those summarized in the 1957 Highway Laws Study have been found interpreting the future use statutes. In Florida, the State Road Department, in connection with constructing a limited-access Interstate highway, wished to acquire a tract before funds had been allocated for construction and before detailed engineering plans, construction drawings, and specifications had been completed and adopted—even before the Department was able to say with certainty when the highway construction would be started. Still the court held that the resolution of the Road Department determining that public necessity for taking the land existed was not a gross abuse of discretion, and therefore would not be set aside.[11] Although the case shows a liberal attitude toward taking land for future construction, it must be remembered that a highway in the Interstate System was involved, and that a Federal Statute,[12] as well as the State statute,[13] authorized advanced acquisition. Other factors aiding the court to decide the case as it did, and which the court noted in its opinion, were an affirmative showing that substantial expenditures had been made already in acquiring rights-of-way for the highway, and that the Federal funds are advanced for right-of-way acquisition within five years following the fiscal year in which the State asks for the advance.[14] Furthermore, part of the highway had been surveyed and located by the State Highway Engineer. Hence, although the highway department could not say when the highway would be built, there were substantial grounds for believing it eventually would be.

A Michigan case that does not mention the future use statute endorses acquiring land for future use.[15] Before the State Highway Commissioner had authority to establish a State trunkline highway within a particular city, the city consented to the highway's establishment without giving the metes and bounds description of the route to be followed. The court found the consent so given valid. It declared that the quantity of land to be taken is discretionary with the Highway Commissioner, and that intending to take more land than necessary for the contemplated improvement is not a clear abuse of discretion. The court said, "The principle that public authorities charged with the laying out and maintenance of highways may act with reference to probable future requirements has been repeatedly recognized."[16]

Limited-Access Highways.—Some States with no explicit general statutory authorization to acquire rights-of-way for future construction of ordinary State highways do have statutes granting such power (at least in some degree) where the future construction will be of limited-access highways. Mississippi authorizes its highway authorities to plan, establish, improve, or construct controlled-access facilities wherever such authorities are of the opinion that traffic conditions, present or future, will justify the facilities.[17] The use of the disjunctive suggests authority to do any or all of the listed activities. This further suggests that advance acquisition of right-of-way is authorized as part of presently planning or establishing a highway slated for future construction.[18] The highway authorities may condemn property for controlled-access roads, and have discretion to acquire an entire tract if this best serves the public interest, even though not needed for the right-of-way proper.[19] The authority to acquire an entire tract although it is not all needed for the right-of-way proper exists

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[11] State Road Department v. Southland, Inc., 117 So.2d 512 (Fla. App. 1960).
[12] 72 Stat. 893, as amended; 23 U.S. Code, "Highways", §108.
[13] Fla. Stats. 1959, §337.27.
[14] 117 So.2d at 515. The Federal statute has since been amended to extend the permissible time of construction to seven years following the fiscal year in which the State requests the advance. 72 Stats. 62, 23 U.S. Code, "Highways", §108.
[15] New Products Corp. v. State Highway Commissioner, 252 Mich. 73, 88 N.W.2d 528 (1958).
[16] Ibid., at 535.
[17] Miss. Code of 1942 Ann. (1956 Supp.), §8039-03.
[18] Opinions may differ as to whether authority for advance acquisition may be derived from the described statutes. The statutes cited in note 20, infra, are listed in the 1957 Study, p. 27, but the view is expressed there that the power to acquire an entire tract is of "no aid in assembling the right-of-way" for a new highway, as compared with widening an old one.
[19] Miss. Code of 1942 Ann. (1956 Supp.), §8039-05.

in eight States[20] in addition to Mississippi, with some variation in details. Generally the statute speaks of the entire tract not being "immediately" needed.[21] In three States the land not needed for the right-of-way may not be condemned.[22] In Alaska, the acquisition authority rests with incorporated cities and political subdivisions, but not with the State Highway and Public Works Board.[23]

Implicit Statutory Power

Ordinary Highways. —The statutes of still other States seem to imply authority to acquire land for future highway construction. The 1957 study listed five such States.[24] One of these States, North Carolina, has repealed its statute[25] but seven others now have such implicit statutory authority.

In Georgia, the implied authority exists for rural roads but not for State highways. The Rural Roads Authority has been set up in that State to which the State governor or the governing authority of each county may convey any right-of-way the State owns or the State highway department acquired "which is at the time used, or may, upon completion of any action permitted to the Authority by this chapter, be used as a rural road."[26] One "action" the Authority may take is to provide for undertaking and financing projects recommended to it by the State highway board.[27] The State highway board and the State highway department may acquire rights-of-way in any way permitted by law for the governor to convey to the Authority.[28] One permitted way is by condemnation.[29] Although the governor may not convey part of the State highway system to the Authority[30] there is nothing to prevent part of the rural roads system being conveyed to the State highway authorities. Therefore, an indirect method of acquiring right-of-way for future highway construction may be available in Georgia. First, the State highway board would recommend a project the board was scheduling for future construction to the Authority. The Authority then would provide for undertaking and financing it, the State highway authorities would acquire the right-of-way, the governor would convey it to the Authority, the Authority would in due course build the road and then transfer it to the State highway system.

Less complicated implications of authority are found in the statutes of other States. Hawaii allows counties to condemn more land than is needed for a public improvement where small remnants would otherwise be left or "where other justifiable cause necessitates such taking to protect and preserve the contemplated improvement, or public policy demands such taking in connection with such improvement."[31] Although this provision probably does not enable counties to acquire rights-of-way for future construction where no road exists at all, it may provide authority to acquire land for future widening of an existing highway. The statute's usefulness may be limited because it enlarges the power only of counties; it confers no power on State agencies.

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[20] Code of Ala., tit. 23, §145; Alaska Comp. Laws Ann. (1958 Supp.), §14A-2-63; Code of Ga. Ann., §95-1704a; Gen. Stats. of N.C., §136-89.52; Ore. Rev. Stats., §374.040; Tenn. Code Ann., §54-2004; Utah Code (1953), §29-9-4; Rev. Code of Wash., §47.52.050. This provision is also found in Mich. Stats. Ann., §9.1094(4); New Mex. Stats. Ann. (1961 Supp.), §55-10-5, and N. Dak. Code, 1960, §24-01-32, although these three states authorize acquisition of land for future highway construction whether of limited-access facilities or not.

[21] In all States except Utah. The Kansas statute applicable to State highways in general also spoke of the land not being "immediately" needed, Gen. Stats. of Kan. (1961 Suppl.), §68-413.

[22] Alabama, Kansas and North Carolina.

[23] Alaska Comp. Laws Ann. (1958 Supp.), §14A-2-63.

[24] Note 4, supra at pp. 36-40, listing North Carolina, Oregon, Tennessee, Texas, and Washington. Washington now has explicit authority, Wash., Laws, 1961, c. 281.

[25] N. Ca., Laws, 1959, c. 25.

[26] Code of Ga. Ann., §95-2606.

[27] Ibid., §95-2607.

[28] Ibid., §95-2606.

[29] Ibid., §95-1724.

[30] Ibid., §95-2606.

[31] Rev. Laws of Hawaii (1961 Supp.), §141-1.

Iowa authorizes rental of land that is acquired for highway improvements but is not "immediately" needed.[32] Although the time lag between acquisition for current projects and actual construction may sometimes be so great as to make rentals feasible, it might be argued that this statute implies authority for advance acquisition. Maine and Rhode Island have similar statutes.[33]

The Kentucky Highway Department may condemn land when by official order it has designated the route of a highway.[34] Depending on how precisely the route must be designated, this statute may allow land acquisition for future highway use.

The New Hampshire governor may determine after hearing whether there is occasion for laying out or altering highways of certain classes or included within the National System of Interstate Highways, in a location proposed by the State commissioner of public works and highways.[35] If the governor decides there is such occasion, he appoints a commission to acquire land in the proposed location.[36] It may be argued that a present anticipation of future need for a new highway or for expanded width of an existing highway may constitute an occasion for laying out or altering the highway. If the argument is accepted, then this New Hampshire statute in some circumstances authorizes acquisition for future use.

New York since 1956 has maintained a revolving fund of $20 million for advance acquisition of rights-of-way. The funds are actually part of current appropriations, but these have been sufficiently large to permit the amounts spent for advance acquisition to be restored to the fund when the projects for which the land was acquired are placed under contract.[37] New York relies on the same statute[38] to authorize advance acquisition that it relies on for current acquisition.[39] This statute contains no language suggesting advance acquisition, but says "the property required" for highway construction, reconstruction, or improvement may be acquired.[40] Accordingly, New York makes no advance acquisitions except where the appropriate district engineer certifies they are necessary for the projects involved and, if the projects involve Federal participation, that local representatives of the U.S. Bureau of Public Roads also can recommend approval. On arterial highway projects, plans must have been developed so that approval from the municipality may be obtained.[41]

In Ohio, the director of highways may purchase realty he deems "will be necessary" for the improvement of State highways.[42] Also, he may agree with the commissioners of a sinking fund created by the State constitution for the acquisition of realty, that the commissioners get the land and hold it until the highway department plans to use it.[43] Two provisions of the statute show it is contemplated that acquisition may occur a considerable time before construction. Each agreement, although it may not extend beyond the two-year period for which appropriations had been made to the highway department, may be successively renewed so as to extend up to eight years from the date of the original agreement.[44] The director of highways may purchase the land from the commissioners any time before letting the highway improvement contract.[45] Another section of the Ohio statutes allows municipal corporations to spend their own funds to ac-

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[32] Code of Iowa Ann. (1962 Supp.), §306.32.
[33] Rev. Stats. of Maine, Ch. 23, §24; Gen. Laws of Rhode Island, 1956, §37-7-1.
[34] Ky. Rev. Stats., §177.081.
[35] N. Hamp. Rev. Stats. Ann., §233.1.
[36] Ibid.
[37] Letter from P. G. Baldwin, Director, Bureau of Rights-of-Way and Claims, Department of Public Works, State of New York, to G. Graham Waite, December 26, 1962.
[38] McKinney's Consol. Laws of New York, Bk. 24, "Highways", §30.
[39] Letter from Saul C. Corwin, Counsel, New York State Department of Public Works, to Robert J. Potter, Deputy Attorney General and Chief Counsel, Nevada Department of Highways, August 22, 1962.
[40] McKinney's Consol. Laws of New York, Bk. 24, "Highways", §30.1(a). The statute also speaks of acquiring all property "necessary" for such projects. Ibid., §30.2
[41] Note 37, supra.
[42] Baldwin's Ohio Rev. Code Ann., §5501.115.
[43] Ibid.
[44] Ibid.
[45] Ibid.

quire rights-of-way for cooperative projects between the municipality and the State to improve State highways within the municipality's limits after the director of highways has given conditional approval to the municipal corporation's preliminary plans.[46] Ultimately, the State reimburses the municipal corporation for the costs of the right-of-way acquired.[47] The statute sets no limit on the time that may elapse between the director's conditional approval of the municipal corporation's preliminary plans (after which right-of-way may be acquired) and the start of actual construction.

Pennsylvania provides for official mapping of future highways[48] but explicitly points out this is not a taking.[49] The effect of placing a proposed highway on the official map is to deny compensation when the land is finally taken for any improvement placed in the bed of the paper highway after mapping.[50] Although in legal theory mapping itself does not amount to a taking so long as the landowner can still earn a fair return on the land without making new improvements on it, still its practical effect is to cause most owners to decide not to develop the land to what, lacking mapping, would be its highest and best use. To the extent that the income from mapped land, though fair, is lower than it would be with the improvements the owner would have placed on it had the land not been mapped, something akin to a taking has occurred, although not in the constitutional sense. In fact, the landowner may be hurt worse economically by mapping than by condemnation because mapping gives him no funds with which to buy other land for development, whereas condemnation does. Considering this immediate effect of mapping for future highways, it may be argued that the power to map implies the sometimes less onerous power to condemn.

Whether there may be implied a general power to condemn for future highway use in Pennsylvania, there is an explicit power to do so in one situation. When a highway is being relocated, the State secretary of highways may change or establish its width, lines, location of grade in order to correct danger or inconvenience to the traveling public or to "lessen the cost to the commonwealth in the construction, reconstruction, or maintenance thereof."[51] The statute provides that the plan of the proposed change must be recorded in the county where the change is to occur and be approved by the governor, the approval being a condemnation of an easement for highway purposes from all property within the lines marked as required for right-of-way and of an easement of support or protection from all property within the lines marked as required for slopes.[52]

Utah allows its State Road Commission to borrow up to five million dollars to purchase land or interests therein necessary for construction of State roads.[53] Nothing is said about advance acquisition, but the money apparently could be used for that purpose if the purchase is declared "necessary." The fund revolves as the loans are repaid from Federal matching funds earned through construction of highways.

West Virginia authorizes its State Road Commissioner to establish a revolving fund for advance right-of-way acquisition,[54] thereby implying authority to make advance acquisitions.

Wyoming speaks in terms of condemnation only for highways to be constructed presently, but allows a right-of-way 300 ft wide to be condemned.[55] Thus, although no condemnation for future use is authorized when no present construction at all is to take place, there is ample authority to condemn land for future widening of a two-lane highway presently to be built.

Limited-Access Facilities.—Massachusetts by statute authorizes, as to limited-access ways, the State highway department to condemn "land or rights in land adjoin-

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[46] Ibid, §5521.12.
[47] Ibid.
[48] Purdon's Pa. Stats. Ann., Tit. 36, §§670-206 through 670-219.
[49] Ibid., §670-208.
[50] Ibid., §670-219.
[51] Ibid., §670-210.
[52] Ibid.
[53] Utah, Laws, 1959, c. 133.
[54] W. Va., Laws, 1957, c. 143; W. Va. Code of 1955 Ann. (1961 Supp.), §§1448(8), 1448(31).
[55] Wyo. Comp. Stats. 1957, §24-6 to 24-37.

ing the highway location whose right of access has been acquired."[56] Could not strips for widening be acquired under this authority?

The Minnesota statute authorizing construction of controlled-access highway allows the road authorities of State, county, city, village, and borough to "plan" for designation, improvement, etc., of such highways whenever the particular road authority involved determines that traffic conditions "present or future" justify them.[57] All these road authorities may acquire property rights by purchase, gift, or condemnation.[58] If acquisition of right-of-way can be considered part of planning controlled-access highways, and doubtless a particular plan is predicated on a particular route, the various roads authorities may acquire land for future use in relation to this one type of highway. The Minnesota court has indicated its approval of saving the State money in acquiring right-of-way, although holding that the highway's route must be tentatively laid out before acquisition occurs.[59] As described earlier, New Hampshire seems to authorize advance acquisition for limited-access roads in some circumstances.

The 1957 study concluded that the Texas Highway Department's power to acquire land for future highway use could fairly be implied from a provision allowing adjoining landowners to use portions not needed for immediate use.[60] In addition, as to turnpikes, the Texas Turnpike Authority may purchase land whenever it deems such purchase "expedient."[61] Nothing is said about condemnation of land on the same basis.

Case Law

As was true in 1957, lack of specific statutory authorization does not necessarily prevent advance acquisition of rights-of-way. Two recent decisions,[62] one in Florida and one in Michigan, are noteworthy. Both States have such specific authority, but the cases show a liberal construction of the statutes. One opinion contains language cordially endorsing the idea of advance acquisition. The cases may be helpful in persuading courts in other States without specific statutory authority to uphold advance acquisition.

In the Florida case the State Roads Department was allowed to acquire land before detailed plans and specifications for the highway had been completed and adopted, before funds had been allocated for construction, and before the department was certain when construction would be started. In Michigan, the court held valid a city's consent to establish a State highway within the city limits although the consent did not give a metes and bounds description of the right-of-way and the consent was given before the State highway commissioner was authorized to establish such a highway. The court said, "The principle that public authorities charged with the laying out and maintenance of highways may act with reference to probable future requirements has been repeatedly recognized."[63] In 1960 the Ohio Supreme Court found that section 5501.112 of the Ohio Revised Code gives the State Director of Highways power to purchase land for future highway use and sustained its validity[64] against a contention that expenditure for advance acquisition was not for a highway purpose within the meaning of the State constitution.[65]

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[56] Ann. Laws of Mass., (1960 Supp.), ch. 81, §7c.

[57] Minn. Stats. Ann. 1960, §160.08(1).

[58] Ibid., §160.08(4).

[59] State ex rel. Peterson v. Werder, 200 Minn. 148, 273 N.W. 714 (1937).

[60] Note 4 supra, at 38, citing Vernon's Tex. Civ. Stat., art. 6674n-1.

[61] Vernon's Tex. Civ. Stat., art. 6674 v (7).

[62] State Road Dept. of Florida v. Southland, Inc., 117 So.2d 512 (Fla. App. 1960); New Products Corp. v. State Highway Comm'r., note 15, supra.

[63] 88 N.W.2d 535.

[64] State ex rel. Preston v. Ferguson, 170 Ohio St. 450, 166 N.E.2d 365 (1960). The language of §5501.112 on which the court relied is "The director of highways . . . is authorized to purchase real property that he deems will be necessary for the improvement of the state highway system . . . ." 170 Ohio St. at 461, 166 N.E.2d at 373.

[65] Ohio Const., art XII, §5a, provides: "No moneys derived from fees, excises, or license taxes relating to registration, operation or use of vehicles on public highways, or to fuels used for propelling such vehicles, shall be expended for other than costs of administering such laws, statutory refunds and adjustments provided therein, payment of highway obligations, costs for construction, reconstruction, maintenance and repair of

The case was an original action in mandamus in the Ohio Supreme Court against the State treasurer to release certain funds to pay for the land. In allowing the writ the court recognized the necessity of right-of-way acquisition "far in advance of actual construction not only to obviate the increase in cost due to the development of areas through which highways must pass but also to afford an opportunity for the planned development of the communities themselves."[66] The Ferguson case clearly establishes the legality of advance acquisition of rights-of-way in Ohio, assuming adequate prior planning of the proposed highway, and removes the doubts created by State v. City of Euclid[67] discussed in the 1957 study.[68]

In a proceeding to validate county road revenue bonds to acquire rights-of-way for State highways the Florida court upheld purchase of land for future highway use even though there was no commitment that a road would be built.[69] The court remarked that it "makes sense" to acquire "adequate rights of way at a time when land values will not be influenced by the immediate announcement of actual highway construction,"[70] characterizing acquisition at such a time "an efficient exercise of governmental power and business judgment."[71] Although the court declared it had no authority to review the discretion of the highway authorities in selecting highways for future improvement, it did point out that the highways named by the highway authorities for improvement through acquiring additional rights-of-way had been shown by a legislative Select Committee on Roads applying standards fixed by the State Road Department to need improvement badly.[72] And it commented that the preliminary survey determining width would have to have already been made before right-of-way was acquired.[73] Perhaps the court is hinting that where acquisition for future use is involved the road authorities' discretion is not quite so untrammeled as when purchase for immediate construction is involved. Future Florida decisions will bear watching on this point.

The West Virginia court has upheld a State statute empowering the State road commissioner to plan and construct controlled-access facilities presently wherever "present or reasonably anticipated future traffic conditions" make such facilities necessary.[74] The court stated that the necessity of taking property for the facilities rests in the discretion of the State road commissioner free of judicial interference, absent a showing of bad faith, capriciousness or fraud.[75] Although there is no statutory provision for advance acquisition of right-of-way, it may be worth noting that present acquisition of right-of-way, which reasonably anticipated future traffic conditions make necessary, is analogous.

Another tacit endorsement of advance acquisition, though dictum, may be found in the Arizona case of State ex rel. Willey v. Griggs.[76] A State statute[77] in effect gave the highway commission two years following its determination that taking was necessary in which to decide finally to condemn the land. Compensation was forbidden, for improvements placed on the property after the determination that acquisition was necessary and no provision was made to pay the owner for the time following the determination and prior to purchase or condemnation during which the land's value is depressed by the discouragement of future improvements. The court held a taking occurred when the determination of necessity was made because the prohibition of compensation for

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public highways and bridges and other statutory highway purposes, expense of state enforcement of traffic laws, and expenditures authorized for hospitalization of indigent persons injured in motor vehicle accidents on the public highways."

[66] 170 Ohio St. 462, 166 N.E.2d 374.

[67] 164 Ohio St. 265, 130 N.E.2d 366 (1955).

[68] At 21-22.

[69] State v. Florida Development Comm'n., 95 So.2d 13 (Fla. 1957).

[70] 95 So.2d 15.

[71] Ibid.

[72] Ibid.

[73] Ibid.

[74] State v. Professional Realty Co., 144 W. Va. 662, 110 S.E.2d 616 (1959). The quoted language is from W. Va. Code Ann., §17-4-40 and appears at 110 S.E.2d 619.

[75] 110 S.E.2d 621.

[76] 89 Ariz. 70, 358 P.2d 174 (1960).

[77] Ariz. Rev. Stat. Ann., (Supp. 1961), §18-155 (D).

later improvements lowered the land's value, and that the statute was unconstitutional since no compensation was paid at that time, and for the further reason that no compensation ever would be made for the landowner's loss during the time his land's value had been impaired. Having thus disposed of the case, the court remarks that the decision does not prevent the State from taking the land; if the State "desires appellees' land for a highway, it can lawfully condemn it in accordance with the Constitution. All that is required is that just compensation be paid."[78] Since a possible lapse of two years between taking and starting construction was contemplated by the statute being considered, and hence in the case at bar, maybe the court will not object to advance acquisition covering the same period.

Conclusions

Since the 1957 study appeared six States have enacted explicit statutory authority for advance acquisition. West Virginia and perhaps Utah have authorized funds for the purpose, thereby implying authority for advance acquisition. Perhaps most significantly, New York uses its basic right-of-way acquisition statute, containing no language of futurity, as authority for advance acquisition. The law of still other States affords bases for implying such authority. Courts have upheld the constitutionality of such laws as have been tested. Although the power of advance acquisition is becoming more firmly established, there is considerable variation among the State statutes as to whether the power applies to ordinary highways, limited-access highways, or both, whether there is power to exchange or lease or otherwise manage the lands acquired before devoting them to actual highway use. Probably less than a fee simple can be acquired in all the States, thereby allowing the States to acquire a right of first refusal to purchase a tract should its owner decide to sell. Although courts habitually say they will not review the determination of necessity of taking in the absence of gross abuse of discretion or fraud, all the conclusions here drawn assume the decision to acquire land in advance of proposed construction is reached following careful planning of over-all future highway needs.

PROBLEMS OF ACQUISITION FOR FUTURE HIGHWAY USE

Futurity of Construction

Just as the 1957 study found, "future" is an undefined term. Table 1, infra, indicates the language in some statutes granting explicit power. The Ohio court has apparently in dictum endorsed acquisition "far"[79] in advance of actual construction. The clearest indications of the time scope of "future" are statutory. Virginia allows acquisition as long as twelve years in advance of construction where the road is to be part of the Interstate Highway System, and six years in advance for highways that will not be.[80] Ohio provides a maximum lead time of eight years without distinguishing between Interstate roads and others.[81] None of these statutory periods have been tested for constitutionality. The Florida Supreme Court upheld a five-year lead time, apparently because this limit was prescribed in a Federal statute.[82] The statute now extends the time to seven years;[83] whether the Florida court would accept this extension has not been determined.

Careful planning of highway needs of a sizable area is absolutely essential before advance acquisition is undertaken. Assuming such planning has been done, then the validity of a particular lead time would seem to depend on answers to three questions (see Table 2): (I) Is there a high probability that actual construction will occur on the particular right-of-way acquired if construction is postponed by the length of the lead time? Courts have indicated more interest in the degree of certainty that the land ultimately will be used for the purpose for which it is acquired than in the amount of

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[78] 89 Ariz. 76, 358 P.2d 177-178.
[79] State ex rel. Preston v. Ferguson, 170 Ohio St. 450, 462, 166 N.E.2d 365, 374 (1960).
[80] Code of Va. 1950, §33-57.1.
[81] Baldwin's Ohio Rev. Code, §5501.115.
[82] State Road Dept. of Florida v. Southland, Inc., 117 So.2d 512 (Fla. App. 1960).
[83] 72. Stat. 893, amended by 73 Stat. 62, 23 U.S.Code, "Highways", §108 (1961).

time that may elapse before the use occurs.[84] (II) Will advance acquisition result either in substantial savings in acquisition costs or in material help in planning the highway net and in meshing the highway plans with community development? These are the legitimate goals of advance acquisition.[85] Only after these questions are answered affirmatively will the third question be reached. (III) Is it reasonably likely that the effects suggested by question II will be present throughout the lead time being considered? Some factors to be weighed in answering these questions are suggested in Table 2 and are discussed in the following.

Determining when the probability that land ever will be used for a highway becomes too small to warrant acquisition must necessarily be a matter of educated guessing until the experience of the several State highway departments now acquiring land for future use is developed statistically. It may be that where rural or heart-of-the-city right-of-way is involved the probability of ultimate highway use is higher for a longer period than where the right-of-way passes through the suburban and rururban fringe. This is suggested because important factors determining route location are relatively fixed in the country (topography) and in the city core (industrial and commercial development), whereas in the fringe areas the pattern of urban development is still evolving. This suggests the need to assemble experience data of the highway departments according to the type of land through which the right-of-way passes. Imposition of thorough land use controls probably enhances the chance of ultimate actual highway use. In all situations certainty of ultimate highway use may be greater if the land is to be part of a highway in the Interstate System rather than for an ordinary highway. Reasons for this are that financing is relatively more assured because a larger portion comes from the Federal Government, which is stronger financially than the States, and because Congress is committed to a long-range construction program seemingly less likely to be abandoned or altered than that of a single State.

Assuming certainty of future construction, when is it reasonable to buy right-of-way? From these points of view (suggested by question II), the greater the effectiveness of police regulations imposed to protect future right-of-way sites the shorter will be the permissible lead time from acquisition to construction. Thorough regulation by police power tools tends to inhibit rises in land values and thus to remove one reason for advance acquisition. Also, thorough regulation itself gives such aid to planning other highways and community development that outright acquisition, except to avoid granting variances, adds so little additional help to planning as to render advance acquisition unjustifiable. If this tendency is generally evident, permissible lead time for advance acquisition will perhaps be less than the time provided in the Virginia and Ohio statutes in those areas where effective police power regulation exists.

Where it does not exist, predicting values of particular parcels of rururban and suburban real estate at a particular time in the future may largely consist of guessing how the "planning of the market place" will cause the area to develop, and where. This suggests that the justification for advance acquisition for such land lies more in the aid it gives to community planning than in the economic savings it allows. The reverse perhaps is true in the urban core where it is too late to plan except where urban renewal may be involved, or where the highway is to be the limited-access type and will serve to bring suburbanites downtown.

In rural regions of productive agriculture, both justifications come into play. Proper location of the highway, by thereby also locating the attendant string development, will help preserve fertile land for efficient farming. Early purchase may also be of open land which otherwise would be improved and therefore be more expensive, before construction begins.

Assuming both certainty of future construction and a situation where in general advance acquisition is reasonable, how long will it remain reasonable? No definite time can be stated, but some factors tending to determine the time period can be suggested.

Once again, in determining permissible lead times between acquisition and proposed construction the type of land involved must be considered—(a) ruruban or suburban,

[84] See 1957 Study at 12, 16.
[85] See 1957 Study, at 33-34.

TABLE 2

RELEVANT FACTORS IN DETERMINING APPROPRIATE LEAD TIME FROM ACQUISITION OF RIGHT-OF-WAY TO START OF CONSTRUCTION

Long Lead Time	Short Lead Time
Question I. Probability of Land's Ultimate Use for Highway Purposes	
1. Right-of-way land is for Interstate: a. Through rural area. b. Through heart of city. 2. Thorough land use controls to protect site.[a]	1. Right-of-way land is for new, ordinary highway: a. Through suburban area. b. Through rururban area. 2. Ineffective or nonexistent land use controls.
Question II. Degree of Reduction of Acquisition Costs and/or Aid to Community Planning from Advance Acquisition	
A. Reduction of Acquisition Costs: 3. Ineffective or nonexistent land use controls to protect future site; and 4. Right-of-way is through urban core where urban renewal is planned. B. Aid in Community Planning: 5. Nonexistent or ineffective land use controls: a. Right-of-way through rururban or suburban area; or b. Limited-access right-of-way through urban core with access points to core. C. Conditions A and B Present: 6. Nonexistent or ineffective land use controls to protect future right-of-way. 7. Unprotected right-of-way is through productive agricultural area.	A. Reduction of Acquisition Costs: 3. Land use controls protect future right-of-way; and 4. Right-of-way passes through rururban or suburban fringe. 5. Right-of-way passes through rururban or suburban area.[b] B. Aid in Community Planning: 6. Land use controls protect future right-of-way. 7. Protected right-of-way for ordinary highway through urban core.
Question III. Probability of Continued Existence of Effects of Question II Throughout Lead Time	
8. Situation B. 5. a obtains with a limited-access highway involved: a. Interchange.[c] b. Ordinary highway.[d] 9. Situation B. 5. b obtains. 10. Situation C. 6 or C. 7 obtains.[e]	8. Minimal effects on community development and unpredictable value trends: a. Right-of-way through urban core for ordinary highway; or b. Limited-access right-of-way with no access to urban core.

[a] E. g., zoning, master plan, and subdivision regulations.
[b] Because of difficulty in predicting development of area.
[c] Increases lead time.
[d] Decreases lead time.
[e] If new highway is involved cost savings will be relatively low, but planning effects high. If widening strips for an existing highway involved, planning effects will be felt only by non-agricultural uses, but cost savings may be high.

(b) urban core, or (c) rural. In the first type of land, the facts pertinent to constitutionality might be the extent to which fixing the location of a highway in an area unprotected by police power controls shapes the development of the area. What effects does it have, over how great an area and for how long a time?

Fixing the location of a limited-access highway, with its heavier traffic, probably will have a greater impact on development of all types of land, especially land near interchange points, than will fixing the location of ordinary highways. This is because such highways are fewer in number and present more marked characteristics than do ordinary highways. If a person desires to locate near a traffic artery or away from it, he will be particularly careful to locate near or far from an interchange on a limited-access highway because here the highway characteristic to which the individual is sensitive is presented in accentuated degree.

There must come a time beyond which the planning effects of the proposed highway are usually overwhelmed by the planning of the market place and the highway site is abandoned. With urban core land, if the highway is to be of the limited-access type with no access points in the urban core, advance acquisiton would have a minimal planning effect even on urban renewal projects that might be undertaken. Land values in the urban core will tend to fluctuate only moderately if no urban renewal occurs; but if renewal does occur, then values should rise at a steeper rate in the area renewed with perhaps a decline in value in the portion of the urban core not renewed and containing facilities competing with the new ones. Since the timing and precise location of renewal projects is hard to predict it would seem that advance acquisition of urban core land for such a facility may frequently be justified only a short time before construction, if at all.

Where there are to be access points in the urban core, siting the points will have an impact on planning, and considerations similar to those suggested for rururban-suburban land may become relevant in determining maximum permissible lead time. However, the speed with which market action would overwhelm the planning impact of right-of-way acquisition would probably be less in the core than in the urban fringe due to the greater difficulty of amassing the capital and blocks of land needed to effect a land use change. Hence the permissible lead time for limited-access facilities with access points in the urban core might be greater than for highways of any type in the fringe.

Permissible lead time in rural areas might be longest of all, where fertile soils are to be saved for agriculture. The fertitility is known and the terrain features dictating highway routes are relatively permanent. The stability of these factors suggests that the route that is most feasible at present will also be most feasible when construction is started however far in the future that may be. Also, one principal factor operating to change the ultimate location of a projected highway, the willy-nilly improvement of land surrounding the right-of-way with permanent structures or by permanent changes in land use, is less potent in rural areas than in the urban fringe areas. In the country, land development will be less concentrated, and hence of less influence on the new highway, than in the urban fringe where residential subdivisions or industrial parks mushroom. Where the projected highway is to be entirely new, the unconcentrated, rather slow development of rural land suggests that little money will be saved by advance acquisition. Where future construction will widen an existing highway, advance acquisition in rural areas will save sizable sums if accomplished before the existing highway invites string development.

To sum up, the length of lead time permissible between the taking and the expected using of land for highway construction may properly be affected by such numerous factors that any definite time period set by statute is unlikely to be valid under all circumstances. The ultimate question of reasonableness of the period involved in a particular case seems inescapable, and perhaps will be best solved by analyzing how long ahead of construction highway routes have been planned that were the same routes actually used. The time will probably vary according to whether the land is rururban or surburban, urban core, or rural in nature; whether land use controls have been imposed, and whether limited-access highway is involved.

If the suggestions of Table 2 are valid, the longest lead times in acquisition may be justified for Interstate right-of-way passing through the urban core where an urban renewal project is contemplated, but no land use controls exist, with access points to the Interstate in the urban core. Another situation in which a long lead time is justified is where Interstate right-of-way passes through a rural area of productive agriculture and no land use controls exist. Although the lack of land use controls decreases the certainty of ultimate highway use where advance acquisition occurs, this factor justifying a long lead time probably is outweighed by factors justifying only a short one. Such factors are that less substantial cost savings will occur and less significant help will be given to community planning. The shortest justifiable lead times occur when right-of-way is for a new, ordinary highway passing through the urban core where no urban renewal project is contemplated.

Financing Advance Acquisition

States may receive Federal funds from the Secretary of Commerce for acquiring rights-of-way for future construction of roads in the Federal-aid highway system, including the Interstate System, the construction to occur as much as seven years after the fiscal year in which the State requests the funds.[86] The Federal payments are not to exceed the Federal pro rata share[87] fixed by statute, 50 percent of construction costs for ordinary highways and 90 percent of the total cost of Interstate System projects provided for by Federal funds under the 1958 amendment to the Federal-Aid Highway Act of 1956 intended to speed up construction of the Interstate System.[88] The regulations promulgated by the U. S. Bureau of Public Roads to administer the Federal-aid program do not explicitly recognize advance acquisition costs for right-of-way as reimbursable, although until 1960 they did.[89] Since the Secretary of Commerce is not required but only "authorized" to reimburse a portion of advance acquisition costs,[90] it might be argued that such deletion shows a decision no longer to make such reimbursements. However, the definition of a highway "project" for which partial cost reimbursement may be made seems sufficiently broad to cover advance acquisition.[91] Advance acquisition might be stimulated if the Federal government made available for current advance acquisition payments, the funds to be appropriated in future years of the Interstate construction project.

Even with Federal reimbursement assured, a sizable financing job remains for the States. The 1957 study observed that six States had set up a special revolving fund for this purpose rather than using current highway appropriations.[92] Indiana in 1961 created from the unencumbered cost balance in the State Highway Fund a $2.5 million revolving fund to be used by local units of government for working capital in cooperating with the Federal Highway Grant-in-Aid program.[93] All moneys received under the program are to be placed in the fund and construction contracts entered into as part of the program are to be paid from the fund.

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[86] 72 Stat. 893, amended by 73 Stat. 62, 23 U.S.Code "Highways", §108 (1961).

[87] Ibid.

[88] 72 Stat. 899 (1958), as amended, 23 U.S.Code, "Highways," §120(a)(6)(1961).

[89] 22 F.R. 1063, §1.11, Feb. 21, 1957 amended by 25 F.R. 4162, May 11, 1960, 23 C.F.R., §1.1-1.38 (1962). Prior to the amendment §1.11 explicitly allowed Federal participation in the cost of "rights-of-way acquired for future highway use." The right-of-way portion of the amended regulation (§1.23) has no such language.

[90] See note 86 supra.

[91] 23 C.F.R., §1.2(b)(1962) defines "project" as follows: "An undertaking by a state highway department for highway construction, including preliminary engineering, acquisition of rights-of-way and actual construction, or for highway planning and research, or for any other work or activity to carry out the provisions of the federal laws for the administration of federal aid for highways." Sec. 1.2 (a) adopts the definitions in 23 U.S.C. §101(a) except as specifically modified by the regulation, and the statute defines "construction" to include costs of "locating, surveying and mapping . . . costs of right-of-way."

[92] 1957 Study at 41.

[93] Ind. Laws, 1961, ch. 248.

Another device used to remove moneys for advance acquisition of rights-of-way from current highway budgets is to borrow against expected future receipt of motor vehicle and gasoline taxes. In New Mexico the State highway commission borrows the money.[94] Michigan contemplates allocation by contract of particular costs of a project among the governmental units participating in it, with each unit borrowing as needed to pay its share of the costs. The State highway commission may be a contracting party. Loans must be repaid within thirty years, pledges may not exceed a stated percent of the previous year's receipts from the taxes.[95] In this way the current appropriations are used only for the annual payments of principal and interest due on the loans. Florida uses a variation of this scheme in that the pledges are made to and the bonds issued by a State corporation rather than by the State or a unit of local government.[96]

Oklahoma reduces the strain on the State budget caused by advance acquisiton by placing the burden of right-of-way acquisition on local governments in some situations.[97] Oregon does not require local governments to furnish rights-of-way but does provide for cost sharing agreements to be made by State, city and town authorities.[98] The Oregon Constitution limits the State debt for highway construction to 4 percent of the assessed valuation of all State property,[99] which limitation may supply one motive for placing right-of-way costs on local government. A problem in intergovernmental relations arises here because Federal reimbursements for advance acquisitions are not authorized to be made to local governments. Amendments of applicable law to allow such reimbursements for acquisitions the local government makes for the States are suggested.

Another way to reduce the burden of advance acquisition costs, or to cause a given sum of money to tie up more land, would be to pay the acquisition costs in installments over a period of years. In this technique the government would purchase or condemn a vendee's interest in the land, including the right of possession, for the time period it deems desirable. The government would not take a deed passing legal title until the end of the period. The amount of the installments to be paid would be determined by the value of the land at the time of acquiring the vendee's interest, by the time period involved, and the interest rate applicable. Not only would such a method allow the government to spread its money over a greater amount of land, but the person from whom the land is acquired may lose less of the purchase price in income tax due to receiving payment in more than one year. To the extent this feature induces more persons to sell their land, the government is saved the costs of condemnation actions and the possibility of excessive awards is avoided. Some doubt of the legality of this method of acquisition is created by statutes in some States providing that title or the right to use property does not pass until compensation is paid.[100] However, at least one State supreme court has indicated the compensation requirement is satisfied if the government has pledged the public faith and credit to pay a fixed compensation.[101]

All these techniques are alike in that they create the fund from highway appropriations or by mortgaging anticipated receipts from certain highway taxes. Ohio uses a somewhat different scheme in that the moneys accumulated in various State pension funds are employed for purchasing the right-of-way and when the right-of-way finally is used the funds are repaid from current highway appropriations. Other States also have created revolving funds for advance acquisition.[102] The constitutional problem of

[94] N. Mex. Stat. Ann. (1961 Supp.), §§64-26-59 to 64-26-65; N. Mex. Laws, 1955, ch. 269. The commission may borrow to finance right-of-way acquisition for current construction also.

[95] Mich. Stat. Ann., §9.1097 (18d).

[96] Fla. Const., art. IX, §16; Fla. Stat. Ann. (1961 Supp.), ch. 288 construed in State v. Florida Development Comm'n., 95 So.2d 13 (Fla. 1957).

[97] Okla. Stat. Ann., tit.69, §46.4.

[98] Ore. Rev. Stat., §366.320.

[99] Ore. Const., art. 11, §7.

[100] E.g., Smith-Hurd Ill. Stats. Ann. (1962 Supp.), Ch. 47, §§2.3,10.

[101] Dept. of Public Works & Bldgs. v. Butler Co., 13 Ill.2d 537, 150 N.E.2d 124 (1958).

[102] Ann. Code of Md. (1962 Supp.) art. 89B §206 (fund created from regular highway appropriations.); New York (by administrative action); Utah, Laws 1959, ch. 133; Washington, Rev. Code of Wash. (1962 Supp.) §47.12.180 (1962); West Virginia, W.Va. Code of 1955, §1448 (8) (31).

seeming to obligate future legislatures to make particular appropriations is avoided by limiting the life of agreements between pension fund and highway authorities under which the advance acquisition is made to two years, the life of one legislature, with power to renew until a total of eight years from initial purchase has elapsed. Although troubled by how renewal can be accomplished without either binding future legislatures or creating a time gap between expiration of the old legislature and renewal by the new one, the Ohio Supreme Court has recently upheld the constitutionality of the plan.[103] Washington in 1961 enacted a similar scheme using teachers' and State employees' retirement funds.[104] Title vests at once in the highway commission rather than in the pension funds as in Ohio.

The difficulty just described was met by Ohio by asserting the renewal has a retroactive effect. From this point of view Florida's use of a State corporation seems "smoother" since its obligations are not State obligations and hence the hazard of appearing to bind future legislatures would not arise.[105] Although no doubt local benefits are derived from State highway construction, Oklahoma's requiring local government to pay for right-of-way in various situations seems dubious. The financial resources of cities are seldom as great as the State's. Furthermore, it is frequently difficult to isolate local benefits from State benefits produced by highway construction and assigning monetary values to them results in rough judgments indeed.

Reduction of Advance Acquisition Costs

The discussion so far has described existing methods of financing advance acquisition of right-of-way with the only economy involved being that inherent in advance acquisition—obtaining the land in a relatively undeveloped state. This section will consider ways of reducing costs of acquiring land of a given level of development.

Where right-of-way is to be acquired through an area already subdivided for residential building lots, it is common to find that the lots are bound by private covenants running to the benefit of all the lot owners in the subdivision. One or more of the covenants may be violated by devoting the land within the right-of-way to highway use. Where this occurs courts have sometimes held that property of owners within the subdivision whose lot lies outside the right-of-way has been taken and compensation must be paid.[106] The compensation is to be the amount by which the market value of the particular lot has been lowered by the breach of covenant. Although the measure of damages seems nebulous and a factor of decreasing significance as the distance of the lot from the right-of-way increases, still substantial sums have been paid owners outside the right-of-way on this basis.[107] The actual economic harm the owner suffers is often zero when the effect of the contemplated highway is considered. For example, it is likely that a residential lot unrestricted as to possible uses is less valuable for residential purposes than a similar lot protected by covenants from nonresidential uses in the surrounding neighborhood. But a residential lot so protected except where a limited-access highway passes is often more valuable than one perfectly protected.[108]

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[103] State ex rel. Preston v. Ferguson, 170 Ohio St. 450, 166 N.E.2d 365 (1960).

[104] Rev. Code of Wash. (1962 Supp.), §47.12.180. Under this legislation the pension funds invest in warrants drawn on the motor vehicle fund. The warrants are issued for a two-year period with an option in the highway commission to renew them for a maximum of four more years. They may be redeemed earlier, and must be redeemed by the time the highway improvement contract is let.

[105] Fla. Stat. Ann. (1961 Supp.), ch. 288, §11.

[106] E.g., Town of Stamford v. Vuono, 108 Conn. 359, 143 Atl. 245 (1928); Petition of Dillman, 263 Mich. 542, 248 N.W. 894 (1933).

[107] In the Vuono case, $10,000; in Petition of Dillman, $250,000, supra.

[108] California Division of Highways, Land Economics Studies, Remainder Parcel Report N. 1, Jan. 1961, at pp. 7-8 and 19-20, describes two instances where highway construction lowered the value of residential property, but at pp. 11-18 describes four instances where the value was raised. Parts of these parcels were taken for the construction. The study says nothing of the highway's effect on residential properties near it and which were not partially taken for the right-of-way. Developers' eagerness to locate residential subdivisions near throughways is some evidence, that the throughway enhances land values for residences.

Therefore, it seems not unfair to such owners to provide by statute that persons acquiring, after a stated date in the future, the benefit of a covenant running with the land at law or in equity would not acquire a property interest as against the government, except where the lot benefited by the covenant is also taken. To be doubly careful against a taking of property the statute might simply create a presumption that owners outside the right-of-way suffered no damages. This, coupled with a provision that in determining the value of such properties the effect of the highway is to be considered, would seem likely to remove this element of cost from right-of-way acquisitions in most instances. At the same time, owners would continue to enjoy protection from covenant breaches by private individuals.

A second important element of cost in right-of-way acquisition arises where only a portion of a tract is taken and the remnant left is less usable than it was as a portion of the entire tract. Severance damages are paid for the loss in value suffered by the remnant. Frequently the remnant is sold after the highway is built for more than the entire tract was worth before construction, or at least for a price demonstrating that the lot had not been harmed by constructing the throughway.[109] In this situation the State's taxpayers suffer two ways immediately. First, by the law's forbidding consideration of the effect of the highway improvement on land values, the owner is paid severance damages even though little or no actual economic damage occurs. Second, where the remnants rise in value due to the highway's construction the State does not obtain the value its improvement created except to the extent that real estate is taxed. Perhaps even worse from the taxpayer's viewpoint, the land uses created by his capital asset (the throughway) tend to generate additional vehicular traffic which will overtax the throughway's capacity and necessitate building additional capacity. Shopping centers or industrial parks tend to spring up around interchanges and residential subdivisions are created along it. Thus, not only is the taxpayer required to pay fictitious damages on acquisition and denied any substantial share of the land values he has created, but also he is forced to pay for further highway improvement caused by the private exploitation of the public's asset. What can be done to give the taxpayer his due?

California attacks the fictitious severance damage problem by striving for more accurate appraisal of the remnants. The Division of Highways is developing a file of instances where remnants later were sold, showing the type of property, how the right-of-way cut up the property, what the remnant sold for and what it should have sold for without the throughway. As appraisal of remnants becomes more accurate, severance damages decrease or disappear in most instances because usually the highway development creates a new use for the remnant that enhances the remnant's value beyond what was originally supposed. Although it does nothing to capture values for the State created by the highway, this is not viewed with too much concern in California because the work of the Land Economic Studies Section of the Division of Highways indicates the values created by the throughway will be evenly distributed among the various land parcels of the State when the throughway section is completed.[110]

This attitude seems in keeping with traditional attitudes in the United States toward the question of who is entitled to economic values created by public improvements, since only values "special" to a tract are thought to belong to the public, whereas values created by the highway but "general" in the sense that they benefit the region as a whole are thought to belong to the private citizens that are able to exploit them. Considering that some of the tremendous costs of current highway construction are due to past failures to retain for the public lineside land values created by the existing highways when they were built, the time may be ripe for an effort to retain both special and general values for the public that are created by current construction.[111]

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[109] California Division of Highways, Land Economics Studies, Remainder Parcel Report, Nos. 1-3 (Jan. 1961).

[110] Interview with Bamford Franklin, Chief, Land Economic Studies Dept., California Division of Highways, Sacramento (July 24, 1962).

[111] There are indications of public impatience with speculation in land generally and of an awareness that landowners are depending for their ultimate profit on values created by society. See Langewiesche, Wolfgang, "Land Speculation, and How to Stop It," Readers' Digest (July, 1962) at 81-85, in which a land value tax reminiscent of Henry

Another technique by which severance damages might be reduced or eliminated is suggested by the Federal Government's renegotiation of contracts after the contractor's actual profits are known to have exceeded the rate contemplated by the contract.[112] One way a State may use the technique is to enact a statute providing for immediate payment of compensation for the parcel taken plus severance damages, with a requirement of renegotiation where any sale or lease of a remnant occurred for a price exceeding the appraised value of the remnant (disregarding the contemplated highway) at the time the right-of-way was acquired, plus an annual increment commensurate with the secular trend in land values. Renegotiation might take several forms, depending on the intensity of desire for public capture of publicly-created values, ranging downward from paying the entire excess to the State. Perhaps a reasonable compromise would be to limit the State's recovery to the amount paid for the parcel taken plus the severance damages paid, with interest. Enforcement might be through denying the status of conveyance to any instrument purporting to convey any interest in the land involved until the required payments back to the State were made. Evidence of payment might be by certificate issued by the State and recorded. Such a procedure would seem to meet the constitutional requirement of just compensation because the only thing denied owners is the chance to obtain a windfall—a chance not protected by the Constitution. Nor could they complain of arbitrary classification of their land as distinguished from their neighbor's that was not taken because the need for the land for highway purposes itself supplies a substantial distinction between the two classes of land.[113] The landowner might be allowed the option of escaping renegotiation if he

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George is urged as a cure for cities lacking land for home building because the land is held by speculators waiting for land values to rise. The magazine states the article is based on a special issue of House and Home, a Time, Inc., publication. Although the idea of taxing land heavily, but not improvements, is an old one, it is notable that it is endorsed by publications popularly associated with economic conservatism. The case against private exploitation of land values along new highways is perhaps even stronger than that against speculators in land generally because, whereas a substantial amount of the rise in values on which the latter depend for their profit is created by private activities, the entire rise in values on which the former depends come from the public's highway.

[112] 65 Stat. 7 (1951), 50 App. U.S.Code, §§1211-1224 (1963 Supp.).

[113] The constitutionality of the Federal renegotiation act, note 112 supra, was upheld in Lichter v. United States, 334 U.S. 742 (1948), the Supreme Court finding the statute to be within Congress' war powers. It also included in a list of Congressional powers that "obviously command attention" the power to provide for the general welfare of the United States. U.S. Const., Art. I, §8, in footnote at page 755.

A State's power to provide for renegotiation of severance damage awards is the police power. Courts have repeatedly sustained police regulations of land use in the name of community welfare, even though the regulation caused economic loss to individuals without providing compensation therefor. See In re Advisory Opinion, 103 Me. 506, 69 Atl. 627 (1907) and Commonwealth v. Alger, 61 Mass. (7 Cush.) 53 (1853). In the latter case Chief Justice Shaw described the police power as the power of the State legislature to "Establish all manner of wholesome and reasonable laws . . . either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same." At page 85. See also Beuscher, Materials on Land Use Controls, pp VIII: 132-135 (College Typing Co., Madison, Wisc. 1957), quoting a portion of the Opinion on Constitutionality of Standard Soil Conservation Districts Law, 1936, written by Mastin G. White, then Solicitor for the U.S. Dept. of Agriculture. Mr. White cites in the quoted portion of the Opinion over ninety court decisions, both State and Federal, sustaining police regulations of land uses, most of which caused some economic hardship to the persons whose use was regulated.

The renegotiation statute suggested in the text, since it aims simply to improve the accuracy of appraising the damages caused by taking part of a tract, and not to deprive a landowner of the use of part of his property, probably will produce considerably less economic hardship than do the regulatory statutes sustained by the decisions White cites. Particularly does this seem likely when it is reflected that a person to whom a severance damage award was paid would know from the time he received the award that renegotiation is a possibility.

granted the state an equitable servitude binding the remainder parcel to such uses and on such conditions as the appropriate land use control body would allow. Renegotiation might be aided by using the previously described installment method of paying the acquisition costs, with a provision allowing adjustment of the total acquisition costs to be paid so as to recoup excessive severance payments. Similar advantages may be obtained from a lease with option to purchase, unless, where eminent domain powers are used, a second condemnation is necessary when the option is exercised to determine the compensation. In such a situation there seems some danger exists of the two awards totaling more than a single award for the fee simple.

Another technique calls for purchase of entire parcels, leaving no remnants. This may be feasible only where acquisition is by purchase and the purchase is by a State corporation, due to the inability of showing a necessity for the purchase. Ohio's use of pension funds suggests a desirable mode of operation. By statute, if necessary, authorize pension funds to be invested in real estate. Then use the funds to buy entire parcels for future right-of-way taking title for the fund's benefit. When the highway is constructed pay the pension funds from highway current appropriations the proportional amount the funds invested in the right-of-way itself plus interest at 3½ percent.[114] The excess land would be retained by the pension funds and leased by them to private businessmen for uses approved by a State roadside land use planning authority, or the pension funds themselves could build and operate roadside businesses.[115] Earnings from real estate operations might be devoted to reducing the contributions to the fund required of employers and workers or be paid into the State's treasury. If the former application of the money was made, the highway department should pay only the pension fund's acquisition costs when buying the required right-of-way from the funds, except where the funds did not earn a net return of 3½ percent, the highway department should supply the difference.

Conclusion

Developments in the law since 1957 indicate general acceptance of the power to acquire title to rights-of-way substantially before road construction is to begin, assuming there has been methodical planning of the State's over-all highway needs. Six States have enacted statutes explicitly giving such authority to their highway departments; none of the fifteen States that had similar statutes in 1957 have repealed theirs. Bases for implying advance acquisition authority exist in the law of many more States. Use of pension funds to finance advance acquisition is proving successful in Ohio and shows signs of spreading to other States.

However, it is hard to say how long in advance of construction right-of-way may be acquired. Probably the length of time varies with the factors affecting the probability of ultimate use of the land for highway purposes and the likelihood that costs will be reduced or community planning aided by acquisition a given time in advance of anticipated construction. Several relevant factors have been suggested in each of several different locales—rural, suburban, and urban core. The suggestions are tentative and must remain so until the experience of the several State highway departments is gathered into orderly form. There are few court decisions on the point.

The utmost flexibility as to the type of interest in land the State is allowed to acquire seems desirable. Acquiring the interest of a vendee, or of a lessee with option

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[114] An actuary and consultant to the Municipal Finance Officers Association says pension funds should earn a minimum of 3½ percent to balance income and expenditures. The Wall Street Journal, Midwest Edition, July 20, 1962, p. 1, col. 1.

[115] Some realty development by pension funds already has occurred. The Ohio State School Employees Retirement Fund is constructing and will own a $7 million hotel in downtown Columbus. In Wisconsin, a State pension fund owns and leases for a long term a department store in Madison occupied by Sears, Roebuck & Co.; Texaco, Inc. service stations in Wisconsin, Michigan and Iowa, and various other retailing properties around the country. Pension funds are authorized to own real estate in Ohio, Wisconsin, Minnesota, New Mexico, New York, Georgia and Kentucky. The Wall Street Journal, Midwest Edition, July 20, 1962, p. 1, col. 1; p. 17, col. 5.

to purchase, allows installment payment of the purchase price, which lets the State tie up more land with a given amount of money, and also may aid in recovering excessive severance damage payments. Power to exchange land parcels for others needed for the highway and to acquire parcels for this purpose is desirable also.

Legislation is recommended requiring consideration of the effects of the future highway on the value of remaining parcels in determining severance damages and set-off of increments in remainder value against the compensation to be paid for the parcels taken.

Various techniques have been suggested for reducing acquisition costs and recouping severance damages. One is installment payment of acquisition costs, preferably in conjunction with renegotiation of severance damage awards in instances of sale of the remnant, within a stated number of years following the State's taking, at a price that is excessive when compared with the value at which the remnant was appraised at the time of taking. Removal of equitable servitudes, in certain circumstances, from the category of property for which compensation must be paid when the government acquires realty might save substantial sums in acquiring right-of-way in suburbia. Obsolescence of the highway caused by destructive lineside land uses may be forestalled by the State acquiring a servitude over such land binding it to the use to which it is put when the servitude is acquired and such other uses a State authority controlling use of lineside land might permit. Most important of all, State development of the land values created by the highway construction program should be considered. By acquiring entire tracts where possible and either leasing or developing itself the portion not used for the right-of-way proper, the State may achieve a substantial reduction in the cost of the highway program to the taxpayer and of State government generally.

Appendix

ADMINISTRATIVE EXPERIENCE OF OHIO IN ADVANCE ACQUISITION OF RIGHTS-OF-WAY

September 5, 1962, Professor James Munro of the College of Law, Ohio Northern University interviewed William J. Gross, Deputy Director, Division of Right of Way, Ohio Highway Department and his assistant, James Stegmeier. The questions Professor Munro asked were suggested by Professor Waite. The questions with the information they elicited are presented below:

1. What problems have been caused by failure to give local governmental units authority to acquire land for future highway use?

No specific factual examples were given of right-of-way acquisition being made more difficult or more expensive because of a lack of authority for advance acquisition by local authority. Apparently a need is felt for such authority, however. A bill was sponsored in the State legislature by a Cleveland planning agency that would allow municipalities to obtain options of three to six months' duration to buy land. The bill was not enacted since no State funds were provided to pay for advance purchases made by the municipalities. Existing statutes in effect allowing the State Director of Highways to finance advance acquisitions with retirement and workmen's compensation funds make no provision for such financing by local government. The Director does sometimes acquire city land under the existing future acquisition statutes, Ohio Rev. Code, §§5501.112 et. seq.

2. Have there been problems caused by giving local governmental units such authority?

Cincinnati appears to be the only municipality that has made advance acquisitions. No problems were reported.

3. What is the usual lead time between taking land and starting construction on those projects actually built on the right-of-way acquired?

Within three to six years. The land is first acquired by the lending agency and held for some time before being transferred to the State for highway purposes. The average time the lending agency holds small rural tracts is three months to one year; for urban tracts it is one to three years. Actual construction follows within two years after transfer to the State. The longer period the lending agency usually holds urban land reflects the Director's interest in acquiring urban parcels, particularly where subject to rapid increases in price, before acquiring rural land.

4. What is the maximum lead time where construction ultimately occurred on the right-of-way acquired?

The Ohio Revised Code, §§5501.112 et. seq. requires the lending agency acquiring the land to transfer the land to the State within five years after acquisition. Since construction starts within two years following transfer, the maximum permissible lead time is seven years. The officials interviewed indicated no need for a longer time.

5. Where the right-of-way has never been used, how long after the acquisition were the plans changed? On the average? Extreme case?

No information available on this point.

6. How is land used prior to highway construction and after acquisition?

The property is leased. The policy is to acquire property having rental value or vacant property. Property unlikely to increase in value and which might be hard to lease is deemed unsuitable for the advance acquisition program. Professional realty management agencies manage the rental property under contract with the State.

7. Have there been any complaints where a private investor has relied on a designated right-of-way and then it has been vacated or there has been a relocation before construction?

In the Akron area, US 224 may be relocated so that a certain proposed interchange area will not be used. Owners of about 20 homes in the area of the proposed interchange must decide whether to sell, perhaps at a loss, or remain. No instances have arisen where a business moved in order to be close to a proposed new highway which either was later built in a different location or was not built at all.

8. How does the State finance advance purchases? Are there any "bugs" in the method?

The procedure established in Ohio Rev. Code, §§5501.112, et. seq., is followed, which permits use of the funds of three retirement boards, Public Employees, State Teachers, Public School Employees, and of the industrial commission as well. So far, only funds of the various retirement boards have been used. Ohio officials seem happy with the arrangement. Advantages to the retirement boards include lower administrative costs than are experienced with other investments, while achieving a higher return. Earnings average 5¼ percent on money invested in right-of-way for future highways, but only 4 percent on money invested in legal securities. The State Highway Department is presently making an estimate of the program's savings to the State. It is thought the savings will run to $4 million for the past three year period.

No particular difficulties have been encountered in the program except as stated in response to the next question.

9. Are Federal matching funds readily obtained for advance acquisitions?

Tracts acquired in advance of contemplated construction are paid for entirely with funds of the various State retirement boards. It is only when they are transferred to the Highway Department that payments are made for which Federal matching funds might be sought. Payments at the time of the transfer are viewed as being for current construction, so in a sense the problem posed by the question does not arise. However, the Ohio Rev. Code, §§5501.11 requires the Director of Highways and the retire-

ment board that made the advance acquisition to agree on a price the Highway Department will pay the retirement board when the land is transferred to the Department. The price is to be the purchase price paid by the retirement board plus an annual percentage of such retirement board purchase price. In practice this percentage runs about 5½ percent per year.

Federal regulations prohibit matching payments for interest or borrowing charges connected with land acquisition. The Bureau of Public Roads considers the payments made to the retirement boards computed as an annual percentage of the purchase price paid by the retirement boards to be in the nature of interest and refuses to pay matching funds for it. The State Highway Department asserts the payment is a "holding charge," not interest, for which matching funds should be available. The question had not been resolved as of September 5, 1962.

A second problem arises from the Ohio technique of using a retirement board to make advance acquisitons and hold tracts so acquired until the Highway Department needs to use them. Regulations of the Bureau of Public Roads provide, where a State pays the full cost of acquisition, that Federal funds "could participate in all such costs, less rentals and salvage." (Section 4S of Bureau P. PM-21-4.1.) The Highway Department asserts rentals collected by the retirement boards before transferring the land to the State for highway purposes are not to be deducted from the acquisition price under the above regulation; the Bureau asserts they are. The matter was unresolved as of September 5, 1962. All agree rents collected after the transfer are to be deducted.

10. Reaction to a proposal by Professor Waite that pension and other such funds be used to buy entire tracts, retaining the excess and developing it or leasing it.

The Ohio Highway Department tries now to acquire complete tracts. If only a portion of the tract is needed for the right-of-way, Federal matching funds are available for the market value of the entire tract. Separate computations are made of (a) the market value of the land actually needed for right-of-way, (b) the severance damages paid, (c) the amount by which the value of the entire tract exceeds the sum of (a) and (b). Then, if the State later sells the portion of the land not used for the right-of-way, profit or loss is determined in reference to item (c). The Bureau of Public Roads receives one-half of the profits so computed but does not share in the losses. This may suggest the Bureau would similarly share in any profits achieved by State development of the land.

11. What suggestions do the State officials have for minimizing excessive severance damages?

Ohio experience indicates that sometimes the remnants of several tracts remaining after different "takes" can be assembled into usable parcels of substantial value, whereas each remnant before assembly was worth little or nothing. No other suggestions were made.

General Comment

The response to question 9 shows Ohio's difficulty with the Bureau in obtaining matching funds for the annual holding charges of the retirement boards. The problem does not arise in California where a revolving fund is used to finance advance acquisitions, because the fund makes no such charge. Perhaps California should require such a charge to be paid the fund. Paying a holding charge in addition to repaying the sum used from the revolving fund would augment the fund's size somewhat and so counteract the gradual diminution in the fund's effectiveness now occurring because of general increases in land prices without any expansion of the dollar size of the fund. Since the savings achieved by advance acquisition are experienced to a substantial degree at the Federal level—due to the cost sharing features of the program of Federal aid for highway construction—it seems thought should be given to revising Federal law to allow paying interest charges in this special situation. Meanwhile, States will enhance their chances of getting matching funds for such charges if the charge is made as a fixed fee for property management services.

Use of Official Map Procedure to Reserve Land for Future Highways

K. W. BAUER, Executive Director, Southeastern Wisconsin Regional Planning Commission

The use of the official map procedure, by which precise designation of right-of-way lines and site boundaries of streets and highways may be established in advance of actual taking and construction, thereby preventing extensive and costly development within these lines, is discussed. Enabling legislation in Wisconsin is described together with methods developed for its implementation, as well as the advantages to be gained therefrom. A unique surveying and mapping technique involving a simple and economical system of survey control, particularly adapted to the special needs of official mapping, is presented and its advantages for planning and engineering work described.

• IN A SERIES of broad-range transportation studies now under way in some of the largest metropolitan regions of the United States, including Chicago, Philadelphia, Los Angeles, Pittsburgh and Seattle, an entirely new approach to the transportation problem has been developed. These studies all recognize that the older, piecemeal planning efforts provide no lasting solutions to the transportation problem and that a new approach, based on comprehensive planning principles, is necessary if all elements of the transportation problem are to be considered and a lasting solution found. Consequently, a great deal of stress is being placed, at the present time, on the importance of formulating long-range highway system plans at all levels of government. It must also be recognized, however, that any adequate solution to the transportation problem will depend not only on sound plan formulation at all levels of government but also on practical plan implementation as well.

An interval must necessarily exist between the time a given transportation facility is incorporated into a comprehensive plan and the time of actual construction. This time lag is inherent in the planning process and it is during this time lag that means must be found to reserve land most effectively for the project and assure the integrity of the long-range system plan.

Although urban planners have developed a full range of plan implementation devices to effect such land reservation, few, if any, of these devices appear to have been adapted and applied directly by highway agencies. The official map is one such implementation device at the disposal of the urban planner which is readily adaptable to highway needs and which can have widespread usefulness in highway plan implementation.

OFFICIAL MAP CONCEPT IN URBAN PLANNING

Before discussing the official map as it might be adapted to highway purposes, a brief description of this device as traditionally conceived and employed in urban planning administration is in order.

The Wisconsin official map act, as set forth in Section 62.23 (6) of the Wisconsin Statutes, is typical of good State legislation enabling official mapping for urban planning

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purposes. This act provides that the governing body of any city may establish an official map for precise designation of right-of-way lines and site boundaries of streets and public lands. The map is given the full force of law and deemed to be final and conclusive as to the location and width of both existing and proposed streets, highways, and parkways.

The primary function of the official map, as conceived for city planning purposes, is to implement the community's arterial street and highway system plan. It does this by protecting the beds of future streets and highways, as well as the beds of existing streets and highways that are to be widened, by essentially prohibiting the construction of new buildings in such beds. The police power device used to enforce the official map is the building permit. A landowner desiring to construct a building in the bed of a mapped street or highway may be denied a permit where the owner will not be substantially damaged by placing his building outside the mapped right-of-way lines. The landowner may, if denied a permit, apply for a variance and, if he can prove that his land is not yielding a fair return, may be granted a permit by a quasi-judicial board of appeals for a building that will increase as little as possible the future cost of opening or widening the street or highway.

A secondary function of the official map in some States, including Wisconsin, is to implement the community's master plan of parks and open spaces. In this respect, the official map can be used to reserve, for current or future use, land for parks and drainageways. Reservation of land for the latter can have important implications for the highway engineer.

The official map thus allows a municipality to express its intent to reserve land for public purposes without commitment to immediate acquisition, and insures that land needed for future streets and highways will be available at the price of unimproved land. The possible monetary savings that can accrue to the community from the proper application of official mapping are, therefore, considerable. For example, a typical recent highway construction project in the Milwaukee Metropolitan Area involved the reconstruction of six route miles of State trunk highway to expressway standards on new location through a rapidly urbanizing area. Right-of-way costs were 19.8 percent of the total construction cost of $7,170,000 and involved the acquisition and razing of several recently completed commercial and light industrial buildings.

The fact that the official map can insure the integrity of the community's arterial street and highway system plan is, however, even more important, and the official map can serve as a refinement of the long-range highway plan, reflecting certain aspects in a precise, accurate, and legally binding manner. By exercise of the police power, specific proposals contained in the long-range plan can be assured of implementation and street and highway reservations can be based not only on immediate needs, as must be the case when such areas are acquired by exercise of the power of eminent domain, but also on long-term future needs.

A concomitant and equally important benefit accruing to the community through properly executed official mapping is that such mapping adequately locates and records all existing street lines and thereby tends to stabilize the location of real property boundaries, both public and private. As an accurate existing condition base map, the official map greatly expedites planning and engineering work of all kinds.

Although other plan implementation devices, such as building setback requirements in zoning ordinances, special building setback ordinances per se along major streets, building setback lines on recorded subdivision plats and private deed restrictions, can all be used to reserve land for future widening of existing streets, none of these devices can be applied to proposed streets and highways. Subdivision control ordinances can be used to protect future streets and highways, but can do so only indirectly, and cannot be used to prevent the erection of buildings in the beds of future streets when the erection of such buildings takes place without land subdivision. The official map is the only arterial street and highway system plan implementation device that operates on an areawide basis in advance of land development and can thereby effectively assure the integrated development of the street and highway system.

EFFECTIVENESS OF OFFICIAL MAP

The official map is one of the oldest plan implementation devices at the disposal of the urban planner. It is also one of the most effective and efficient devices that can be brought to bear on the problem of reserving land for future public use. A study and evaluation of local highway system planning recently conducted in Wisconsin[1] bears this out.

The study procedure included structured interviews directed toward an analysis of the local highway planning process and these interviews included a group of questions directed at determining the relative effectiveness of existing arterial street and highway plan implementation devices. Interviewees included professional planners; professional city, traffic, and highway engineers; mayors; city managers; aldermen; large-scale land developers; and citizen leaders, including newspaper editors. Each of the interviewees was asked on the basis of his personal experience to rate as effective, moderately effective, or ineffective each implementation device he had actually observed in operation. Results were tabulated and through the simple device of assigning numerical values to each rating, weighted averages were obtained for each device reflecting combined opinion.

Results of the rating are given in Table 1. Two of the most commonly employed plan implementation devices (zoning and capital budgeting) were consistently given extremely low rank orders of effectiveness, whereas two less frequently used devices (urban renewal and official mapping) were consistently given the highest rank orders.

The high order of effectiveness attributed to the official map as a plan implementation device is particularly significant to this paper. The interviewees attributed the effectiveness of the official map to the following characteristics of the device:

1. Unlike subdivision control which operates on a plat-by-plat basis, the official map can operate over a wide planning area well in advance of requests for development.
2. The proper application of the official map necessitates the preparation of precise or definitive plans beyond the general plan stage and thereby assures that the broad objectives expressed in the highway plan are reduced to specific and attainable ones.
3. The official map is a useful device to achieve public acceptance, if not understanding and support, of a highway plan, in that it serves legal notice of the government's intentions on all parties concerned well in advance of any actual improvements. It thereby avoids the altogether too common situation of development being undertaken by segments of the public without knowledge or regard for the long-range plan and thereby does much to avoid local resistance when plan implementation becomes imminent.

The same study found that although the public (i.e., the electorate) may accept and support the general concept of a long-range plan there is generally no awareness among the public of the plan proposals or their implications as these may affect specific areas. Consequently when plan implementation, in the form of a street and highway improvement, becomes imminent, a great deal of local resistance is generated not to the plan in general but to a specific portion of it. The strong local reaction is often successful in blocking the plan implementation and thereby destroying the integrity of the over-all system plan. Planning tools that can mitigate such local resistance are therefore quite valuable to attaining integrated arterial street and highway systems.

It further appeared that certain plan implementation devices are growing in effectiveness because of newly developing techniques and because of an awakening by important segments of the public to the needs and benefits attending these devices, whereas others are declining in effectiveness at least insofar as implementation of local arterial street and highway plans are concerned. The official map and subdivision control fall in the former category, and bond issues (which, in direct contrast to earlier practice, are being increasingly directed toward schools and sanitation and away from streets and highways) in the latter category. Evidence of the growing awareness of the importance

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[1] K. W. Bauer, "A Study and Evaluation of Local Highway System Planning in Wisconsin," U. S. Bureau of Public Roads and State Highway Commission of Wisconsin (May 1962).

TABLE 1

SUMMARY OF INTERVIEW RESULTS ON RELATIVE EFFECTIVENESS OF PLAN IMPLEMENTATION DEVICES, MARCH 1961

Plan Implementation Device	Rating by Technicians				Rating by Lay Leaders				Over-All Combined Rating[a]	Over-All Combined Rating[a] by City					
	No. of Times Rated			Combined Rating[a]	No. of Times Rated			Combined Rating[a]		Madison	Racine	Waukesha	Appleton	Green Bay	Janesville
	Very Effective	Moderately Effective	Ineffectively		Very Effective	Moderately Effective	Ineffectively								
Urban renewal	5	0	0	4.00	1	1	0	2.50	3.57	3.60	3.50	--	--	--	--
Official map	11	1	0	3.92	9	4	0	2.69	3.28	3.17	--	3.29	3.40	3.29	--
Bond issues for specific improvements	8	2	1	3.45	10	0	0	3.00	3.24	3.57	2.80	--	3.33	3.00	--
Subdivision control	15	4	0	3.79	17	6	0	2.74	3.21	3.29	3.29	3.25	3.00	3.14	3.29
Precise plans	5	2	1	3.25	3	4	2	2.11	2.65	2.29	--	--	--	2.50	3.17
Advance right-of-way acquisition	7	0	3	2.80	8	1	2	2.44	2.63	3.00	--	2.75	--	1.75	--
Zoning	2	15	3	2.65	11	9	2	2.41	2.52	2.43	2.83	3.00	2.43	1.57	2.86
Capital budgeting	7	7	6	2.45	3	12	6	1.86	2.15	2.57	2.29	1.88	1.86	1.57	3.00
Setback base line ordinances	3	6	0	1.67	7	4	0	2.64	2.03	2.86	--	3.12	--	2.80	--

[a]Weighted average by following assigned weights:

	Technicians	Lay Leaders
Very effective	4	3
Moderately effective	3	2
Ineffective	0	1

and effectiveness of official mapping in Wisconsin is indicated by the fact that the two largest cities in the State are currently undertaking the preparation of an official map, and the fact that approximately 60 percent of all the cities in Wisconsin having a population in excess of 25,000 have either adopted official maps or are preparing such maps.

OFFICIAL MAP CONCEPT APPLIED TO HIGHWAY PLANNING

It is apparent that official mapping can be adapted to highway system plan implementation at the State level in two ways: (a) indirectly through cooperative State-local application of local official map powers, or (b) directly by a delegation of some form of official map power to the State highway agency.

Joint State-Local Efforts

In States where enabling legislation empowers local units of government to prepare and adopt official maps, this power can be indirectly applied to State and regional planning needs through cooperative State-local planning programs. Such cooperative programs must be founded on practical and workable local arterial street and highway system plans, plans that meet State and regional, as well as local, transportation needs and that can therefore be cooperatively prepared and adopted and jointly implemented by the various levels and agencies of government concerned.

In Wisconsin, local official map powers can have a widespread applicability to State highway facilities because the statutes provide that a local official map may be extended to include areas beyond the corporate limit lines but within the extraterritorial plat approval jurisdiction of the municipality. In Wisconsin, such extraterritorial jurisdiction includes the unincorporated area within 3 miles of the corporate limits of a first, second, or third class city, and within 1½ miles of a fourth class city or village. (In Wisconsin cities are classified for statutory purposes as follows: first class, Milwaukee; second class, 39,000 to 150,000; third class, 10,000 to 39,000; and fourth class, under 10,000.) Moreover, in Wisconsin the official map act is a part of the basic planning enabling act and as such is made applicable to towns as well as cities and villages.

Such joint State-local application of the official map power has actually been carried out in Wisconsin and specific examples can be cited. The State highway commission in 1961 prepared a definitive plan for the ultimate development of US 41 in the vicinity of the City of Oshkosh. Presently, this facility consists of a single roadway on a 175-ft right-of-way with partial control of access. The ultimate development plan seeks to preserve the capacity and life of this facility on its existing location by eventual staged conversion to a full freeway.

Additional right-of-way required for the staged construction of a second roadway, frontage roads, and interchanges was indicated on the long-range plan. Under then existing legislation, however, this plan had no force of law to assure compliance of private development with its objectives. The State highway commission therefore requested the City of Oshkosh to place approximately 9 route miles of the facility on its official map. This was done by two separate actions: (a) on March 7, 1962, incorporating 6 route miles of the facility (Wis. 26 to Lake Butte des Morts); and (b) on October 17, 1962, incorporating the remaining three route miles (Lake Butte des Morts to US 95). The entire 9 miles are outside of the corporate limits of the city, but within the city's extraterritorial plat approval jurisdiction. Thus these cooperative actions by the city and State preserve the integrity of the State's long-range plan and assure that right-of-way can be acquired either at no cost to the State through dedication if land subdivision occurs before conversion, or at minimum cost to the State as unimproved land, should conversion precede platting.

The City of Neenah has also similarly incorporated those portions of this facility lying within its extraterritorial jurisdiction (Cty. G to Cty. PP) in its official map, the action being taken on September 21, 1962, thereby fully protecting another 6½ route miles of this facility. Within the corporate limits of the City of Green Bay, this same facility was to be eventually reconstructed on entirely new location, and the city, on January 19, 1960, placed 1.44 miles of this new route (Highland Avenue to Larsen Road)

on its official map. In all, 16.94 miles of this major highway has been protected by cooperative official mapping to date.

The monetary benefits that can accrue to both the State and local governments through such joint exercise of plan implementation powers are considerable, but the pattern and direction that such plan implementation can give to private investment, by properly relating it to the facility, are of even greater importance.

State Official Map Powers

Enabling legislation permitting State highway agencies to exercise official mapping powers would appear desirable as a supplement to local powers, or, in States where no such local powers exist, as a direct State level highway plan implementation device. Such legislation could empower the State highway agency either with full official map powers identical to those typically given local units of government or with modified powers.

In 1961, the Wisconsin Legislature amended the basic statute under which the State Highway Commission functions by creating Section 84.295, "Freeways and Expressways." This newly created statute, among other things, gives modified official map powers directly to the State highway commission, with the specific legislative intent to "protect from imminent and future costly economic development, corridors of lands to be available when needed for future highway construction."

The act provides that the State highway commission may, after a public hearing, establish corridors for freeways and expressways by surveying and mapping such corridors and showing the location and widths of rights-of-way required, including that for interchanges, grade separations, frontage roads, and the required alteration or relocation of existing streets and highways. The map must also show the location of property lines and record owners of land required. The completed map is placed on file with the county register of deeds. This action is advertised, and the property owners of record on the filing date are notified of this action by registered mail. The map may be changed from time to time by the same procedure.

The act in essence, prohibits the construction of any new buildings or structures, or the alteration of any existing structures within the officially mapped right-of-way, or "in such proximity thereto as to result in substantial damages when the right-of-way is acquired," without first giving 60 days' notice to the State highway commission by registered mail. The highway commission may then encourage alteration in such construction proposals to clear the needed right-of-way or may purchase the required right-of-way to prevent erection of any improvements thereon. No damages are allowed for any construction, alterations, or additions to buildings made in violation of the act.

Although considerably weaker than the local official map powers, this limited mapping power, if exercised within the framework of a documented long-range State-wide highway system plan, can nevertheless result in substantial benefits to the State. Moreover, the exercise of such mapping powers will permit sound decisions to be made on land use and development alternatives by private investors. The lack of any sound basis for such decisions in the past has been a constant source of friction between the State highway agency, local governments, and private developers.

SURVEY REQUIREMENTS

Documented State-wide long-range highway system plans are usually presented by imprecise maps setting forth the general location of the major traffic corridors and, in general terms, the type of facility required to meet the ultimate traffic demands of these broad corridors. An official map, however, to reflect and refine certain aspects of such general plans properly, must be capable of precise and accurate interpretation. This requirement for precision and accuracy seems to provide the principal difficulty in the proper application of this plan implementation device at both the State and local level. Surveying and mapping techniques are now available which can readily overcome this difficulty without resorting to expensive centerline location surveys.

If adequate base maps of sufficient precision exist, and if these maps are based on permanently monumented field surveys so that their accuracy can be ascertained, then an official map can be readily created by simple compilation techniques. If, however, as is more often the case, adequate base maps are lacking, then an official mapping program will first require the construction of such maps.

Any accurate mapping project requires the establishment of a system of horizontal control, which consists of a framework of points whose horizontal positions and interrelationships have been accurately established by field surveys. The map details are adjusted to these points and may be checked against them. For effective official mapping the horizontal control network must meet two basic criteria. First, it must be permanently monumented on the ground so that ownership and reservation lines shown on the map may be accurately re-established in the field when a planned facility reaches the construction stage. Secondly, the control net must permit the accurate correlation of property boundary line information with topographic data. Most photogrammetrically compiled topographic maps, whether produced for highway engineering or municipal engineering purposes, do not meet these criteria today.

At the present time, much new topographic mapping for city and highway engineering purposes is based on third order control nets having, at best, temporarily monumented stations. These control nets are tied to the National geodetic datum and the finished maps compiled on a State plane coordinate grid. Property boundary line maps, on the other hand, are most often mere compilations of paper records, with no real framework of survey control being used in their construction at all. Accurate correlation of such cadastral maps with topographic maps and even with other cadastral maps is therefore virtually impossible.

A system of horizontal control based on both the U. S. public land survey system and the National geodetic datum is therefore proposed as a practical basis for the compilation of official maps for both highway and city planning purposes. The establishment of such a control system requires the relocation and monumentation of all section and quarter-section corners within the area or corridor to be mapped, and the use of these corners as stations in a second order traverse net tied to the National geodetic datum. This order of accuracy is essential, even though it may not be required for the mapping work itself, so that the control net have permanent utility in all subsequent local survey work. The control traverse net thus establishes the exact lengths and bearings of all quarter section lines, as well as the geographic positions, in the form of State plane coordinates, of the public land survey corners themselves. Such a system of control has the following important advantages for official map purposes:

1. It permits the ready compilation of real property boundary line base maps to standards of precision and accuracy sufficient for official mapping with an absolute minimum of field survey work. Because the boundaries of the original government land subdivision form the basis for all subsequent property divisions and boundaries, the accurate re-establishment of the quarter-section lines and corners permits the compilation of property boundary line maps as well as the compilation by the usual photogrammetric methods of topographic maps.
2. It provides a common system of control for both topographic and boundary line maps. By relocating the public land survey corners and accurately placing them on the State plane coordinate system, it becomes at once possible to prevent the future loss of these corners and to correlate property boundary line information accurately with topographic details supplied by aerial mapping. This placing of property boundary and topographic data on a common datum is essential to sound official mapping, yet such a common datum is rarely used in engineering surveys today.
3. It provides an extremely practical control network readily usable by both private and public surveyors and engineers for all subsequent survey work within the mapped area or corridor, and thereby correlates and coordinates all survey work within the area or corridor.
4. For the first time, it makes the State plane coordinate system available on a practical basis for property boundary survey control, thus preparing the way for the use of State plane coordinates in boundary, easement, and right-of-way descriptions.

CITY OF OAK CREEK

RECORD OF CONTROL SURVEY STATION - SECTION OR 1/4 SECTION CORNERS

SECTION OR 1/4 SECTION CORNER $\frac{24 \mid 24}{25 \mid 25}$, TOWNSHIP 5 N, RANGE 22 E

OR BENCH MARK NO. _____ IN _____ 1/4 SEC _____, T 5 N, R 22 E

MILWAUKEE COUNTY, WISCONSIN

SET BY: Alster & Associates, Inc., Washington, D.C.

STATE PLANE COORDINATES: NORTH 325,007.70 EAST 2,577,989.20

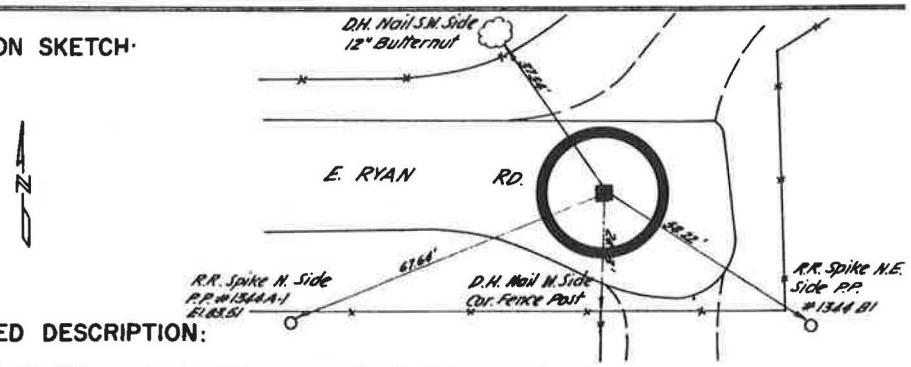
ELEVATION OF STATION: 80.12

HORIZONTAL DATUM: WISCONSIN STATE SYSTEM OF PLANE COORDINATES LAMBERT PROJECTION-SOUTH ZONE

VERTICAL DATUM: CITY OF OAK CREEK

HORIZONTAL & VERTICAL CONTROL ACCURACY: SECOND ORDER

LOCATION SKETCH:



DETAILED DESCRIPTION:

From South Chicago Road and East Ryan Road, drive east 0.7 mile.

SURVEYOR'S AFFIDAVIT:

STATE OF WISCONSIN
MILWAUKEE COUNTY

I HEREBY CERTIFY THAT I found a 6" square limestone monument, 8" below the road surface.

DATE OF SURVEY June 1961

_____ S 371
REGISTERED LAND SURVEYOR

(1) 2

Figure 1. Typical dossier sheet for each control station.

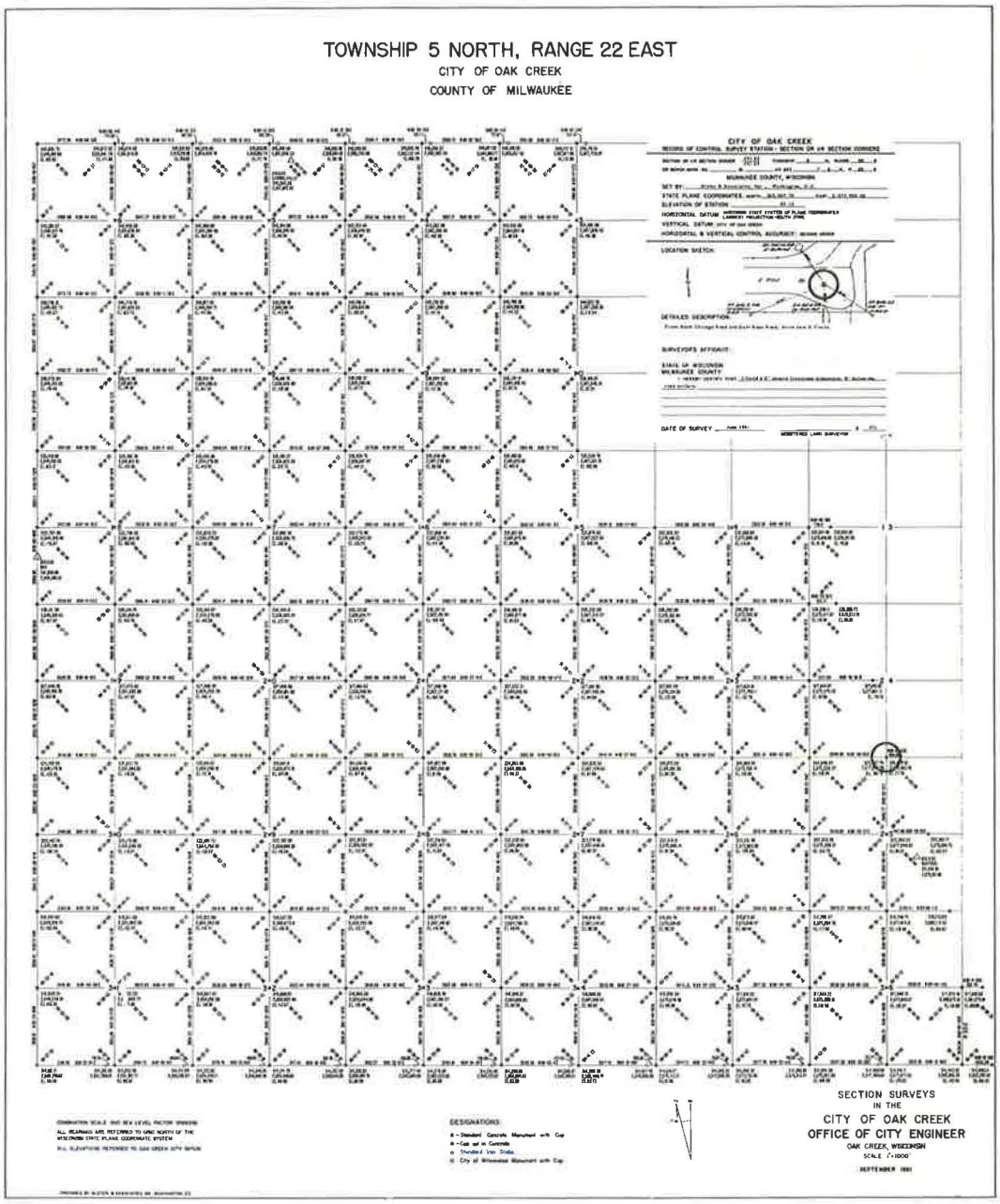


Figure 2. Completed control survey summary diagram covering entire urban area and precisely locating public land survey corners on State plane coordinate system and giving complete survey control information.

Figure 3. Typical finished topographic map sheet showing correct position and orientation of quarter-section lines and corners.

5. It permits reservation lines drawn on the official map to be accurately and precisely reproduced on the ground at the time of plan implementation or at any time prior thereto.

6. It is readily adaptable to the latest survey techniques and is of relatively low cost.

A particularly efficient and economical arrangement is to undertake an aerial mapping project as an integral part of the official mapping program. This not only supplies the topographic data necessary to the proper design of projects to be placed on the official map but affords a substantial economy in the control survey work. When it is realized that the cost of control surveys executed in the usual manner for aerial mapping projects can account for from one-quarter to one-third of the total cost of the finished maps, and when it is further realized that this control is largely unrecoverable and unusable by local engineers and surveyors, the real economy of using the control system proposed herein becomes apparent. By allocating to the control survey work a

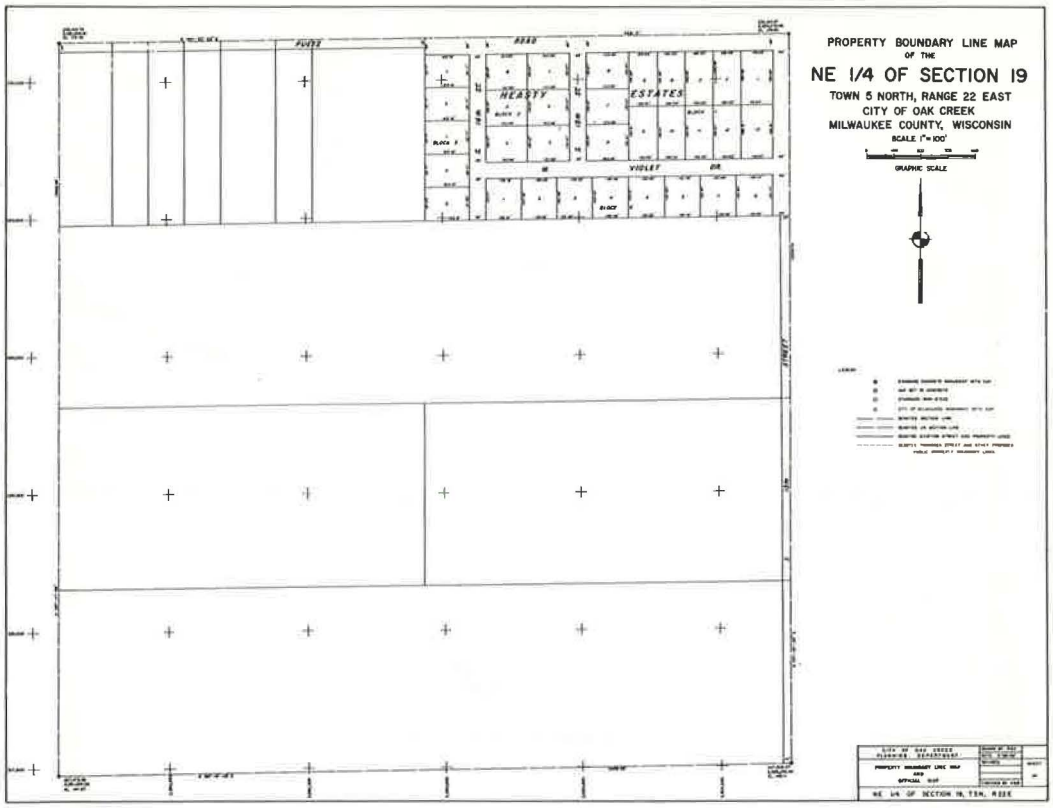


Figure 4. Typical finished property boundary line map sheet in outlying urbanizing area; property boundary lines tied precisely to State plane coordinate system, making accurate correlation with topographic maps possible.

relatively small additional amount of the total resources available for mapping, far more effective and useful finished maps can be obtained and a valuable and permanently useful system of survey control can be concurrently provided. The only significant increase in costs actually assignable to the control system proposed are solely those incurred for the relocation and monumentation of the land survey corners and the relatively small amount of additional traversing required to coordinate these corners. Experience indicates that this amounts to approximately 20 percent of the total cost of a mapping project.

The proposed survey control system to date has been used as a basis for official mapping by two Wisconsin municipalities. Both cities used almost identical specifications to govern their mapping programs and these specifications would be readily adaptable to highway purposes. These specifications required that finished photo-

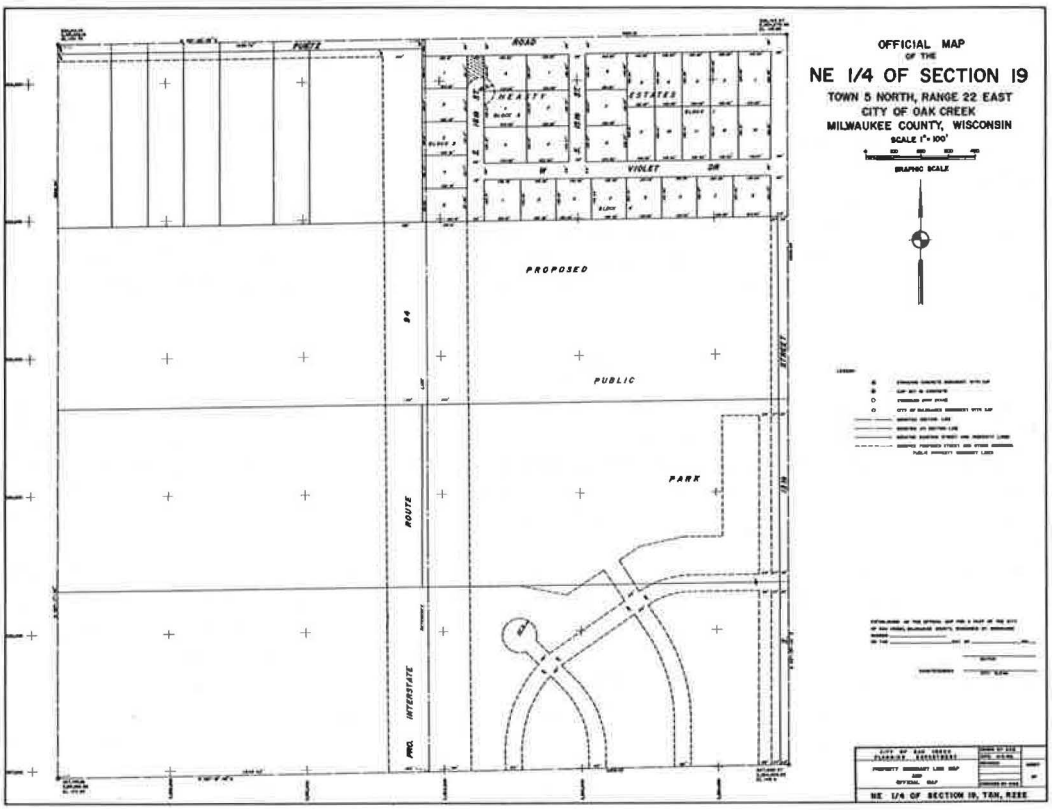


Figure 5. Typical finished official map sheet showing precise location for proposed public works projects.

grammetrically compiled topographic maps be furnished to national map accuracy standards at a scale of 1 in. equals 100 ft with a vertical contour interval of 2 ft, and that these maps be based on the survey control system proposed herein.

The specifications further required that reinforced concrete monuments, having engraved bronze caps embedded in their tops, be placed to mark the relocated public land survey corners, and that a dossier sheet be provided for each corner giving all information necessary to permit easy recovery and use. This includes a sketch showing the monument erected in relation to the salient features of the immediate vicinity, all witness monuments and ties, the State plane coordinates of the corner and its public land survey identification, and the bench mark elevation of the monument (Fig. 1). A control survey summary diagram is required showing the exact lengths and grid bearings of the exterior boundaries of each quarter-section; all monuments set; the number of degrees, minutes, and seconds in the interior angles of each quarter-section; the State plane coordinates of all quarter-section corners together with their public land

survey identification; the bench mark elevation of all corners set; basic U.S.C. and G.S. control stations used to tie the public land survey corners to the National geodetic datum; the angle between geodetic and grid bearing; and the combination sea-level and scale-reduction factor (Fig. 2).

The finished topographic maps, in addition to the usual contour information, planimetric detail, and coordinate grid ticks, also show in their correct position and orientation all quarter-section lines and corners established in the field surveys (Fig. 3). Property boundary lines are then readily plotted on the topographic maps themselves, or on separate overlays, from title records and adjusted to the quarter-section lines (Fig. 4). Specific projects may then be taken from the long-range plan, detailed as to specific location by working directly on the maps, and the maps adopted as portions of the official map (Fig. 5).

CONCLUSIONS

The official map can fulfill an important planning function by providing a necessary and effective means of implementing both State and local arterial street and highway system plans. An official mapping program should be based on base maps of adequate precision and accuracy compiled on a framework of permanently monumented horizontal control which permits accurate correlation of real property boundary line information with topographic data.

The control survey system outlined here places a monumented, recoverable control station of known position on both the public land survey and State plane coordinate systems, and of known elevation, at ½-mile intervals throughout the area being mapped, whether that area be an entire city or an existing or potential traffic corridor. This monumented control net not only permits the reservation lines established by an official map to be accurately and economically reproduced on the ground but also expedites and coordinates all survey work, both public and private, throughout the mapped area.

The official map can and is being applied to highway plan implementation in Wisconsin, both through cooperative State-local exercise of local official map powers and through newly instituted State level official map powers. Further application of this plan implementation device can probably best be encouraged by permitting Federal and State participation in State and local mapping programs which employ a system of control adequate for official map purposes. Such encouragement merits careful consideration in light of the Wisconsin experience.

Research into the Value of Landlocked Right-of-Way Parcels

KARL S. ALBRINK and JOSEPH F. COBBS, Ohio Department of Highways

This paper reviews a study of land areas landlocked by the western half of the Ohio Turnpike. The study was made by the Ohio Department of Highways in cooperation with the Bureau of Public Roads and involved 168 agricultural and 51 residential tracts of land. The properties discussed were landlocked in 1953-54, and research on the after situation began in 1958 and extended into 1962. Because of the widely separated interchanges, general benefits affecting adjacent properties are felt to be held to a minimum.

The newly developed schematic diagrams used by the research team to show visually the owner's action pertaining to landlocked lands as it relates to size, shape, and number of abutting owners are presented to establish that a large variance of opinion could be supported and an ultimate "after value" should be determined by experienced appraisers using research information as part of their basic inquiry only.

• A BY-PRODUCT of almost any fully limited-access highway is the isolation of adjacent tracts of land left without legal means of access to a public street or road system. The potential loss in value of these so-called landlocked parcels, both real and theoretical, plays a significant role in determining the location of a highway and the over-all cost of the facility. Inasmuch as the normal basis of payment to a landowner for property taken is the difference between before and after values of the residue of the property, it can readily be seen that both before and after values are equally important. The appraiser in determining these values looks basically to the market for guidance; market data relating to the before values are usually conveniently available. It is the after value of the landlocked parcels that presents the most difficulty. The market here is usually restricted to areas that have had similar highway improvements and where sufficient time has elasped for a bonafide market to be established; that is, a sufficient number of sales that can be relied on for use by the appraiser to predict values of other landlocked areas.

The Ohio Department of Highways has recently completed a land economic study of the areas surrounding the western half of the Ohio Turnpike. The area (Fig. 1) extends along 105 miles of the Turnpike from the Ohio-Indiana State line, traversing six counties, to the Sandusky-Erie county line. There were a total of 537 parcels having remainder tracts after completion of the Turnpike in the fall of 1955. Of this total, there were 168 agricultural and 51 residential tracts of land that were landlocked. Research on the after situation began in 1958 and extended into 1962. Information obtained during the study was recorded in case histories like those in Figures 2 and 3. Data for the preparation of case history information (such as size of the parcel, appraised value of land and improvements, size of tract purchased for right-of-way, size of remainder tracts, and the breakdown of total acres in the various types of land use) were collected from the Ohio Turnpike Commission's records. Property maps were obtained from the County Engineer's Office. Aerial photographs of the subject properties before

Paper sponsored by Committee on Land Acquisition and Control of Highway Access and Adjacent Areas.

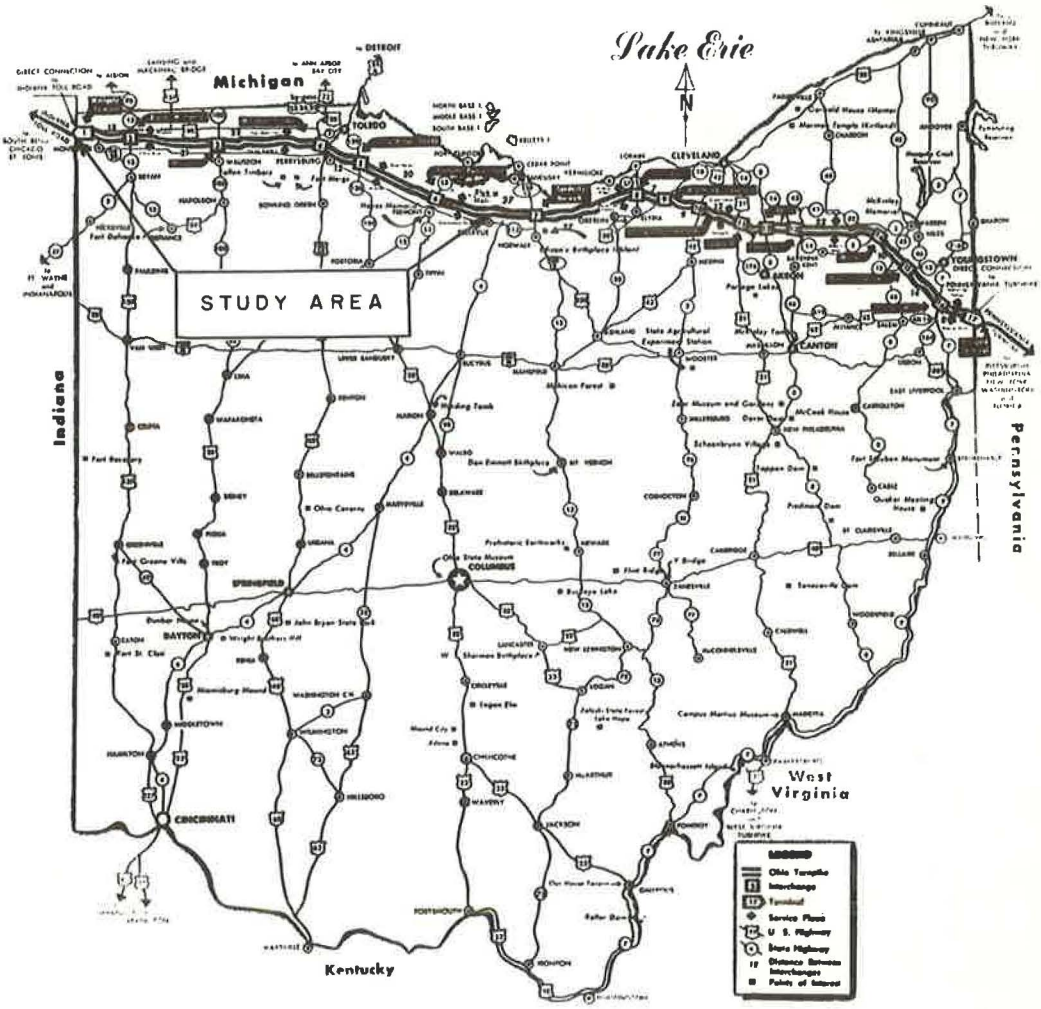


Figure 1. Study area along Ohio Turnpike.

construction of the Turnpike were obtained through the Agricultural Stabilization Committee, Washington, D. C. The Aerial Engineering Section of the Ohio Department of Highways photographed the completed Turnpike to show the after situation. The before aerials were taken in 1950 and the after in 1960. Information for present situation was obtained through a personal interview with the present owner and a review of the title and sale information available at local county courthouses.

Factual information obtained on properties sold after the building of the Turnpike is the basis on which the after values of landlocked areas were established. Comparison of the values developed was done through computation of a "percent of recovery." The percent of recovery is the proportion of the before value that the land regained as evidenced by later sale, expressed as a percentage. It is computed by dividing the selling price, multiplied by 100 by the before value of the landlocked area. The after value used in this comparison was generally considered to be the dollar amount received when a tract was sold. The appraised value of the entire parcel, adjusted for time differential and changes in real estate values to the sale year, was used as a basis for arriving at the adjusted before value. Agricultural parcels were adjusted by use of the

Before Construction		Land	After Construction			Type	Sold	Bought	Present Situation				
Land Use	Acres	Taken	Sev.	Isol.	Lkd.	Acc.			Sev.	Isol.	Lkd.	Other	Total
Cultivated	70	8	23		39		39		23				23
Pasture													
Woods	8				8		8						
Waste													
Other													
Homesite	2		2						2				2
Totals	80	8	25		47		47		25				25

Appraised "Before" Value (19 52)		Computation Of Percent Of Recovery					
		Category	Sales			Adjusted	Percent
			Acres	Price	Year	Appraised Value	Recovery
Land	21,650	Severed					
Buildings	17,184	Isolated					
Total	38,834	Landlocked	47	13,000	1955	19,360	67.1

Influencing Factors:

A. **The owner is retired. He rented-out the land "before", but lived on the farm.**

B. **The landlocked parcel was sold to an abutting owner of which there were three.**

C. **The severed land continues to be tenant operated. The buildings are vacant.**

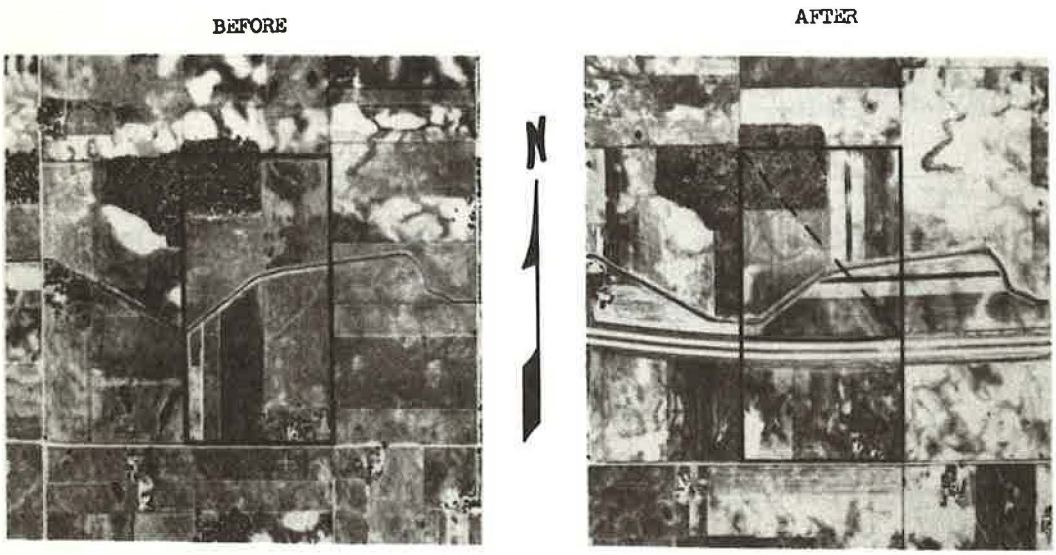
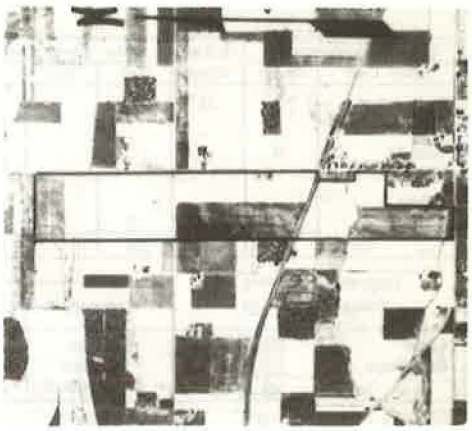
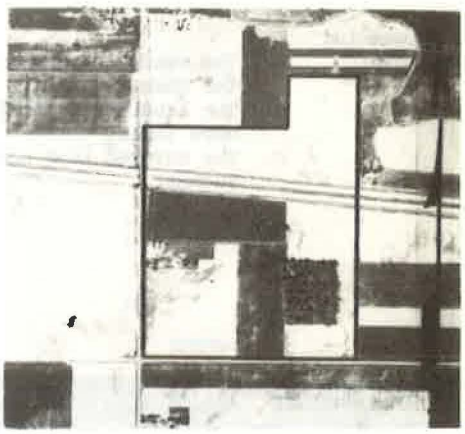


Figure 2. Case history, parcel 50, Fulton County.

Parcel № 12			County	Fulton		
Appraised Value Before (1953)			Land	24,200		
			Buildings	3,200		
			Total	27,400		
Before Construction		Land	After Construction			Type
Land Use	Acres	Taken	Sev.	Isol.	Liked.	Acc.
Cultivated	222.0	8.9	192.3	20.8		
Pasture						
Woods						
Waste						
Other						
Home Sites	1.0		1.0			
Totals	223.0	8.9	193.3	20.8		
Owner Opr'd. Rented Out	X		X	X		
Remarks: Appraised value is for 80 ac. only. No major changes other than fence changes.						



Parcel № 13			County	Fulton		
Appraised Value Before (1952)			Land	31,400		
			Buildings	19,246		
			Total	50,646		
Before Construction		Land	After Construction			Type
Land Use	Acres	Taken	Sev.	Isol.	Liked.	Acc.
Cultivated	96.0	11.8	58.2		26.0	T
Pasture						
Woods	7.0		7.0			
Waste						
Other						
Home Sites	2.0		2.0			
Totals	105.0	11.8	67.2		26.0	T
Owner Opr'd. Rented Out	X		X		X	
Remarks: Owner has retired. Also owns Parcel 15 (272.7 ac.). Son does farming. No livestock raised now.						



Parcel № 14			County	Fulton		
Appraised Value Before (1952)			Land	35,200		
			Buildings	17,029		
			Total	52,229		
Before Construction		Land	After Construction			Type
Land Use	Acres	Taken	Sev.	Isol.	Liked.	Acc.
Cultivated	100.0	12.5	51.2		24.0	T
Pasture						
Woods	18.0	5.0	7.0		6.0	T
Waste						
Other					12.3	T
Home Sites	2.0		2.0			
Totals	120.0	17.5	60.2		42.3	T
Owner Opr'd. Rented Out	X		X			
Remarks: Temporary access through neighbor to landlocked tract. Rents-in 80 acres since turnpike. Some soil sold for fill.						

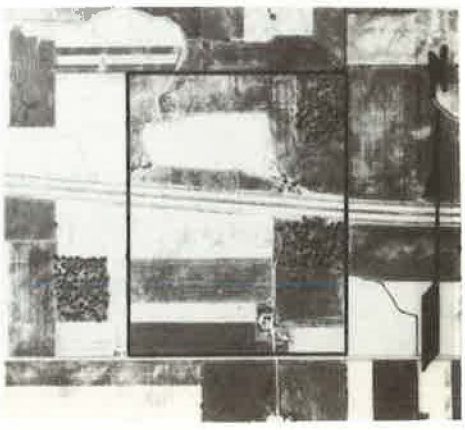


Figure 3. Case histories, three parcels, Fulton County.

Ohio Farm Real Estate Price Index calculated by the U. S. Department of Agriculture. Residential properties were adjusted using Boeckh's Building Costs Index. Further adjustment became necessary when buildings remained on the residue.

As an example, the case when only a portion of the property is sold and further adjustments are required is given. If the property had buildings and a portion was sold separately, the question arose as to what portion of the building values should be allotted to the land to determine the before value of the area sold. If the building remained on the unsold residue and a large portion of the original farm was being sold, it would not be realistic to allocate all the building value to the land, for this would leave too low a valuation on the buildings left. By the same line of reasoning, allotting none of the building value to the land would leave a high valuation on the buildings.

Case histories were reviewed and it was found that 48 owners, or 11 percent, of the original farms either had sold the residence and homesite separately from the productive land or were cash renting the dwelling to one tenant and crop renting the land and service buildings to another. There were 12 farms on which the homesite was sold, and 36 farms where the homesite was rented separately. Table 1 gives the average percent of recovery in the subject counties. These counties have been grouped as to relative distance from the employment center. The rate of return from the dwelling appeared to vary with the proximity to the center of employment.

Table 2 gives for those farms where the homesite was rented out the percent of return based on the appraised value. This table shows where the percent of return is

TABLE 1

PERCENT OF RECOVERY OF STRUCTURES AND HOMESITES WHEN SOLD SEPARATELY FROM THE LAND, OHIO TURNPIKE, 1961

Counties	Number of Sales	Sale Price ($)	Appraised Value ($)	Recovery (%)
Lucas-Summit	3	50,672	33,581	151
Wood-Sandusky	6	35,781	41,197	87
Williams-Fulton	3	24,787	41,739	59
Total	12	111,240	116,517	95

TABLE 2

ACTUAL RATE OF RETURN IN RELATION TO FRACTIONS OF APPRAISED VALUE

County	Rate of Return (%) to Appraised Value of					
	100	90	80	70	60	50
Williams	4.8	5.3	6.0	6.9	8.0	9.7
Fulton	5.4	6.0	6.8	7.7	9.0	10.8
Wood (Lucas)	9.6	10.6	12.0	13.7	16.0	19.2
Ottawa	7.1	7.8	8.8	10.1	11.8	14.2
Sandusky	6.2	6.8	7.7	8.8	10.3	12.4
Avg.	6.1	6.9	7.7	8.8	10.3	12.3

equal to the net income before depreciation, divided by the appraised value (adjusted to 1961), multiplied by 100. Tables 1 and 2 together show the full value of the farm residence should not be deducted from the appraised value of the farm before arriving at a value per acre for the land. It was concluded that the percent of the appraised value which should be allotted to the productive land varied with the counties. In Williams and Fulton Counties, 50 percent of the appraised value of the residence and homesite was allotted to the productive land, 40 percent was allotted in Ottawa and Sandusky Counties, and 10 percent in Lucas and Wood Counties. In other words, 50, 60, and 90 percent, respectively, of the appraised value of the residence was allotted

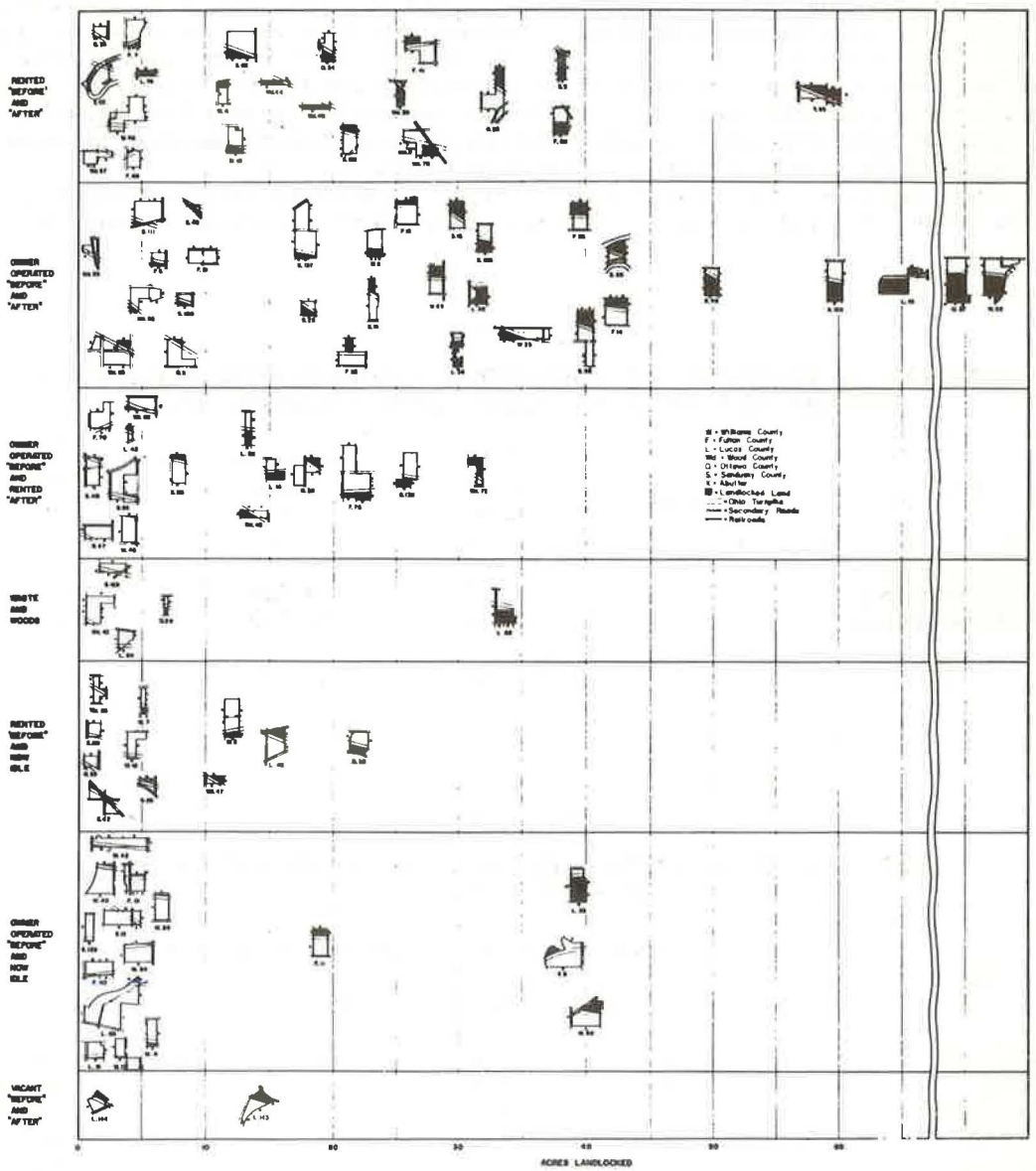


Figure 4. Before and after uses of landlocked tracts not sold and their corresponding size to entire parcel, for all parcels 10 acres and over.

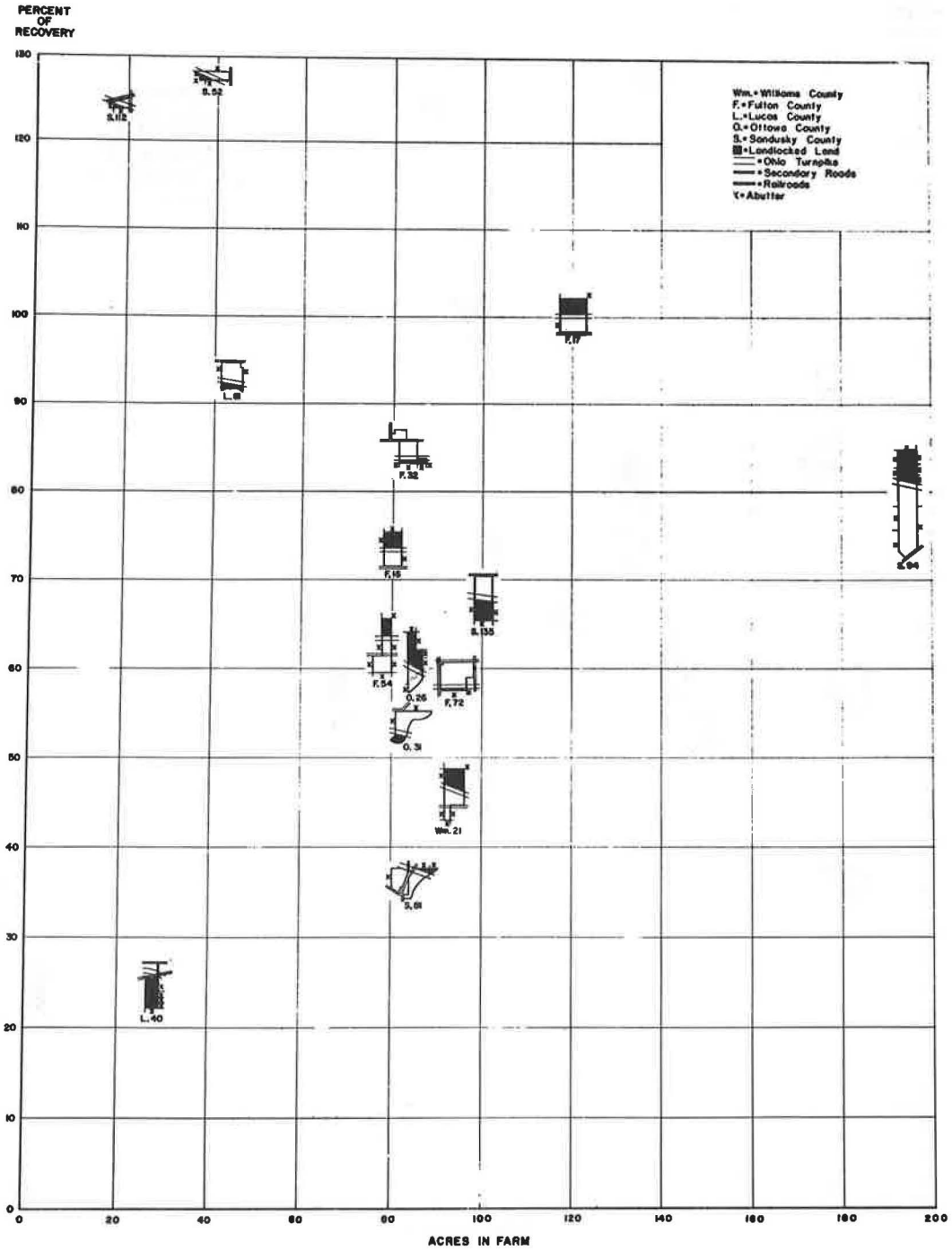


Figure 5. Percent of recovery relative to size of farm with landlocked acreage when farm sold as a unit.

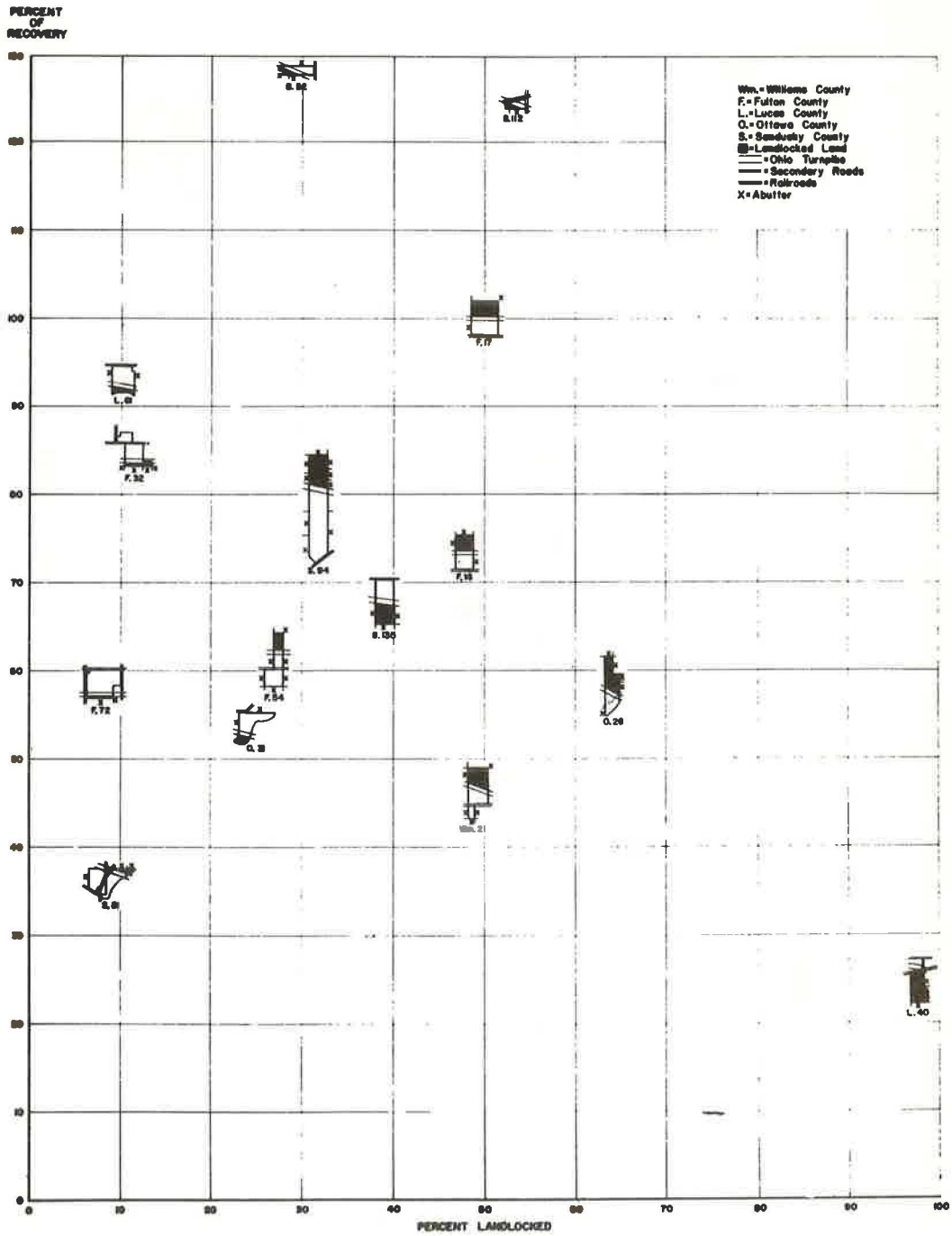


Figure 6. Percent of recovery relative to percentage of farm landlocked when entire farm sold as a unit.

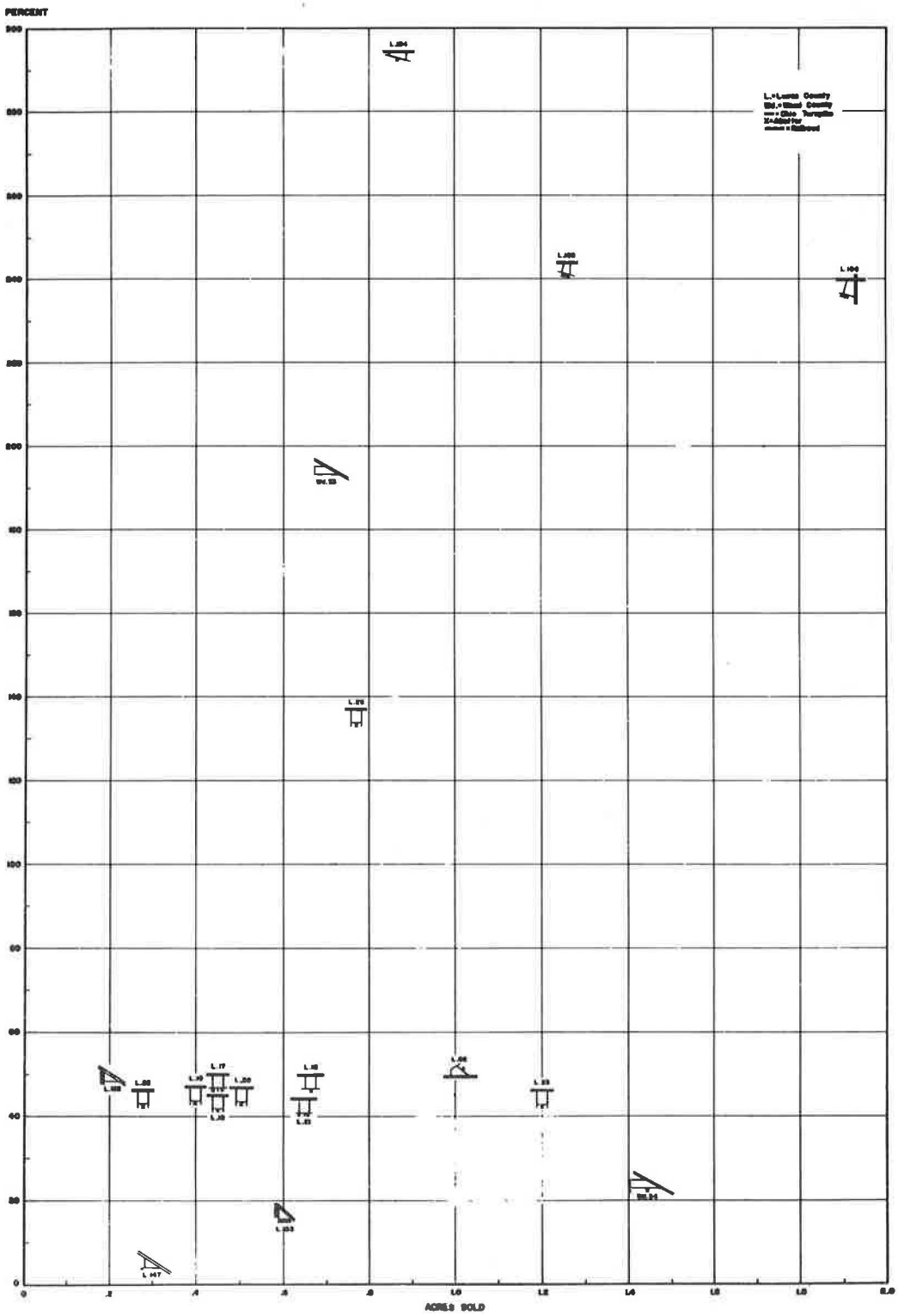


Figure 7. Percent of recovery and corresponding size of landlocked tracts sold from parcels under 10 acres (borrow sales excluded).

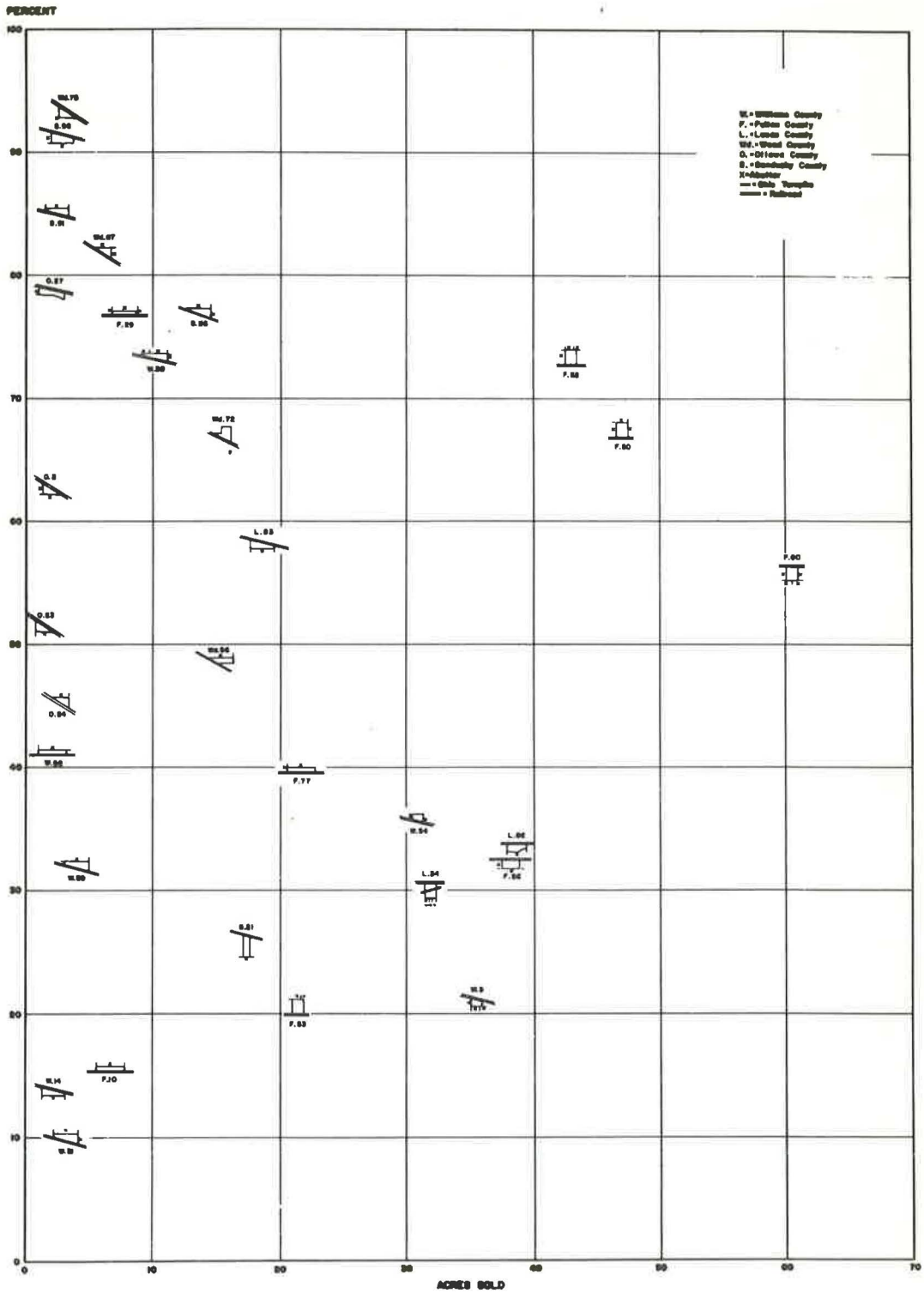


Figure 8. Percent of recovery and corresponding size of landlocked tracts sold from agricultural parcels 10 acres and over (borrow sales excluded).

to the homesite in those counties. This was the basis used in arriving at the before value of a portion of the property sold.

In the Ohio Study, landlocked areas have been conveniently plotted on schematic diagrams to show visually the owner's action in relation to the size, shape, and number of abutting owners. Figures 4 through 8 show the schematic diagrams that pertain to landlocked parcels.

Figure 4, which shows the before and after uses of landlocked tracts that have not been sold for all parcels originally 10 acres or over, can be divided into two primary categories. The upper three groups indicate usable land before and after, and the lower four groups indicate idle land. An examination of the case histories for the larger tracts of idle land (such as O-30, F-11, L-33, and W-50) indicated that these tracts were not useful because of a physical characteristic of the land itself which prevented any normal productivity.

Table 3 gives the various owners' action on the landlocked areas. In the majority of cases, the owner has retained the land. Of the sold tracts, the percent of recovery is shown in Figures 5 through 8. These schematic diagrams serve as an excellent index to the case histories as well as aiding the reader in grouping action taken on various classes of parcels.

One theory of the value of landlocked areas is that their value will vary in accordance with the number of abutting owners. Table 4 shows that the cases reviewed do not support this theory.

It has not been possible here to present all the information obtained in the Ohio Turnpike Economic Study as it relates to landlocked areas, nor has it been possible to cover all the various methods of analysis that were pursued in the attempt to find definite trends that could be useful in predetermining values of landlocked areas. The reward for the

TABLE 3

OWNERS' ACTION ON LANDLOCKED TRACTS, 1961
(Agricultural Parcels)

Use	Tracts		Acres	
	Number	Percent	Number	Percent
Retained by owner:				
Rented to abutter	16	9.5	177.2	5.8
Idle	31[a]	18.5	266.5	8.7
Temporary access	32	19.0	761.8	24.9
Permanent access	16	9.5	472.3	15.5
Subtotal	95	56.5	1,677.8	54.9
Sold by owner:				
To contractor	22[b]	13.1	459.7	15.0
With other land	19	11.3	414.0	16.6
Separately	29	17.3	506.7	13.5
Subtotal	70	41.7	1,380.4	45.1
Combination	3	1.8	--[c]	--[c]
Total	168	100.0	3,058.2	100.0

[a]Includes five tracts from which contractor obtained borrow.
[b]Includes five tracts sold with other land to contractors.
[c]Included in preceding figures.

TABLE 4

PERCENT OF RECOVERY FOR LANDLOCKED TRACTS SOLD, CLASSIFIED BY NUMBER OF ABUTTING OWNERS, 1953-61
(Agricultural Parcels)

Number of Abutting Owners	Number of Tracts Sold[a]	Total Sale Price ($)	Adjusted Appraised Value ($)	Range of Recovery Rates		
				Avg.	High	Low
1	11	15,145	29,227	51.8	93.3	13.9
2	9	19,300	48,694	39.6	91.2	10.1
3 or more	8	45,550	83,282	54.7	76.8	20.9

[a]Excluding borrow sales.

tremendous amount of detailed and time-consuming research effort and analysis is the usefulness of these studies to the appraiser and the negotiator.

To the appraiser, studies of this nature are invaluable. Certainly any attempt on the part of an appraiser or reviewer either to use the case histories as direct comparables or to apply averages in the actual determination of values must be questioned. There are just too many variables involved. The diligent review of project studies such as the Ohio Turnpike Study gives the appraiser a broader experience background with which to approach a problem on landlocked lands better. He must recognize the high recovery possibilities as well as complete loss of usefulness of the land. His conclusion as to value should be more valid under these circumstances.

Information obtained from the studies can be an equally important tool in the hands of a well-informed negotiator. He can lessen the fear of the owner by showing what others have been able to do with areas that might at a first instance appear valueless.

The administrators of the highway program must recognize that the present study represents a relatively small sampling of the problem and that research into the value and usage of landlocked areas should continue. The results of such studies should be made available to all appraisers and to the public for educational purposes.

As more and more information becomes available on landlocked areas, acquiring agencies may want to make recommendations to their legislature for laws that would aid in narrowing this wide range of values, such as providing definite corrective procedures for establishing access to these landlocked areas without burdening the public in their maintenance. So far, the studies have shown that there is a wide variance in recovery and there appears to be no method of analysis of values of landlocked areas that will result in a pattern that can be applied in the determination of value. The good judgment of a competent, informed appraiser is still essential.