

Report of Committee on Land Acquisition and Control of Highway Access and Adjacent Areas

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•THE COMMITTEE on Land Acquisition and Control of Highway Access and Adjacent Areas continued through the year 1963 to give assistance to State highway departments and other governmental agencies in providing information on new and improved methods of land acquisition to the end that the highway program may be expeditiously and economically carried out.

Previous annual reports of the committee have carried digests of appellate court decisions handed down by State and Federal courts in which matters relating to condemnation of property for public purposes were at issue. Since the beginning of 1963 these digests have been included in a new publication called the "Highway Research Board News," and therefore will not be further carried in the Land Acquisition Committee report. These digests, however, still remain a valuable part of the committee's work and continue to receive widespread recognition in various publications and house organs.

The committee's 1963 report was published in "Highway Research Record Number 8" which included the following papers: "Jurisdiction to Regulate Utilities on Highway Right-of-Way," by James E. Thomson; "Impact of the Highway Program on Railroad Property Rights," by Walter L. Young; "Tenant Relocation and the Highway Program," by J. Allyn Preston; "Effect in Florida of Requiring Condemner to Pay Condemnee's Entire Litigation Expense," by Thomas C. Britton; "Highway Reservations and Land-Use Controls Under the Police Power," by Daniel R. Mandelker; "Techniques of Land Acquisition for Future Highway Needs," by G. Graham Waite; "Use of Official Map Procedure to Reserve Land for Future Highways," by K. W. Bauer; and "Research into the Value of Landlocked Right-of-Way Parcels," by Karl S. Albrink and Joseph F. Cobbs. The last four papers were sponsored by the committee. The study by Mr. Mandelker has received wide distribution including the BPR Regional and Division Engineers.

For several years the committee has had a vital interest in the severance damage studies that are being made in the States. It is interesting to note that at least 46 States have or are now making such studies. A bank of approximately 1,200 cases have been processed, and the data derived therefrom have been used in responding to a number of requests. An analysis of these cases has also been made and was presented at the HRB 43rd Annual Meeting.

A valuable addition to the vast and growing library of works dealing with all aspects of highways is the publication of "Control of Highway Access" by Ross D. Netherton. The book analyzes the framework of statutes, cases, and administrative law that has grown up around the policy of controlling highway access. Here for the first time the legal aspects of access control as they relate to the principles and practices of planning, land acquisition, valuation, and land-use regulation are examined comprehensively. The book traces the historical evolution of legal concepts of public and private property as applied to highways, and presents hitherto unreported data regarding acquisition and control of access rights. The traditionally hazy boundary between the realms of the police power and eminent domain is examined. Also evaluated are the various aspects of the law of nuisance, conveyancing, planning, zoning, and condemnation in connection with highways.

The committee participated in "The Wisconsin Colloquium on Appraisal Research" held at the University of Wisconsin, March 5 and 6, 1963. The Colloquium was primarily a research planning conference for an interchange of views among a small invited group of real estate appraisers, mortgage lenders, Government officials, and professors.

The committee also cooperated with the U. S. Bureau of Public Roads in the production of a comprehensive annotated bibliography on right-of-way.

The committee will continue to provide assistance wherever possible in the right-of-way field, and to provide case information by the issuance of memoranda through the Highway Research Board News.

The year's highlight of committee activities was the open meeting sponsored by the committee at the HRB 43rd Annual Meeting. The five excellent papers presented dealt with right-of-way management techniques and with the many problems in highway condemnation.

The first paper, entitled "The Application of the Critical Path Method to a Highway Right-of-Way Operation," was prepared jointly by Ralph C. Bordley of the Office of Right-of-Way and Location, U. S. Bureau of Public Roads, and Richard C. Tennent of the same Bureau's Office of Research and Development. It is a report on an investigation of the feasibility of using this modern management tool for land acquisition activities. It presents a brief background of the use of CPM in this field and describes the development of a standard or prototype network to be used as a pattern for individual networks for the right-of-way operations in the individual States. The general pattern of the network is applicable to the operations of all of the States although revisions will be necessary to conform to legal requirements and procedures of each individual State.

To determine recent trends in highway condemnation cases a few years ago the U. S. Bureau of Public Roads entered into a contract with the University of Wisconsin. A paper, entitled "Recent Trends in Highway Condemnation Law," presented by Orrin L. Helstad, Associate Professor of Law at the University of Wisconsin is based primarily on information gathered in the aforementioned study for the period 1946-1961. The discussion of trends is divided among three major areas of condemnation law: (a) the right of the condemner to condemn; (b) the right of the owner to receive just compensation; and (c) condemnation procedure. Two general trends appear to emerge: (1) a tendency to look with favor upon the right of the condemner to condemn and to acquire quick possession of the property so that construction may proceed without delay; and (2) a gradual trend toward expanding the scope of the landowner's right to receive compensation.

A review of inverse condemnation problems to focus on the relationships between tort and inverse causes of action was presented in a paper by Daniel R. Mandelker, Professor of Law, Washington University, St. Louis, Missouri. Inverse condemnation has brought concern to many lawyers in State highway agencies because of the role it plays in identifying new interests for which compensation is payable in condemnation law. Claims and interests of all kinds which were not compensated in an original condemnation action, or where no direct taking was involved, are likely to be adjudicated in an inverse condemnation suit. In such suits, the litigants press for compensation for a wide variety of claims, arising out of loss of view, loss of access, and damage from noise, dust, and fumes. The more conventional water damage cases are also common. Even more threatening, the inverse condemnation action is used increasingly as a dodge around sovereign immunity, and highway agencies face a growing number of lawsuits in which inverse condemnation is used to secure damages for what would usually be considered an ordinary tort.

Leonard I. Lindas, Chief Counsel, Oregon State Highway Department, presented an "Analysis and Evaluation of Oregon Condemnation Cases." His study dealt with the period from July 1955 to June 30, 1963, in which the Oregon trial staff prosecuted 635 condemnation actions. It was concluded that charting the trials of cases from a percentage of increase basis does not necessarily give a true picture of trends in jury verdicts. However, one trend appears to stand out, and that is that since 1960 in Oregon's one large metropolitan area—Portland—the highway department has fared better in condemnation trials than in rural areas. Mr. Lindas attributes this to the demonstrated fact that where portions of the Interstate System have been completed, property values have not decreased, but, in fact have increased.

At this session Sidney Goldstein, Chief of the Economic Research Division, Office of Research and Development, U. S. Bureau of Public Roads presented a paper, entitled

"The Discovery Process in Highway Land Acquisition," in which he seeks to evaluate the fundamental nature of the discovery process in litigation and its significance in the land acquisition process for both parties. Implications drawn from this evaluation can serve as a basis for legal counsel and right-of-way personnel in State highway departments and at other levels of government to develop adequate procedures to: (a) counter the inordinate use of discovery rules against State highway departments and the Federal Government in eminent domain cases, and (b) encourage its use where relevant to a determination of fair compensation for the property owner. With approximately ten percent of highway land acquisitions culminating in trial, this process becomes of vital importance. Mr. Goldstein was given assistance on the paper by James C. Rice, and William J. Lavelle, both of the U. S. Bureau of Public Roads.

LEGISLATION 1963

The State acquisition methods for acquiring the millions of parcels required for the highway program have been greatly improved in recent years. It has become obvious, however, that further improvement is necessary if, for example, the right-of-way for the Interstate System is to be acquired in time so that construction of the 41,000-mi system can be completed by the 1972 deadline. During the year a number of States enacted legislation aimed at improving their acquisition processes. A resume of this legislation follows:

Land Acquisition

Hawaii legislation authorizes the sale of unneeded public lands, classifies highways, and provides for the disposition of abandoned public highways.

A new eminent domain law was enacted in Maryland. This is a comprehensive law and provides, among other things, for immediate possession, special benefits, highest and best use, time of valuation, time of taking, nature of interest, right of entry, and abandonment. An interesting innovation on the date of taking is that it permits deviations backwards or forwards in time if the influence of the highway improvement on the value of the property being taken would be eliminated by so doing.

Connecticut legislation authorizes entry upon private property for highway purposes and provides further that upon refusal of entry for borings, soundings or other tests the courts, upon petition, may authorize entry or specify conditions whereby such entry may be authorized.

Georgia shifted the power of eminent domain from the State Highway Board to the State Highway Department.

The Kansas Legislature enacted a law declaring it to be the public policy of the State to acquire real property and rights therein well in advance of highway construction, thereby eliminating costly details in construction, reducing hardship to property owners, and eliminating economic waste occasioned by improvement of such property immediately prior to its acquisition for highway uses.

Minnesota authorized the Commissioner of Highways to acquire lands needed for relocation of railroad tracks, and to exchange such lands or other lands owned in fee by the State for trunk highway purposes but not needed therefor, for lands owned by a railroad company and needed for highway purposes.

Montana approved legislation to require the State highway department to prepare and file a plat in accordance with the provisions of Sec. 11-614 whenever a parcel of land taken for highway use is less than the U. S. legal subdivision of ten acres, or is irregularly shaped so as to require a survey.

A Nevada law provides that taxes levied on real property which is acquired by the State for highway purposes shall be abated ratably for the portion of the fiscal year such real property is owned by the State.

New Jersey authorized the State Highway Commissioner, in addition to the powers now vested in him to acquire lands, to enter into cooperative agreements with housing authorities or redevelopment agencies for acquisition and clearance of property and the equitable sharing of costs. Where consequential damages would result to the owners of remaining property, the Commissioner may acquire such remaining property and transfer it to the authority or agency.

Oklahoma amended their property acquisition law to authorize the Department of Highways, in acquisition of land, to take into consideration present and probable future needs. The measure sets up a procedure whereby upon payment of a sum into court the highway department may take immediate possession of the property in condemnation proceedings. Further procedures are set forth for appeal, etc. Another law provides for the sale of lands no longer needed for highway purposes.

A Rhode Island resolution created an investigative study commission to determine if State citizens were receiving fair market value for their property when taken under eminent domain.

South Carolina legislation gave the Department of Highways the power to condemn the fee title in land.

South Dakota legislation provides that the State Highway Commission may take immediate possession of property needed for highway purposes upon payment into court of the estimated just compensation for the land being taken. Another South Dakota law provides that where real property is voluntarily relinquished to the State Highway Commission under an agreement whereby the damages are determined subsequent to the taking, interest at the rate of six percent shall accrue from the date of the agreement.

Both Utah and Connecticut recodified their highway laws.

West Virginia revised its eminent domain law and provided for immediate possession of property needed for highway purposes upon payment into court of the fair market value.

Outdoor Advertising

The Federal-Aid Highway Amendments Act of 1963 provided a two-year extension from July 1, 1963 to July 1, 1965, for States to enter into agreements with the Secretary of Commerce for the control of outdoor advertising along the Interstate System. Twenty States¹ have already entered into agreements in order to qualify for the one-half of one percent bonus, and this amendment affords the remaining states additional time to take advantage of the bonus if they so desire. Five States (Kentucky, Maine, New Hampshire, New York and Virginia) have received initial bonus payments for controlling outdoor advertising along the Interstate System in accordance with the current standards.

New Jersey and Rhode Island approved new billboard control laws in 1963 making them eligible for the Federal bonus. Maine, Nebraska and New Hampshire enacted laws providing that billboard restriction along the Interstate System will not apply to commercial or industrial zones. Another new law in Nebraska provides for the removal of advertising devices which interfere with the operation of motor vehicles. Oregon transferred all functions relating to licensing permits and enforcement of the State billboard law to the State Highway Commission and State Highway Engineer.

A resolution adopted in Michigan creates a three-member legislative committee to study roadside advertising. New York continued their Joint Legislative Committee on Commerce and Economic Development investigation of all aspects of outdoor advertising. A resolution adopted in Tennessee provides for a study by the Legislative Council Committee to determine whether the State should regulate outdoor advertising on all State highways. Billboard control legislation was considered in almost every State that had not already approved such measures.

Public Utilities

Maryland, Nevada, Tennessee and West Virginia enacted laws permitting reimbursement of public utilities for the cost of utility facility relocation made necessary by highway construction.

The new Maryland law authorizes the State to pay costs of relocating the facilities of publicly owned utilities when necessitated by construction, reconstruction or improvement of the Interstate System when Federal reimbursement is available under the pro-

¹Connecticut, Delaware, Hawaii, Kentucky, Maine, Maryland, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, West Virginia and Wisconsin.

visions of the Federal-Aid Highway Act of 1956 as amended. In Nevada, Tennessee and West Virginia, the legislation authorized the State to pay relocation costs of privately and publicly owned utilities where such facilities are located on the Interstate System, provided such costs are reimbursable from Federal funds.

New legislation in Minnesota permits the State Highway Commissioner to agree to lump sum payments for relocation of utility facilities, based on estimated relocation costs, where the sum so agreed upon does not exceed \$2,500. Texas declared such costs to be an expense of right-of-way acquisition.

Relocation Assistance and Removal Costs

At least 12 States (Hawaii, Massachusetts, Minnesota, Nevada, New Jersey, Ohio, Oregon, Rhode Island, South Dakota, Utah, Vermont, and West Virginia) approved legislation authorizing relocation payments of not more than \$200 for families or individuals, and not more than \$3,000 for businesses or nonprofit organizations, required to move because of highway construction. The new laws in Oregon and West Virginia also stipulate that persons required to move shall receive advisory assistance from the State in finding new locations. New York and North Dakota approved amendments to previously passed tenant relocation laws. Twenty States are now paying such moving costs.²

Controlled Access

The Colorado freeway law was amended to make it permissive rather than mandatory that access be provided between severed portions of property held under one ownership at least once within one mile if the landowner demands such crossing. It permits compensating the landowner in lieu of such crossing. Further amendments provide that no private right of access shall accrue to property abutting any freeway established on a new location, except at such points as may be authorized.

Connecticut amended its limited-access highway law to provide a penalty for entering such highway at any place other than a highway intersection or other designated point.

An amendment to the Iowa controlled-access law provides that no access rights to any highway shall accrue by adverse possession or prescriptive right, nor shall any action heretofore or hereafter taken by any authority from the basis for any such claim.

Montana amended its control of access law to provide additional definitions; includes in term "controlled-access highway" those "portions of throughways and roads, streets and highways within a throughway intersection area." Other sections of the law were also amended.

Oklahoma extended the provisions of the limited-access highway law, except special assessment provisions, to all cities having a population of 3,000 or more (rather than 5,000 or more).

Amendments to the Washington limited-access highway law provide that it shall apply to counties as well as to cities and towns.

²Connecticut, Hawaii, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Utah, Vermont, West Virginia, and Wisconsin.