The Highway Corridor as a Legal Concept

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•ATTORNEYS interested in the future of highways in this country have some difficult legal jobs cut out for them. Unless they participate as social engineers in planning for the organization and accomplishment of these new jobs the inevitable legal tasks in connection with the highway corridor and its development as a legal concept for preserving amenities and providing recreation will be doubly difficult. If we permit fragmentation of power among the state agencies and among state and local agencies, these tasks will be rough indeed.

I would like to suggest first that to a lawyer there is nothing unique about the notion of a highway corridor. The thing that is new about the corridors under discussion is that instead of thinking about them in terms of safe and relatively speedy transit for traffic, we are now thinking of them as providing safe, pleasurable transit, with some recreational opportunities close along the way. Lawyers will rely on the same basic legal tools that they are working with today: eminent domain, police power, grant-in-aid, and tax power.

COOPERATION IN CORRIDOR PLANNING

How are the states going to exercise these powers to preserve so-called highway corridors which accomplish the kinds of objectives described by Professor Lewis? It seems to me completely clear that there have to be combinations of environmental design men (such as Professor Lewis), highway design men, and law-trained men, who start working with the design team as soon as the decision to build a scenic highway is made. I think it is clear that the state highway departments ought to take charge, with the basic purpose of making the highway a means of safe and pleasurable travel and providing recreational areas adjacent to it. As the highway department takes charge, the highway lawyer should advise how this effort may be organized toward the goal of a total program, and not (as we customarily have) a limited access control activity at the state level, a local zoning activity spread out among hundreds of little units of government, and a subdivision control activity spread out among some of the units of government and sometimes also at the state level. We need to organize for a total program of highway corridor protection.

Certainly state agencies other than the highway commission will participate; local units of government will be heard from; and local units of government have to have a part in this. But it seems to me that the organizer of the program should be the highway department of the state, and the highway department's legal man should be in the top layer of the team planning this program. He should be there just as much as the landscape designer, the highway designer, the planner, and the administrator.

Next, I would like to discuss a subject with which Wisconsin has had some experience, and with which other states will be involved: the so-called scenic easement, as it relates to the establishment and preservation of the highway corridor concept.

THE NATURE OF SCENIC EASEMENTS

Some of the legal techniques involved are centuries old. In 1285, Edward I of England was concerned with having the shrubs cleared for a space extending 200 ft back from the edge of the road, and had the lords of the manor put the fences for their parks at least this far back. In 1285 King Edward had the corridor idea and employed land-use controls to implement it.

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When considering corridors for safety, drainage, and access control, we have not visualized them as being located any uniform and specific distance from the edge of the highway. Similarly, when establishing corridors to preserve amenities and provide recreation, we do not think of them as having fixed boundaries parallel to the edge of the highway. At some points the highway corridor may be 1,000 ft wide; in some situations the edge may be 2 mi from the edge of the highway; and in other situations it may be 15 ft wide, as, for example, where a highway is immediately adjacent to a rock wall.

There has been so much talk about scenic easements in connection with this undulating corridor that some people, including lawyers, have come to assume that this tool will accomplish the whole job. It is not that at all. Highway departments will continue to buy fee simple interests in order to preserve some of the resources of the corridor area. They will continue to use police power to preserve some desirable features, and be inventive in these uses. For example, I predict that in a few years highway departments will be putting what may be called a "quick freeze order" on areas alongside the highway to preserve that area for the time being, with the proviso that if the property owner shows that he has a chance to sell or develop his land the highway department must "fish or cut bait," i.e., either buy him out or let him go ahead and develop. I foretell that we may also use the tax power in new and imaginative ways to induce private land-owners to cooperate in corridor programs.

The scenic easement, then, must be regarded as one of several important tools available to the lawyer, which he may use when, but only when, the circumstances are appropriate. And one of the jobs the lawyer can do for the right-of-way people is advise as to when these circumstances are appropriate. A true story will illustrate this point. At a meeting of the Wisconsin state highway department's right-of-way people a few years ago, one man from the Green Bay area expressed the opinion that the scenic easement wasn't worth the trouble needed to obtain it. Why? He had gone out to buy some easements. It was his first experience with them. He had approached a man who had a tract of land located between a state trunk highway and Green Bay at a place where the view was particularly lovely. This land between the highway and the bay was not suitable for agricultural purposes. The only thing it was good for was a "view lot." The right-of-way man said to the landowner, "I'll give you $100 for a scenic easement." The owner said "What do you mean?" "Well, it means that I'll pay you $100 for an easement, and after that you won't be able to build on your land." Naturally the landowner laughed at him.

In this situation, if the state of Wisconsin wanted this view, it should have gone ahead and paid for a fee simple interest to guarantee that the land would be left open. A lawyer and a design man could have helped the right-of-way man determine precisely how much of this land was needed, and how to arrange the transaction to obtain it. It is possible, also, that the design man might have said this view will be enhanced by encouraging the owner to develop his land, but to do it in clusters of houses with open spaces between the clusters. In such circumstances, the state's best course would be to buy the open spaces and not bother with scenic easements. In other circumstances there may be cogent economic reasons for preferring fee simple ownership of roadside land rather than an easement.

Suppose a highway is going through a dense forest, and the right-of-way man proposes to buy a scenic easement back 350 ft from the right-of-way. The land involved gets its value from the forest. If the state takes a scenic easement which requires that the owner not cut the trees, it has taken away the land's only value, and in justice the state ought to buy the fee simple.

Thus, there are times when scenic easements are appropriate, and other times when they are not. Research should be used to develop criteria for distinguishing these circumstances.

FLEXIBLE TREATMENT OF LAND-USE CONTROLS

The term "scenic easement" does not describe anything; it needs further definition. Easements can be as diverse as imaginable. For example, the distance back from

the highway which is covered by the easement may vary. Also, the restrictive terms of the easement may vary. It may do no more than say that trash shall not be deposited in the area concerned, or that trees may not be cut except in a selective way. Or the easement may preserve the existing uses and allow the landowner to expand his improvements as long as they are agricultural buildings, but permit no other uses. Or it may contemplate new or other uses with a proviso that, for instance, houses will have to have a certain minimum amount of frontage to preserve a low-density character. Or it might provide for continuing to use the existing structures but not add to them. Easements can be used to regulate building heights and virtually everything that can be achieved through zoning. In a recent case along the Great River Road, a farmer said, "I am perfectly willing to sell a scenic easement—I think it is a wonderful idea—but I promised my son that when he got married I would deed him a plot of my land up the road a piece. Would you be willing to write the scenic easement so that it exempts that plot from the restriction on building any further structures?" Of course the highway department acted intelligently, and arranged the easement just this way.

Flexibility is a source of strength in the easement technique, but clearly it is not desirable to have every easement unique and tailor-made for each landowner. This creates problems for the administrator in interpreting what the easement means. There has to be some compromise between the stability that standardization brings and the advantages of flexibility. How do you reach the best possible compromise? One of the rough ideas that has occurred to me is to work out one general kind of easement to deal with the situation where the view to be protected is over a great distance—a high hill or mountain. Here it does not make much difference if there are some structures in the foreground because, if they are not unattractive and too high, the viewer standing on the highway can easily appreciate the important objective of the view. Another general type of easement could be worked out for, say, wetlands, where the view is on approximately the same level as the highway. Still another could deal with those situations where the view is below the level of the highway, as in the case of a lake adjacent to the highway. Here the easement probably would have to restrict the roadside structures or else require spacing and arrangements so that the view was preserved.

All the easements which Wisconsin has used prohibit billboards. The effect of this provision is shown in a set of slides taken along the Great River Road, showing the areas covered by scenic easements, amounting to some 70 miles of continuous coverage, and also the area just beyond the point where the scenic easement coverage stops. What a shock! One billboard after another, just as close as they can be bunched together. Of course, the scenery in this stretch beyond the scenic protection is just as lovely as that which is inside the protection, but man has not given it a chance to show.

It is often said that a scenic easement is a negative easement. Actually, it does not have to be negative, and in many situations it should not be. The highway department may want to forbid dumping trash and building billboards, which is certainly negative, but it might easily couple with these provisions an authorization for the highway department to do some planting at designated points, or something else in the way of affirmative action on this land. It can, and probably should, authorize the highway department to deal summarily with violations of the easement's negative terms. So, here again, flexibility is a characteristic of good scenic easement drafting practice. In this regard, somebody has to tell the lawyers what they want before the scenic easement can be drawn up in the best possible terms. This is another reason why the lawyer should be closely involved in the discussions of the designers, planners, right-of-way people, and administrators. It would help these new scenic road programs immensely if there was some overall scenic plan required so that the lawyer could see the objectives that he was being asked to protect.

THE ENLISTMENT OF PUBLIC OPINION

Finally, it should be emphasized that the highway departments need to develop good public relations with the people of their state in regard to these programs. I

do not mean this in the sense of using "Madison Avenue techniques." I simply mean that when people are approached with the idea of getting them to cooperate with the state by selling easements or property, they ought to be advised precisely what they are getting into, and what they will be contributing to the overall plan and objective of the state.

This can and should be put in attractive terms. To some it may come as a surprise that local landowners respond to the appeal of a chance to preserve the native landscape in this way. These people often grew up on the land where they live, and they are proud of it and want to see it looking attractive instead of deteriorating. In some instances, of course, people do not feel this way, and here is where an educational challenge arises. Right-of-way personnel will have to be trained to sell this program. In many cases it will be new to them, and someone will have to familiarize them with how the legal devices and scenic design objectives fit together. Appraisers will have to learn how to put values on the property interests involved. And finally, those who are involved in acquiring property interests for scenic purposes must bear in mind the problems of administering the arrangements made with the landowners. There is no point in paying for scenic easements only to find that it is impossible to administer and police them. Wisconsin has found that typical, intelligent right-of-way people who know the highway system intimately are likely to represent the state best in scenic easement acquisition.

A program of scenic road development can be made to work. The highway departments have most of the tools they need, and experience will quickly show where highway lawyers ought to use their imagination to develop new methods. Highway lawyers need not be afraid of getting in over their depth. But they should be brought into the program early enough to help shape the organization and procedures for the state to follow to achieve the kind of scenic highway corridor results described by Professor Lewis.

DISCUSSION

Question: Are there any figures available showing the cost of these scenic easements?

Answer: Yes. The first easements were acquired in 1952 for an average of about $20 per acre. Later, as land was acquired closer to towns, the cost rose to $30 per acre. This is only the cost of the easement, not the subsequent development of plantings, and so on, or maintenance. This would work out to about $400 per mile.

In a recent article Harold Johrdal (1) gives details of this experience. Of course, if you include the cost of the planning and surveys, cost of right-of-way personnel's work, and sometimes cost of condemnation, the total cost is higher. In our early phase, we started condemnation in about 20 percent of the cases. Very few cases actually had to be tried, however. Now, the percentage of condemnation acquisitions is up a bit more as we work closer in toward the towns. We have had most of our experience along the Great River Road, but now we are getting into other parts of the state.

Question: If the Internal Revenue Service allowed a tax deduction on these easements, do you think some landowners would make gifts of them?

Answer: There is no doubt about it. We have had some come as gifts even though the donors were not concerned about the tax aspect, or else felt that a greater good would accrue to their overall land value and the community's land values. We are now doing a study of the value of parcels of land restricted by these easements as compared with the value of comparable parcels not so restricted. I suspect we will find some situations where the value of the restricted parcel has become greater than the unrestricted comparable. People are being attracted to buy in these restricted areas and are investing more heavily in their property because it is protected and this protection comes from the state and not the local zoning board which frequently changes its mind about zoning.

Question: How do you handle utilities using the right-of-way or land adjacent to the right-of-way?

Answer: We are careful to permit them to continue to use their locations. Wisconsin has not had any major problems with this matter.

Question: Has any thought been given to using state-wide zoning to accomplish the results you obtained through easements?

Answer: Yes. In some of our counties we had, by county zoning, substantial setbacks from the highway. In some instances this accomplished the same thing through the police power. It is my opinion, however, that some time soon we will have to decide which technique to rely on. Perhaps it will turn out that we use state or local zoning to protect features that are some distance from the highway, and use easements to protect the areas close to the roadside. I think this problem will turn up all over the country. How do we organize this corridor for protective purposes? Do we proceed on the basis of strict constitutional law principles, or do we do what people expect in the way of fair treatment? And, what is the difference between these two approaches in the results that follow? These questions all have to be thought out.

REFERENCE

1. Land Economics. Vol. 34, No. 4, pp. 343-365, Nov. 1963.