Organization of Intergovernmental Relations

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• HIGHWAY programs give rise to a bewildering variety of intergovernmental relations problems, but by far the most urgent of these are the problems that arise out of the planning and construction of highways in urban areas. It has been estimated that in the United States during the next 30 years there will be an increase of 100 million persons living in urban areas. This is more people than now live in our 25 largest cities. During the next 30 years, then, our nation will have to build cities and supply urban facilities equal in quantity to (and, hopefully, better in quality than) the urban facilities now existing in our 25 largest cities. There is no need to stress the singular importance of highways in shaping these urban areas.

Charged with the job of solving these urban problems are a variety of governmental agencies on all levels: federal, state, and local. Their interrelationships and their shared powers result in a structure that has been compared to a marble cake—and has also, less charitably, been called chaotic. If the efforts of all these agencies are really to produce livable cities, this chaos must be replaced by some kind of order. What the nation needs, as Professor Doebele of Harvard has pointed out, is "a quite new type of three-tiered federalism: institutional arrangements in which local, state, and federal jurisdictions each have a clear but limited role to play. The federal government," Professor Doebele notes, "has the financial and technical resources, the state has the necessary political jurisdiction over the total urban area and its hinterlands (laying aside for the moment the special problems of interstate cities), and the local government has the machinery for creating public policies which in this day of bigness are still mindful of the human scale."

It seems clear that the legal profession must play a leading role in devising the institutional arrangements needed for the best functioning of the tri-level government. And in view of the preeminent importance of highways in shaping our urban destiny, I think that the studies needed to devise these institutions should be considered a major frontier of research in highway law.

This paper concentrates on a particularly familiar and important type of intergovernmental problem: the potential, and too often realized, conflict between a state highway department—the "action agency" in most highway programs—and a community affected by a highway department proposal. You are all familiar with disagreements of the type over route location, over whether a freeway should be depressed or elevated, or just where an interchange is needed. How should our institutions seek to resolve these conflicts? The primary objective, of course, should be cooperation among the affected governments.

In recent years, particularly since the Sagamore Conference in 1958, there have been general recognition and widespread discussion of the need for all units of government to cooperate in meeting urban transportation needs. Some progress has been made. By formal devices, such as public hearings, and informal ones, such as continuing staff contacts and very early consultations on project proposals, many differences between state and local viewpoints have been compromised before conflict ever came to a head. Perhaps more important in the long run, a great deal of education has taken place, with the result that planners and engineers are now doing at least a slightly better job of understanding each others' viewpoints.

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There is still, of course, a long way to go before we have truly effective cooperative planning—a longer way than we have come so far—but we seem to be on the right road; all we must do is move along it faster. A significant push in the right direction is provided by section 134 of the 1962 Federal-Aid Highway Act. This is the section that requires federally aided highway projects initiated in urban areas after July 1, 1965, to be "based on a continuing comprehensive transportation planning process carried on cooperatively by States and local communities." There is some question how effectively the act can force cooperation or truly adequate planning. The "workable program" requirement of the urban renewal legislation has not been a notable success in those communities whose only interest is to meet minimum federal requirements. Too often the form of planning is present but the substance is missing. The highway act provision should nevertheless be of great benefit, if only because it calls attention to the need for cooperative planning and causes states and local governments to set up additional channels within which cooperation can take place. Cooperative planning, then, is the first objective. By its use, most potential disputes can be settled before they arise. Those disputes that do arise will ordinarily be settled by one party educating the other or by compromise at some midpoint.

What is to happen, though, if state and local officials do not reach agreement? At present, if we look only at the state statutes, it appears that the state highway department will prevail in one group of states, the local government in others. Statutes in a number of states give state highway departments authority to build certain types of highways within cities despite objections or disagreement by city authorities. The statutes may require various types of cooperation with city officials—perhaps notice or various kinds of hearings—but the final decision is left to the highway department.

Other statutes go to the opposite extreme. They require municipal approval of state highway projects within cities. A substantive municipal veto power may result even in the absence of such a statute if certain local action, such as the vacation of a local street, is required before the new highway may be built, and the locality has complete discretion to take or refuse the needed action.

In practice, of course, the statutes do not tell the whole story. The highway department facing a local veto may exert pressure by threatening to abandon the project or to place it low on the priority list. On the other hand, the objecting local officials may invoke political pressure by running to legislators or congressmen. The important point, though, is that there is no formal mechanism available to resolve these disputes, nobody to act as judge or arbitrator. We believe there should be.

Is it really so unsatisfactory to have state law give final decision-making power to one unit of government or another? To have no formal arbitration machinery?

In cases of this kind, we believe it clearly is unsatisfactory. In the first place, any given stretch of major highway in an urban area is likely to be an integral part of an overall statewide or regional transportation net and also part of the transportation net within the urban area. Under these circumstances—and the division of metropolitan areas into many small localities intensifies the problem—it seems an oversimplification to let either the state or local view prevail automatically in the event of disagreement. It seems equally unsatisfactory to permit the decisions to be made through shadowy, informal or political channels.

In the second place, there is more at stake in these disagreements than state and local transportation plans. Many of the disputes resemble the most common kind of land-use disputes. That is, they represent a conflict between the need for a particular facility and the objections to that facility because of its effects on the adjacent community. There are, of course, elaborate legal procedures to deal with an impasse in a land-use dispute. The proposed facility is a private project. The owner seeks governmental approval, permission to build the project.

Take a regional shopping center, for example. Such a project has the same enormous impact on its surroundings that a freeway has. The center will be subject to local zoning. In practice, some form of legislative zoning decision by the local government—an amendment of the ordinance, a review and acceptance of the design—will ordinarily be needed before the center can be built. This will subject the proprietor to an "ordeal by public hearing," during which his views, those of his neighbors, and

those of local officials will all be aired. Thereafter, the local governing body will make its decision. Although serious doubts have been expressed about the adequacy and fairness of zoning procedures, and numerous suggestions have been made to improve them, the existence of the process is worthy of note, as is the fact that the decision is subject to judicial review—a very searching judicial review in some states.

There is a difference, of course, between public and private projects. But it is easy to exaggerate the difference. Controls of private development are justified on the theory that private developers are usually selfish and without concern for the community at large. But public projects, this argument would run, are designed to benefit the public and are proposed by boards or individuals ultimately subject to the electorate.

We believe this approach must be rejected. It should be recognized that a public agency responsible for a particular project can generally be expected to weigh the importance of building that project more heavily than any detrimental effects its construction may have on the surrounding area. Local governments have been known to build garages for their garbage trucks in the midst of their own best residential areas just because the site was convenient and the land was cheap. And when a government agency, such as a road-building agency, spends most of its time on a particular type of public facility, it is understandable that the agency develops a certain momentum, or bias, that is extremely difficult to overcome.

Some state road-building agencies have done a creditable job of integrating planners into their organizations—a better job, probably, than many local planning agencies have done in using engineering in the preparation of their local traffic plans. Hopefully, the addition of planners has increased the concern of highway agencies with community effects of proposed facilities. The fact remains, though, that the primary responsibility of highway departments (and this includes the planners as well as the engineers) is to build highways. And it is not clear that the decision between getting the most road for the public dollar and considering the welfare of the adjacent community is always best reached by an interested highway department official. The problem is made no easier when it is realized that money for highway building normally comes from earmarked funds, which results in a definite reduction in the legislative control compared with that which exists in some other areas of governmental activity.

We are not arguing that state highway programs should be subject to local land-use controls. Anyone who has dealt with many local officials will recognize that they (and sometimes their planner employees) too often fail to see the big picture—too often want to protect the status quo even if it means excluding a vitally needed public project. As the interests of individual suburban communities increasingly diverge from those of metropolitan areas as a whole, this problem becomes increasingly serious. In fact, in such areas we must recognize three parties of interest in a state highway program: the metropolitan community as well as the state and the particular city.

The impracticality of complete local control has been recognized by the one group of statutes that has established machinery designed to reconcile the need for particular public facilities with the adverse effects of those facilities. These statutes, based on the Standard City Planning Enabling Act issued by the Department of Commerce in 1928, require that plans for any type of public facility (often including state highways) be submitted for approval by the plan commission of each affected locality. If the plan commission disapproves, however, the proposed facility may nevertheless be built if two-thirds of the membership of the governmental body proposing the facility votes to overrule the commission. Thus, it appears that the drafter of the standard act recognized, quite properly, that a local veto is not practical.

These considerations, then, lead to the conclusion that neither the action agency nor the objecting municipality should be given the power of final decision in those cases reaching a true impasse.

What is needed is a new institution, not specifically identified with either contending agency, one with a breadth of view enabling it to see all sides of the picture. We believe this new institution should be a board at the state level, modeled on the federal regulatory commissions such as the Interstate Commerce Commission or the Federal Power Commission. Like these agencies, the board's power should be subject only to broad policy standards established by the legislature. The board would be required to

consider presentations by the action agency, municipal objectors, and others. The board would then have power to make a final and binding decision.

Although no exact precedent for such a board is known, there are some useful analogies. In some states, although public utilities are subject to local zoning regulations, state public utility commissions are authorized by statute to grant exemptions from local regulations. In New Jersey, for example, such an exemption may be granted if the board of public utility commissioners find that "the present or proposed situation of the building or structure in question is reasonably necessary for the service, convenience or welfare of the public." New Jersey court decisions have spelled out fairly precisely the nature of the matters that the board must consider in applying this standard. We can infer that the legislators wanted neither the utility nor the locality to make the final decisions. Statutes such as this are particularly interesting because of the great similarity of the land-use questions presented by, say, an electric power transmission line and a highway.

The Ontario Municipal Board offers another analogy worth studying. That board considers a variety of municipal questions: annexation, assessments, bond authorizations, various planning decisions, and zoning. The procedure is simple enough. Certain municipal decisions must by law be submitted to the board for approval. The board gives notice to all concerned, hears evidence and arguments, and hands down its decision. There is no doubt that the board and its work are highly regarded. It is usually possible to obtain a hearing before the board within a month or two. In minor cases, board decisions are frequently handed down right at the hearing. And in important cases, decisions are usually forthcoming within a few weeks.

Still another analogy may be the boards established in a few states to pass on annexation questions. These boards, like the Ontario Municipal Board, are primarily concerned with review of actions contemplated or taken by a single municipality, although intermunicipal conflict is often involved.

If established to deal with highway disputes, we believe an institution of the proposed type would rapidly come to be used for a number of other state-local and intermunicipal disputes as well. Richard Babcock, an eminent zoning lawyer, has written forcefully of the need for a statewide administrative agency to review local zoning decisions. At present, although there is an increasing realization among planners of the need for some land-use control authority other than local governments, particularly in metropolitan areas, no agency is now available to perform the needed review functions. For the resolution of controversy, the courts are the only recourse, and their experience in intergovernmental disputes is not extensive, nor particularly sophisticated. In addition to land-use control questions, annexation matters could also very easily be assigned to such a board.

We do not insist that a board of this type will be an unmixed blessing. There will be a danger of the board being biased (as regulatory commissions are often accused of being) or of abusing its broad powers. The method of appointment of board members can become a seriously debated point, although this problem has been faced and apparently resolved in the case of the federal and state regulatory agencies. As the boards became more experienced, it would presumably become possible for state legislatures to lay down more detailed policy standards to guide board decisions.

There would also be a problem of delay. This could easily be the most serious problem of all. It is not necessary to remind lawyers how long administrative processes can take. Existing procedures sometimes delay private developments for years, and such delays of vital links in urban highway networks would not be acceptable. The magnitude of administrative delays would have to be continually examined as the boards operated. Certainly, highway disputes should be assigned higher priority than most of the other types of disputes. And an adequate staff to handle the disputes would have to be provided by state legislatures. In view of the vast amounts of money being spent on urban highways and in view of the incalculable effects these highways can have on our cities for decades or even centuries to come, there is a strong argument for instituting such a formal process even if some delays do result. With expeditious handling, the delays should not be so long that the processing would do more harm than good.

We are also realistic about our own field, public planning. We are well aware of the inadequacies that exist—inadequacies in staff, in preparation, in real knowledge of the

variables. We recognize that there is often a complete lack of local consensus on a particular problem and its solution. The intuition of local politicians is no match for the precision of an engineering presentation. Yet this should not discourage us. The doctrine of "put up or shut up" will be invoked. As we see it, the end cannot but help both our houses. Planners as well as highway engineers will be forced into a deeper and more accurate understanding of the urban development process.

In sum, our hope is that, in conjunction with the state-local cooperation now developing in the highway field, it may be possible to devise a new institution to settle disputes when cooperation fails. Once established, this institution could also turn part of its attention to the increasingly serious intermunicipal disputes for which there is now no machinery to resolve. We have long had tribunals to regulate conflicts among private interests and conflicts between private interests and public ones. We should at least try a similar approach in reconciling disputes between public agencies that have differing views of the public interest. Lawyers in the highway field could play a leading role in getting the needed boards established.