

# HIGHWAY RESEARCH RECORD

**Number 166**

Highway  
Corridor Planning  
and  
Land Acquisition

9 Reports

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## *Department of Legal Studies*

(As of December 31, 1966)

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## Foreword

The "highway corridor" is one of the most important innovations to be added to American planning concepts in the present decade. Although it is not altogether a new idea, its application to highway programs is new and, as a result, no extensive body of doctrine or experience exists for those seeking to apply this concept to real situations. The series of papers compiled in this RECORD is intended to provide a starting place for the formulation of policies and procedures needed in planning, land acquisition, land-use control, and highway administration.

Viewing the corridor as a planning and design concept, Prof. Lewis discusses its basic elements, and Wisconsin's method of using it in the state's 10-year program of resource development. Viewing the problems involved in implementing corridor plans by legal powers and techniques, Prof. Beuscher also draws heavily on the recent experience of Wisconsin.

The three papers which follow deal in some detail with the applications of the corridor concept to three specific types of highways. Dr. Levin's paper reviews recent progress toward developing guidelines for establishment of a nationwide system of scenic highways running through corridors in which a wide range of legal techniques is used to protect and enhance the scenic quality of the adjacent land. Mr. Frankland's paper examines some of the problems which must be dealt with when highways traverse urban areas where the corridor's features are of the man-made sort. Mr. Campbell's paper deals with a particular kind of urban area corridor—the transportation system corridor—in which several types of transportation facilities utilize the same right-of-way.

The papers which comprise the second part of this RECORD relate directly to implementation of the corridor concept through the eminent domain power. Specifically, they are addressed to the legal and appraisal problems arising when eminent domain is used to acquire scenic easements and to eliminate roadside advertising signs and junkyards.

Mr. Matheny's paper describes the governmental framework established in California to carry on that state's program of planning and corridor development through scenic easement acquisition. In the course of his discussion he describes not only the structure for coordination between public agencies, and between the state and its political subdivisions, but also outlines a role for participation of nongovernmental groups in the corridor planning process.

Mr. Lorens' paper describes the application of appraisal techniques to the acquisition of scenic easements. A series of sample "case histories" supplements the author's text and provides illustrations of various types of scenic terrain situations.

The papers by Mr. Kerian and Mr. Margetis are of particular interest because of the emphasis which Congress, in the Highway Beautification Act of 1965, has recently given to the compensation of owners of roadside billboards and junkyards for removal of these activities.

All of the papers compiled in this RECORD originated in the proceedings of the Highway Research Board's Workshop on Highway Law. The papers by Lewis, Beuscher, and Matheny were presented at the Board's 1965 workshop, held at Washington University's School of Law, St. Louis, Missouri; the papers by Levin, Frankland, Campbell, Lorens, Kerian and Margetis were presented at the 1966 workshop, held at the University of Colorado School of Law, Boulder, Colorado.

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# The Highway Corridor as a Concept of Design and Planning

PHILIP LEWIS, University of Wisconsin

•IN 1961 Wisconsin established the basis for a far-reaching statewide program to develop various of its natural resources which, because of neglect or improvident practices in the past, were in danger of being wasted by the present generation and irreplaceably lost to future generations. Efforts to redirect the state's programs for conservation, reforestation, resources development, scenic and historic preservation, highway construction, and other objectives were organized to achieve total environmental planning. In this program, the portion relating to highway planning and design had an essential role. The importance of this role became clearer as the state's highway plans were studied in conjunction with those of other departments in a comprehensive survey of the state's potential for scenic and recreational development carried out by the Wisconsin Department of Resources Development.

In any program for planning transportation to serve recreational or scenic purposes we normally start out with the pattern of people. If we look at the United States very quickly and diagrammatically we see that, in traveling from Maine down through Virginia, we move in and out of one urban scene after another. It is a great megalopolis. We also see that there are major urban complexes along the coasts of Florida and the Gulf. There is a similar situation on the West Coast, with major urban concentrations developing.

In terms of outstanding scenic resources for these people to turn to for recreational or environmental experiences, the East Coast megalopolis has the Atlantic Ocean, the offshore islands, and the intercoastal waterway to turn to, provided we act promptly to set aside some of these lands and preserve them. They also have to the west of them the mountains with great contrasting scenic resources. On the West Coast there is a similar situation, with the Pacific Ocean on one side and the mountain ranges immediately to the east.

When we begin to look at our own Midwest, however, we start with urban area complexes in Detroit, Ann Arbor, Kalamazoo, Gary, East Chicago, Racine, Kenosha, Milwaukee, Madison, Minneapolis, St. Paul, Peoria, St. Louis, Paducah, Evansville, Cincinnati, Akron, Indianapolis. In the Midwest this urban complex is developing a more or less circular pattern of people with the flat prairie landscape, which does not have great scenic contrasts in its resources. People escaping from their urban patterns move outward. They go to the Smoky Mountains in the southeast, or the southwest where the Ozarks are, or even greater distances to Florida and the Gulf States in the wintertime. But in the hot, humid months the escape route is northward to Michigan, Wisconsin, Minnesota, and increasingly to Canada, and the pure unspoiled nature that is offered there.

When one begins to look at this pattern in more detailed fashion, one notes the counties which have populations of 50,000 or more. These show that there is beginning to develop a linear urban pattern here. Secondary patterns are beginning to develop, too, and it is interesting to see that these are developing in the major highway transportation corridor areas along such routes as US 66 between Chicago and St. Louis. The significant fact is that within this pattern are roughly 52,000,000 people, and immediately north of the Great Lakes region are another 6 million people, making a total of 58 million, or almost one-third of the population of the country.

One of the great present tasks of recreational and environmental planning is to make people in the Midwest aware that it is no longer a rural regional area, but an urban industrialized area which is making a tremendous urbanized impact on the national resource base. This area is blessed with mineral resources and food and fiber resources to support an ever-growing population. It has one of the greatest fresh-water supplies in the world. It has the Tennessee, the Cumberland, the Mississippi, the Ohio, the Wabash, the Kaskaskia, the Illinois, the Rock, the Wisconsin, and the Missouri making up a river system, in addition to the Great Lakes.

The present population may well double within the next 30 years. The impact of this urbanization on transportation and the area's natural resources indicates that a substantial additional effort should be directed toward planning for orderly and coordinated growth.

Not only will there be more people in smaller space, but these people will have more leisure time, and more ability to move around. What will these people seek when they leave the cities? There does not seem to be any question but that the urban dweller will seek the change of visiting the rural areas, and the rural resident will seek his change in the city. The typical urbanite, surrounded by his brick, steel, glass and asphalt, seeks variety; similarly, the farmer, surrounded by his rows and rows of cultivated crops, seeks variety, too.

### MAN-MADE CORRIDORS

If we look more closely at the life of a typical urbanite, we find that he wakes up in a little cubicle he calls his bedroom, staggers out of the bedroom down a man-made corridor to the bathroom. Here he shaves and dresses, and goes down another man-made corridor to another cubicle he calls a kitchen, where, if he is lucky, his wife has provided him toast and coffee to start his day. After that he goes down another man-made corridor to get his hat and coat, and then along a sidewalk corridor to the cubicle called the garage. Here he gets into a metal cubicle called an automobile, backs down a driveway corridor into the street, and he is on his way to work. The significant thing about all this, for present purposes, is that all of his waking moments this man's activity and movements are controlled by a series of right angles and man-made corridors.

He whizzes down the expressway at 60 miles an hour past the left elbow of his neighbor amid the exhaust of the city. He comes out of this into a network of asphalt runways, hubcap-to-hubcap with his neighbor, and together they crawl along toward and through a cluster of office buildings.

Generally these are corridors of brick, stone, glass and asphalt. But if he is fortunate, his city may have had some urban renewal applied, and introduced back into the city at great cost some of the features that once existed—the open space, the vegetation, flowers and foliage, and the feeling of space in which to move about. How much better it would be if on the fringe areas of our cities we would identify these outstanding natural and cultural features, and see that our urban patterns are developed in harmony with them as the urban areas grow out to engulf them.

Back to the typical urbanite, we find that he has arrived at his office and crossed the plaza, and entered his office building. Here he enters another cubicle and is shot up a tube 30 stories into the air. Of an evening he returns home, again going through this series of man-made corridors and cubicles. Most of his experience outside his office or his home is acquired in this highway corridor environment, so we begin to think simply about moving people from here to there, and getting them to their destinations rapidly. We simply have to begin to think in terms of the quality of the environmental experiences that people are having within these corridors, and in this process of transportation.

If the population of the United States doubles in another 30 years or so, what will urbanites really seek when they get out of the city and head toward the nearest recreational areas? In the Wisconsin studies, this was considered in terms of the passive and the active types of sports and exercises that people seek. From the Outdoor Recreation Review Commission came some idea of how many people were seeking

various types of activities. These data showed that by far the greatest stated desire for recreation was scenic and pleasure driving. This was also verified by studies conducted in Chicago and Minneapolis and certain other selected urban areas. Not only was this the most-stated desire, but it doubled all others in its magnitude. Thus the automobile and the highway system are having a terrific impact, and will continue to have this impact so that they cannot be overlooked. In terms of our planning studies, we found that the biggest impact was being felt in the rapidly urbanizing regions. Thus if you project the 80 million visits which are being made today to the year 2000 it may well be 244 million visits if there is any scenery along the corridors to be seen.

This leads to asking what basic cultural resources and features in our natural and cultural landscape support this recreational activity. To this new and rapidly developing tourism industry these resources are as iron ore has been to the steel industry. Recreation and tourism is one of the most rapidly growing industries in this country, and unless the states can protect, develop, and enhance these basic recreational and cultural features, there simply will be no basis for this new industry.

### CORRIDORS FOR TRAVEL AND RECREATION

In Wisconsin, the Department of Resources Development had one year to produce something meaningful in the way of a study to show what could be done. We knew we could not identify all of the resources of the state during that time, so we took Rock County as a demonstration project. From land use studies we had plotted all the urban impact on the natural resources base—the old core of the city, identified from studying the cores of the mature trees on the street; the new ring outward; and beyond that the suburban sprawl along the outlying transportation system. All the major rivers were noted, together with their major and minor tributaries, the Class A wetlands, the interesting topography and ridge lines with a topography of 15 percent or greater. When blocked in on a map, this pattern of water, wetlands and steep topography took on a linear system. And to show the importance of this pattern in a county as it affects the quality of the environment, it is this pattern of a combination of water-wetlands-and-steep-topography that gives the quality and personality to our environment.

We then set out to identify some individual isolated specific resources, like archeological sites, historical buildings, pheasant habitat, deer habitat, lands identified by the Audubon Society as outstanding, lands owned or leased by the Conservation Department, and lands being proposed for acquisition by the state. It was discovered that most of these isolated specific resources, which do not occupy much space on the land, also fell within this same corridor pattern identified by the water-wetlands-and-interesting-topography. By superimposing these two patterns together, a major environmental pattern became recognizable.

How does this help in planning land acquisitions? One way it helps is by indicating the type of demand that needs to be satisfied. For example, if one has originally visualized a certain area as a hunting reserve, and subsequently finds that the greatest interest in the area is as a wetland where people come just to see water birds in their native habitat, one may well want to change the kind of land that will be acquired, or the extent of it. A good land acquisition policy will be flexible enough to accommodate changes in the demands for public recreation facilities.

From the Rock County study, we concluded that it was feasible to identify the major linear systems and patterns within the state, and the isolated specific features—such as sandy soils adjacent to rivers and lakes—which were meaningful either by themselves or in combination with other features. The interesting topography, being too steep to develop without the risk of excessive erosion, could be preserved as scenic features. Also, the rims and ridges of the scenery were identified. These are the places which make the best parkways for scenic driving, or hiking and bicycling trails. All of these fell into a pattern of corridors, and this pattern dominates the landscape.

This corridor also is essential for most of the quality and variety of the environment not only for recreation, but also for all living and working activities. If we could reach in and pull this pattern out of the topography, we would remove the thing

that gives quality and variety to the region, not just for recreation, but for making it a pleasant environment for living, working and playing. These patterns are the major rivers and tributaries, and the steep imposing slopes. They are the major shore lines, and major ridge lines made up of mountains, hills, plateaus, and so on.

These remaining patterns are linear. In Wisconsin, the early pioneers began to put under the plow small patches of tillable land, and by 1900 most of the tillable land had been put into cultivation, leaving those linear patterns of the flood plains and topography too steep to plow. Today, in certain areas, these little villages which were laid out years ago have grown until they are beginning to run together. By 1980—or even today in certain areas—these urban areas will flow one into another, obliterating all the natural qualities of environment, as well as the rich farmland. Until we identify these quality patterns and devise modes of conduct toward them, and mold the impact of our urbanization and transportation system growth to harmonize with them, we have two alternatives. We will either protect them and develop them wisely, or we will obliterate them, and they will not be available for future generations unless we pay great sums to provide them all over again.

The natural corridors formed one of the major patterns which we discovered in our study. After this came the job of identifying the other significant resources. Using symbols which could be put on a map, we looked for several categories of features. In the area of natural resources we listed waterfalls, rapids, chasms, bathing beaches, natural springs, fossil collecting areas, natural bridges, glacial moraines, caves, balanced rocks, and so on. In the man-made resources which had meaning to someone, we found blacksmith shops, pioneer trading posts, taverns, mines, historic churches, covered bridges, lumber camps, battlefields, and old forts. We identified wildlife habitats by the silhouette of the animal.

Some 260 elements which were meaningful to someone or some profession or group were identified. Inventorying these elements meant getting out into the field and looking for them. With only a small task force in the Department of Resource Development, we turned to the state agencies and Federal agencies which had their own regional offices and regional staff people. We also turned to the highway department, and found they had excellent photographs of many parts of the state. U. S. Geologic Survey maps were enlarged to a scale of 1 inch to 2,000 feet on milar sheets so inexpensive "blue-line prints" of each county could be obtained. These were given to the various agencies that had staff people in the field—the state conservation agency, foresters, fish and game wardens, and park supervisors. These people knew the county better than any others we could find, and so we gave them our blue-line maps and the list of resources we wanted inventoried. Within three weeks they had inventoried this list and plotted the locations of everything on the blue-line print. When these were returned to the Department of Resources, they were turned over to the state agricultural extension service, where certain other resources were added.

Symbols were also created for twelve landscape scourges, such as billboards and junkyards, and these were plotted. Thus we had some idea of the impact that these were making on our natural resources base. We turned to the Soil Conservation Service and plotted their values for the soil.

When these symbols were plotted on an overlay and viewed in conjunction with the map of the corridor pattern which had been discovered earlier, we found that 90 percent of these natural resources were concentrated within the corridors. So everything seemed to come together here—the waterfalls, the wildlife and fish habitat, the rapids, the archeological sites—in conjunction with the water. We were able to define concentrated areas of these features which we called "nodes of interest." So the corridors and nodes provided concentrated areas of diversity of interest providing many different types of recreational experiences. A numerical evaluation for each of these resources was developed so that the resources within a given node could be tallied and given a value which could be compared with the value of another. This was needed to help guide our program of acquisition of property under Wisconsin's \$50 million recreation development program.

There was one other pattern that was very important for scientific study. This was the pattern of the natural scientific areas which needed to be preserved in an



undisturbed condition for scientific study. Many universities and professional scientific groups are concerned about the rapid disappearance and destruction of these areas, and warn that without them future generations will have nothing with which to study the original character of their areas.

As this study has continued, there has been developed, county-by-county, on a state-wide basis the following information: (a) the water and wetland patterns, (b) the "12 per cent slope" pattern, (c) the timber pattern, and (d) corridor pattern which results from blocking out these first three elements. The corridor is basically important both to our study and to the community; in many cases it is the "back 40 acres" with the low tax base which has all of these desirable characteristics in terms of recreational experiences. Also, from plotting the roughly 260 symbols representing the location of the specific resources, we found that about 90 percent of these human and natural values lie within the corridor system.

### PLANNING THE HIGHWAY CORRIDOR

The value of this corridor system in laying out networks of scenic highways is, therefore, obvious. By superimposing the proposed highway pattern on this set of maps, vertical and horizontal alignments can be made in harmony with these qualities. These data also provide aid in determining priorities in highway development. The conservation department's data, for example, identified the first, second and third priority fish and game areas. Because these fish and game areas are within the water and wetlands, the pattern was identical to the corridor pattern.

In Wisconsin we now know where these major resources are. This, however, has not solved the problem of getting people from here to there. We have invented all sorts of vehicles for moving people over the land, and we have produced them in such great numbers that they are readily available. But we should not forget that whenever we make a highway facility for moving people by these vehicles, we make a man-made linear corridor impact on the natural resource base.

We can take our natural corridor system and superimpose a highway corridor pattern on it along with our trail systems, and see where the systems run parallel or cross. If the natural ecological area will suffer unduly from the highway, the highways can be realigned to relieve this pressure. The same thing can be done in connection with development of the scenic potential of the highway corridor. Wisconsin plans to have funds to acquire up to 2,000 miles of scenic easements along its state highways. This corridor pattern study will provide guidance in the acquisition of those easements.

There are other patterns that the planner should be aware of in designing facilities for urban areas and transportation systems. He should look in a generalized way at his state's landscape, and block out the interesting topography and the wildlife areas. He should then superimpose on it the water system and the map of its soil system. These visual combinations of water and wetland topography produce the textures and colors which give an area its landscape personality. In Wisconsin, we found 62 different personalities in the landscape, as compared with 15 that were identifiable in the Illinois landscape. The Illinois study pointed out that the prairie was the predominant personality feature for that area. Wisconsin found, therefore, that it had great scenic variety to draw upon for its tourist industry. But, again, to lay out a scenic route depends upon making inventories to know where the quality exists.

Another resource which could be brought into the planning of scenic and tourist systems was revealed when the University of Wisconsin identified the various ethnic groups in the state, and plotted the pattern of their locations on maps. This element could then be added to the inventory of resources, and the attractiveness of these nodes of interest enhanced with the traditional foods, festivals, architecture, crafts, and costumes of the ethnic groups. Thus variety can be added to the resource base. One proposal for utilizing this resource called for a highway system called "The Heritage Trail" which would follow these linear systems of quality, and tie together various natural personality features. In Wisconsin, for example, tourists coming up from the direction of Chicago could be directed first to the Great River Road, then through the lake district across the state to Door County and Green Bay, down the

Kettle Moraine drive, and back to Chicago. The state highway engineers and planning department could use the information developed in this inventory and study to build a highway system that would accommodate this type of traffic in the increasing volume that would be generated in the future.

In 1958 Professor Wetmore presented a paper before the Highway Research Board on the subject of visual values in highway planning (1). At that time it appeared there might be some risk in taking the platform and arguing for aesthetics before a group of highway engineers. Yet the room was packed, and afterwards an engineer from California who had heard the paper said, "You know, we believe in these values you have talked about. But you must remember that the soil scientist and the geologist develop the various patterns of soils that will support our ribbons of concrete, while no one is identifying these outstanding natural and cultural features and patterns in a way that we can use in our work." I am glad to say that at least in Wisconsin, working with the planning section of the highway department, we have found that it is possible to map these resources and evaluate them for use in the highway planning process. Hopefully, the new highways that are going to be built will be designed in such a way as to harmonize with the quality-giving features of the environment. We have tested our conclusions, at least in some initial stages, in the Hiawatha Trail, linking four states, and found that once the inventory has been made, so that the locations of the scenic and other resources are known, they can be linked like beads on a string by a network of scenic highways.

Corridor patterns are very important in the alignment of highways, but they also can be very important to guiding and serving as urban "form-determinants" in the growth pattern of our cities. We can allow our cities to grow in a sprawl fashion or we can begin to identify these form patterns and develop our cities around them. There is evidence that planners are getting away from the old technique of identifying bits and pieces of parkland, and adopting the concepts of developing some of these linear systems that have been used in Milwaukee, Boston, Minneapolis, and other older cities. It has also been seen that, because these corridor systems lend themselves to scenic alignments with the various man-made facilities for hiking, bicycling, and so on, they can be used in identifying some 6,000 miles of scenic roads for the Federal Scenic Roads and Parkways Program Study.

In urban areas these corridor greenways lend themselves to serving as urban form determinants dividing the city into various land uses. Particularly does this appear in the fringe areas, and hopefully highway programs will respect their integrity instead of cutting them into bits and pieces by residential street systems.

Hopefully, also, designers will blend the human facilities in harmony with the natural systems. To do so would be to offer the resident of the urban core an opportunity to traverse both urban and rural scenery without the danger of traffic and the cost of taxicabs. Protected, the corridor of green may well provide cooler air above it, and serve as an air conditioning unit for the urbanite. It is well known that the air above some of these green spaces is as much as 12 degrees cooler than air over the city. Also, the clean air above these corridors can greatly disperse atmospheric pollution. Another important factor is that, by preserving the corridors and preserving the slope, siltation of the aqua recharge areas can be overcome, protecting the urban surface water supply.

Once these urban systems are inventoried, they have more value than merely providing more recreation through scenic driving. These are the major functions, but one should not neglect mentioning the minor ones which are becoming important. Retained as natural ribbons or web-like patterns of green, they serve as a background of ever-changing natural colors and textures and serve as a natural foil that unifies and makes tolerable the miles and miles of man-made ticky-tack. They may well serve to enhance property values and serve as a design catalyst throughout the urban fabric because of their linear nature. Protected, the corridor can provide most of the areas needed for sports and exercise in the future. As was pointed out in the Milwaukee regional study, they really provide all the wildlife and fish habitat needed within an urbanizing region. Protected from development and possessing most of the

soils unsuitable for septic systems, corridors can help control serious health problems, and, encompassing most of the flood plains, corridors can help reduce flood damage.

Since 1913, when LIFE magazine ran a story on what our environment was going to be like, we have been talking about doing something to improve our environment. It appears that now we are going to do something about it. In England they have been doing something about it through an educational program, making the public aware of its surroundings and what it costs the community. The same thing is needed in the United States. We know that the surroundings of highways can be monotonous, both in the urban scene and the natural scene. There is a monotony in seeing the same hill with the same bit of timber on it for miles and miles without any relief. In landscape architecture, we break up this form of monotony by creating what are called "outdoor rooms." These are created by varying use of landforms, deciduous materials, or water. We can classify the visual quality of these outdoor rooms or spaces, and can create a graphic shorthand or symbols to plot them on a regional map. We can, in other words, arrange things so that we see the three-dimensional quality of the space through which we pass. As designers we know there are all sorts of techniques for laying out trails or highway systems through these patterns in an interesting way. We know that if we have the same type of space with the same straight alignment, the result can be pure monotony. But if we introduce variety in the right amounts—because too much variety defeats and prevents a pleasing impression as well as too little—we can create a beneficial experience for people.

We are beginning to study the effects on people of changing their environment in this way. What happens when they are subjected to monotony for a period of time? We are also quite concerned—as all of us should be—about the visual quality and the carrying capacity of those given corridors to support different activities. In Wisconsin the studies of existing highway systems in the north country were used to point out to the people of Lake Superior that in many stretches of highway one must travel along monotonous forest roads without knowing that nearby is an exciting lake or an interesting marshland. The studies also showed that this northern route along Lake Superior could be a much more exciting experience than it now is if there were windows cut in the forest to see the lake occasionally. The necessary selective cuttings could be made by local labor which is unemployed during some seasons of the year.

The same effects of selective cutting can be used to open up a view from the road of an interesting church, or hilltop, barn, or other man-made feature which adds variety to the driving experience.

In urban areas, man-made features predominate, and the need for diversification of the visual features along the motorist's route of travel may be met by providing openings in the otherwise solid walls of buildings on each side of the street. These open spaces may be either permanently or temporarily vacant lots; the point which is important is that they be recognized as a potential scenic asset, and developed (by landscaping, or simply by cleaning them up) to enhance the experience of the city street traveler. If there is something diverting once in a while it breaks the monotony of any section of highway, and is a safety factor.

In laying out these new scenic systems, one of the main concerns is that the new highway corridors will not destroy the basic quality of the environment. If highway systems are going to be laid out in close proximity to natural features, a completely new approach to design standards will be needed. Hopefully it will be an approach with more and closer collaborative efforts between the design team and the engineering team. Each of these linear systems creates varying impacts upon the natural resource base, and through an integrated effort of the natural scientists we can try to get the basic information to make these wise decisions.

Our state and Federal highway programs have built a network of corridors of concrete which have vastly increased traffic between our cities, increased the markets, and encouraged private capital to furnish many of the services adjacent to these highways to take care of the traveling public. There are, however, understandable objections to taking too much land off the tax rolls, and understandable arguments that we should be developing our land rather than preserving it. An accommodation of public and private interests must be reached. What we would like to suggest is that these

corridors of natural quality be protected, that minimum features (like hiking trails and other facilities) for outdoor recreation be provided, and that, hopefully, scenic highways can be created to move traffic between these areas and the population centers, to again encourage private capital to come in under design controls to provide some of these extensive recreational facilities that the state seems to want to build itself today. When the systems of channels or corridors through which people travel are studied, they will show where the greatest impact of the public's travel is going to be felt, and also permit the pinpointing of our chief patterns along these corridor systems. As I see it, we have two alternatives. We can either inventory what is meaningful to all of us, see where these patterns are, and develop modes of conduct toward them, designing our facilities in harmony with them, or we forget about them and let them be destroyed for future generations.

#### REFERENCE

1. Wetmore, Louis B. Visual Approach to Highway Planning and Design. HRB Bull. 190, pp. 29-40, 1958.

# The Highway Corridor as a Legal Concept

J. H. BEUSCHER, University of Wisconsin Law School

•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.

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

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# Scenic Corridors

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•IN this exploration of the corridor concept, we must start by considering the possibilities of breaking out of a narrow right-of-way, to which the highway facility has been confined these many years, and expanding into a larger physical and functional area which might be called the highway corridor.

That such a thought has come to the serious discussion stage is hardly frivolous. Thoughtful highway officials have known for many years that there are two variables operating in time and space to influence highway transportation. One is the highway right-of-way itself, containing the physical highway plant; the other is the pattern of public and private land uses which depend on highway transportation, in whole or in part. Up to the present time, the highway official generally has controlled only the highway right-of-way. He has been powerless to do much about the adjacent land uses, though he has sought to influence their placement and design, sometimes, through such engineering and legal devices as control of access, the frontage road, the divided highway, and the like.

The highway official has found, often to his consternation, that the land uses adjacent to the highway sometimes render that highway facility functionally obsolete long before the physical highway plant wears out. He has found that his fine-spun planning and design sometimes go for naught, largely because the land-use development, over which he has no control, is inconsistent with his planning and design. And while much such uncontrolled land-use development may be anticipated, the lack of control itself makes planning for its accommodation impossible.

This is the rationale for the corridor concept, from the highway transportation standpoint. Additionally, however, if two variables are so intimately related as are the highway and its adjacent land uses, logic and the public interest dictate that reasonable measures be taken to control them, not only so that the public investments in highways are preserved, but also so that the full scenic, recreational, and conservation potential of the corridor can be respected and used to the best advantage.

A scenic roads and parkways study has been underway for the last eighteen months, and a first report is to be published by the U. S. Department of Commerce. One of the important elements of the report and the program it proposes is the scenic corridor concept. It may be useful to examine the corridor concept in its scenic environment, for its possible applications to the functional highway transportation systems.

In urban areas, the corridor concept may have some added significance and potential. In connection with land acquirement, highway officials frequently find that where partial takings of property are involved, considerable severance damages must be paid property owners, in addition to compensation for property taken. In such situations, it is sometimes advantageous to acquire entire lots or blocks of property, and the resulting additional cost may be only slightly higher than its alternative. The remaining space may be used for housing, parks, playgrounds, parking, and other appropriate uses.

Finally, there is every indication that highway departments will be concerned, more and more, with joint interagency undertakings. One of the elements of such projects would be highways, but housing, conservation, recreation, urban development, and others will also be involved both from a cost-participation and planning point of view. In this connection, too, the idea of a corridor will be implicit.

## SCENIC CORRIDORS AND SCENIC ROADS GO TOGETHER

The concept of the scenic road and its scenic corridor is not new. Americans with vision advocated such public enterprises many years ago in a variety of ways.

Long before the automobile appeared on the American scene, New York City demonstrated what could be done to make driving more pleasant. It took a pioneering step by accepting a design for Central Park which accommodated heavy traffic and at the same time reserved a park environment with opportunities for pleasure driving.

Boston originated parkways as public works projects to combat the depression of 1893-1894. Many other examples of early urban parkways exist which still have significance today.

Automobile touring was a popular pastime from the very beginning of the automotive age. Even before the first world war, recreation facilities in the national parks and national forests were beginning to become overcrowded. In the next decade, even more Americans were on the go, eager to try out their new cars and new roads. By 1928, landscape architect Frederick Law Olmsted could report that pleasure driving had become one of the major recreation activities in California. An estimated half of all travel in that state at that time was for personal enjoyment.

Olmsted stressed the great economic significance of such travel as well as its "incalculably great" social values. Today, nearly forty years later, after a tripling of the state's population and an even more dramatic increase in passenger miles of recreational travel, California and several other states have started to identify scenic corridors and to plan for statewide systems of scenic roads and parkways.

## CORRIDORS REACH BEYOND THE ROADSIDES

A scenic highway corridor includes two elements: (a) a road and its right-of-way, and (b) the scenic and recreation areas traversed and extending outward beyond the right-of-way. Scenic corridors are the foundation of any program of scenic roads and parkways. A scenic corridor gives a scenic highway or parkway its principal significance. In such a corridor, the quality of the landscape and the recreation opportunities, existing or potential, must give the user an outstanding travel experience. Without an adequate corridor, a scenic road can offer little promise or purpose.

The corridor is a much wider area than the highway right-of-way. It includes the elements which make for outstanding scenic vistas and the facilities for enjoying them. These may be within the immediate roadside area or may be part of a sweeping distant panorama. The features found in such a corridor normally would include: (a) lakes, streams, other bodies of water, and wetlands; (b) striking stands of timber; (c) unusual geological formations, outstanding mountain or desert scenes; (d) exceptional pastoral scenes and even notable urban views; and (e) cultural and historical features that offer the motorist enjoyment and edification.

In areas of relatively level terrain, or on high ground, the corridor may extend for miles in horizon-to-horizon vistas. Narrow valleys will greatly limit the corridor's depth. In general, the corridor boundaries will be defined by landscape elements such as landforms, large bodies of water, trees or other vegetation, and man-made objects which restrict the observer's view.

The long-term control, management, and use of the land in the corridor is critical to the establishment of a scenic road. Future changes in land uses may greatly alter the present landscape and reduce or destroy its scenic nature. Ownership or control devices must be available to protect the scenic values of the corridor.

## CORRIDORS CAN BE MANAGED

Corridor management, for all practical purposes, is most important in the foreground. This may be identified as the "inner zone" of the scenic highway corridor. The rest of the corridor is the "outer zone." The panorama viewed from a mountain crest usually offers little or no opportunity to modify the many activities going on within the landscape. A state agency may be able to extend its zone of control only a relatively short distance beyond the right-of-way—involving the inner zone—without

incurring prohibitive costs for scenic easements or other devices. Even when the entire corridor is in public ownership—within a state forest, for example—it is not feasible to manage all of the resources in a manner designed specifically to preserve or enhance scenic values. Fortunately, however, scenic qualities attractive enough to justify development of a scenic road or parkway are generally durable enough to continue if the foreground is protected.

The area within a scenic corridor may not even be contiguous. A foreground may drop away into an unseen valley and be viewed against the backdrop of a distant mountain range. Or the middle ground may be intentionally screened from view. A specific tract may be a feature of many different landscapes viewed from a succession of vantage points along a winding scenic road. It may be at various points the foreground, the middle ground, or the background—or it may be permanently blocked from view from some angles.

A landscape can be managed or modified by working with the foreground. The dimensions of a scenic corridor can be changed, just as the aesthetic quality can be increased, through actions such as the following:

1. A screen of trees and shrubs can narrow the corridor at certain points by permanently blocking from view objectionable features of the landscape;
2. In heavily forested areas, careful timber harvesting can open "windows" which greatly extend the depth of the field of vision; and
3. Overlooks can be constructed, road segments relocated, and spur roads added to obtain a desired change in the depth of the corridor visible from the roads.

#### ALTERNATIVE LOCATIONS

In choosing the location of a new scenic road or parkway, the merits of alternative scenic corridors must be considered along with the other factors normally considered in locating a highway.

A particular land use may have enough significance and interest to serve as the focal point of a scenic road. For example, open-pit iron ore mining on the Mesabi Range in Minnesota, irrigation in certain arid regions of the West, or timber harvesting in a patch-cutting operation in Douglas fir timber may be featured within a scenic corridor.

#### Selection Criteria

The basic criterion for route selection is that the route must provide people with an opportunity for an outstanding travel experience. Thus, the landscape or recreation resources within the corridor are the key to selection rather than the road itself. No matter how well the roadway is engineered, or how fine the complementary facilities are along the way, there must be a distinguishing characteristic of natural beauty or other quality that causes the location to stand out among other recreational driving opportunities.

Scenic highways should have these significant features:

1. Quality—The scenic, historic, or cultural character of the highway corridor should have a quality that merits state or national recognition, or should be of sufficient interest to be a destination, in and of itself, for recreation purposes. It should provide frequent opportunities for the development of roadside complementary facilities adjacent to the road.
2. Variety—The highway should provide changes in terrain, types of landscape, or land-use activity. It should provide a balance to the type of experience offered elsewhere in the state by exhibiting a type of natural or cultural landscape peculiar to that area of the state.
3. Accessibility—The highway should provide access to or links between existing or proposed parks, other public recreation areas, or points of scenic, cultural, or scientific interest.

Accessibility may have another application in connection with scenic roads. On parkways, the number of access points may be limited. On other kinds of scenic

roads the number of private and public points of access to the highway may be limited to no more than four per side per mile in heavily populated areas.

4. Location and Geographic Distribution—The scenic highways of a state should be distributed in location over as wide a geographic area as is possible consistent with other qualifying requirements. It is also desirable to select some highways which will occasionally parallel the approximate alignment of a major trans-state or interregional route, or swing out in a wide loop and return. Motorists using the through routes would then have the opportunity to leave them periodically to enjoy a particularly scenic area in a more leisurely manner. On long trips, these opportunities would be more than welcomed by those needing to relax from the tensions of the trip.

5. Design and Safety—The highway should have a geometric design which fosters graceful, ground-fitting horizontal or vertical alignment, appropriate curves and striking vistas, and accommodates the anticipated volume of traffic without undue hazard to highway users.

6. Adaptability to Development—The immediate roadside should be relatively free of commercial or restrictive development which would fall within the minimum corridor suggested and right-of-way width of 200 feet. Other development within the corridor, which would not be in keeping with the desired character of the corridor, could be eliminated, bypassed, or screened from view. Further undesirable development could be prevented.

7. Compatibility—The location of new highways should be coordinated with other outdoor recreation, aesthetic and conservation objectives. The highway should not disrupt wilderness areas, fish, wildlife, or nature preserves. Its location should not impair the maintenance or enjoyment of features of scenic, geologic, cultural, or historic interest.

8. Competing Uses—The requirements of other highway users for the use of the highway should not materially interfere with the use of the road for recreation purposes. The other-use traffic: (a) should be small enough in volume to be of little concern; (b) the bulk of it should occur at a time when little recreation use is being made of the road; or, (c) should be considered by having additional capacity and design features built into the road to accommodate, with safety, the needs and driving patterns of the recreation seekers and other users.

### SAFEGUARDING THE SCENIC HIGHWAY CORRIDOR

Without adequate protection, the character of the corridor through which a scenic road passes in time may be altered enough to diminish or lose the highway's recreation value. Publicly owned land is less likely to suffer undesirable changes in landscape values than privately owned or controlled land, but this is not necessarily so. The state should give serious consideration to the most effective means of preserving the scenic values of the land in the corridor.

The states have indicated that corridor protection was urgent on approximately one-third of the mileage nominated for scenic roads and parkways. This means that the corridors would be despoiled forever unless effective control measures were instituted reasonably soon.

Control may be exercised in a variety of ways:

1. By using the police power of the state, without compensation; for example, the corridor, or a portion of it, could be zoned to preserve the desired character of the area, or a reservation device could be used; or

2. By acquiring the land in fee, or scenic or conservation easements, from the adjoining owners for this purpose, for a consideration.

The use of the police power, or the acquisition of land for this purpose, may require special enabling legislation. Tax concessions of various sorts may also be helpful. It may be most practicable to fashion a nimble synthesis of both police power and eminent domain control on the same project. For example, it may be advisable to employ outright purchase of the conservation or scenic easement in the inner zones of the corridor, and an appropriate police power regulatory device in the outer zones of the corridor.

TABLE 1  
EVALUATION OF EFFECTIVENESS, COSTS, AND EASE OF ADMINISTRATION OF  
MECHANISMS TO PROTECT SCENIC HIGHWAY CORRIDORS

Mechanism	Effectiveness	Cost	Ease of Administration	Comments
Wider-than-usual right-of-way	Could be most effective, but the area would need to be very limited	Cost would be very high, probably prohibitive	Easy to administer because control would be obsolete	Private property owners would probably resent "excessive" acquisition by government
Outright acquisition of either inner or outer zones of corridor	Very effective if authorized aid permitted by courts	Costs could be burdensome, even prohibitive	No special problems of administration except contesting some antagonism against public authority "being in the real estate business"	
Fee acquisition and leaseback	Very effective	Very costly and requires large capital outlays which are later repaid in part at least	May be difficult to sell property owners on the idea; extends the public domain considerably	Facilitates maintenance; keeps the corridor "alive"
Acquisition of scenic or conservation easements	Could be quite effective if right kind of easement acquired	Cost would be reasonable in some cases, considerable in others, especially in or close to urban areas; costs in these instances might be so great that outright acquisition would be more reasonable	No particular difficulties except one of educating the public	
Zoning at local level	Not very effective—only as effective as zoning is; subject to pressure	No cost except that of administering the program	Same difficulties as those associated with zoning today and maybe a few more because this would be a new application	Generally, not a very happy solution
Zoning at state level	Hardly ever has been used—its legal fate is largely unknown; if politics were kept out of administration, might be reasonably effective, but it is essential that it be done	No costs other than administrative costs	Administration would be subject to the same detail as local zoning	
Scenic highway corridor reservation (state level)	If sustained in courts as a valid exercise of police power, could be reasonably effective; would require new legislation and a new legal concept; would have none of legal or popular encumbrances of zoning	No costs except costs of administration of program	Once the notion is clearly defined there should be no difficulties of administration; in fact, large areas could be so regulated with a minimum of public effort	Well worth a try
Special conservation or corridor districts	Could be one of the most effective, but would be a broad new application of a relatively new device	Would be negligible, only costs of administration	No significant problems of administration	Offers considerable promise
Comprehensive planning	Would be effective if the device is applied in its best and broadest connotations	Generally, only costs would be those of administration, unless acquisition mechanisms are considered part of this process as they might be	Usual problems, which may be many, of a comprehensive planning approach	
Restrictive covenants	Could be helpful in a small, limited area, but should hardly be relied on for an entire scenic road project; is more of a supplement, particularly in urban areas	None, except small costs to property owners	Handled privately, perhaps under government auspices	

Justification for this treatment would be that the primary areas close to the highway right-of-way would demand more critical attention to assure their permanent protection in the public interest. The secondary areas farther out could be adequately controlled, without compensation. Real injury to the scenic qualities of the environment would not be too likely. Such a combination arrangement would cost less than otherwise and, accordingly, would be much more manageable.

Many other mechanisms can be conceived to facilitate corridor protection either under police power or eminent domain. All of them would require new state enabling authority because a new application—scenic roads and parkways—would be involved. Existing authority would probably be insufficient because new and sufficiently different problems would need to be anticipated.

In summary, possible devices to control the scenic highway corridors, in terms of either the inner or outer zones, include the following:

1. Wider-than-normal rights-of-way,
2. Outright acquisition,
3. Fee acquisition and leaseback,
4. Acquisition of scenic or conservation easements,
5. Zoning at the local level,
6. Zoning at the state level,
7. Scenic highway corridor reservations,
8. Special conservation or corridor districts,
9. Comprehensive planning, and
10. Restrictive covenants.

The effectiveness, cost, and ease or difficulty of administration of each of these mechanisms are evaluated in Table 1.

A reasonable evaluation indicates that two devices seem to be generally superior to the others. These are (a) the scenic or conservation easement under the power of eminent domain; and (b) the scenic highway corridor reservation device under the police power. An examination in some depth of the experience with similar devices may be helpful.

### Scenic or Conservation Easements<sup>1</sup>

Property ownership generally consists of a series of definitive rights which have sometimes been identified as a "bundle of rights." One or several of the sticks of that bundle are involved in an easement.

Easements may be of several varieties: (a) affirmative easements, in the conservation field, such as hunting and fishing rights, highway easements, flowage easements, navigation easements, and event trajectory and electronic easements; or (b) negative easements, such as safety easements around ammunition dumps, clearance or obstruction or height easements, protection-of-wetlands easements, scenic easements, and others.

The affirmative easement seeks the right to perform overt acts on the lands encumbered with or subject to the easement. The negative easement seeks merely to prevent the landowner subject to the easement from doing something.

A long and illustrative judicial history surrounds the use of the easement, to the point where it is firmly established today in the tradition of the nation. There have been three notable applications of the scenic easement—the National Park Service of the U. S. Department of the Interior; the State of Wisconsin; and the Great River Road states. Some comment on each of these is in order.

The National Park Service has used the scenic easement largely along the Blue Ridge Parkway in Virginia and North Carolina, and the Natchez Trace Parkway in Alabama, Mississippi, and Tennessee. The easements along the former covered nearly 2,500 acres of land; along the latter, nearly 5,000 acres.

With some variations, such easements generally include the following rights:

<sup>1</sup>For an excellent treatment of this subject see Ref. (1).

1. A restriction against new buildings and structures or major alterations of existing ones;
2. An authorization for necessary public facilities such as roads and public utilities;
3. A prohibition against cutting trees, shrubs, and the like, but authorizing general maintenance;
4. A prohibition against dumping;
5. A prohibition against billboards;
6. A general prohibition against doing anything inconsistent with the conservation of the recreation potential of the property.

The National Park Service has been something less than enthusiastic about its experience with the scenic easement, though there are regional variations in its experience, too. Considerable friction has sometimes occurred between property owners and the government concerning the easements. From a practical point of view, certain kinds of prohibitions—such as one against the cutting of trees—have been difficult to enforce. It is difficult to prove damages after a violation has already occurred and the harm has already been done.

The State of Wisconsin has had the most recent and the most extensive experience with the scenic easement. Some of this started with its activities along the Great River Road. But its history-making, ten-year, \$50-million resource development and conservation program, authorized in 1961, set aside \$2,000,000 for the purchase of highway scenic easements. A study as of May 1, 1964, reveals that easements are being acquired in 34 of the 72 Wisconsin counties; easements involving 296 parcels had been acquired, and 411 others were pending. The bulk of the acquisitions were obtained through negotiated settlements with property owners, but approximately 25 percent were condemned. Easements along the Great River Road in Wisconsin averaged \$20.66 an acre, while the statewide average cost under the present and larger program was \$24.18 an acre. Minnesota expects to acquire easements at a cost of about one-sixth of the value of the land.

### Scenic Highway Corridor Reservation

Some states may prefer to use a reservation device under the police power to protect the scenic highway corridor, rather than acquire a scenic easement.

Such a reservation mechanism is similar to the official maps laws which may be found in more than half of the states, but largely applicable to its localities (2). Under these statutes, a municipality or a county is given authority to formulate on a map a precise plan of the public streets or highways it contemplates building. Following formal adoption of the plan, no building or improvement may be erected within the bed of the streets designated on the plan without permission first having been secured from the designated 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.

A few states have given their state highway departments the power to protect highway rights-of-way prior to construction. In Michigan and Wisconsin, for example, these state agencies have been given the authority to control new subdivisions along state highways; in Michigan at least, this authority has been used to compel dedications for highway rights-of-way. Several states have even more comprehensive reservation statutes.

Unlike the municipal and county official map acts, the state highway reservation laws are not based on the hardship-variance principle. Though there are considerable differences in these laws, most of them afford relief to the affected property owners in hardship cases by requiring the highway agency to purchase the property involved in the restriction, if a petition is filed requesting it to do so. Some of these laws also contain a time limitation on the reservation.

Reservations somewhat akin to these could have an application in a national program of scenic roads and parkways as means of creating and preserving corridors. They might be employed as an alternative device to the scenic easement device, or to supplement it. For example, a reservation device might be used effectively in the outer zone of the scenic highway corridor, while the scenic easement could be acquired in the inner zone.



## Tax Incentives

Tax adjustments offer another device to help secure needed scenic easements. Maryland, for example, has enacted legislation enabling counties to provide, in connection with assessment of property, for deduction of the value of scenic easements or other rights given up by the owner. This could be a strong incentive for property owners who are in sympathy with the objective of having a scenic corridor nearby, and who would not suffer any economic loss or inconvenience by granting such an easement.

Other forms of tax exemption, deferral, partial rebate, and classification have been advanced as possible ways of preserving scenic corridors. Though there are variations in state constitutional provisions, land that provides a public benefit may be exempt partially or wholly from real property taxes. Scenic corridors may possibly qualify under these conditions. Private lakes open to public hunting and fishing, private historic sites open to the public, and private lands open to public hiking or riding trails, are illustrations of private land that might be eligible for tax exemptions.

It has also been suggested that regularly assessed taxes due on scenic corridor lands might be deferred until the land is sold for a purpose not inconsistent with its use as a scenic corridor.

Professor Charles W. Eliot of Harvard University has authored a Massachusetts legislative proposal to create a system of tax rebates on land zoned and registered with the tax assessor as open space. Ninety percent of the real estate taxes would be rebated for the first three years, 70 percent for the next seven years, and 50 percent thereafter, as long as the open space regulations remained in force. All rebated taxes would fall due with any zoning change permitting nonopen space uses. Perhaps this device could be used on scenic highway corridors with even greater success.

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# Coexistence in the Highway Corridor: A Test of Intergovernmental Cooperation

BAMFORD FRANKLAND, Supervising Right-of-Way Agent, California  
Division of Highways

•LA CANADA is an unincorporated community in the County of Los Angeles which has developed an identity of its own through strong community desire and action. It lies on a narrow bench of the San Gabriel Mountains a few miles north of the Rose Bowl in Pasadena. The community and others beyond it are served by Foothill Boulevard, a high type four-lane conventional highway which, unfortunately, is seriously overcrowded.

Interstate 210, the Foothill Freeway, was planned as part of the metropolitan freeway network to serve the growing suburbs of Los Angeles between San Bernardino and San Fernando and to relieve the pressure on Foothill Boulevard.

La Canada's bench is the only feasible location for one section of the freeway. The community objected strenuously, however, to any consideration of alternate routes in the highway corridor which passes across the bench.

Planning for, and adoption of, the Foothill Freeway involved 18 communities and two counties over its 46-mile length. By Division of Highways' policy, agreement on location had to be reached with each local governmental unit. It was a monumental job which was made even more critical by the completion deadline for the Interstate System.

The controversy which developed in La Canada severely tested the strength of the concept of intergovernmental cooperation and, in microcosm, displayed all the problems attendant on coexistence in the highway corridor.

What cooperative arrangements are necessary to insure peaceful coexistence in such situations? How can the various agencies involved be effectively coordinated? What kind of problems arise as a result of land-use changes and how are they handled? What developments are possible in urban areas which can help insure optimum transportation service and proper development of urban communities? These are some of the questions which highway planners and urban planners are asking today.

In a situation such as that revolving around La Canada, where one community out of 18, interested only in a short six miles of a total 46-mile route, could effectively delay planning and construction for an extended period of time, intergovernmental cooperation is a key issue. This, of course, is the kind of situation state highway departments were created to resolve.

The first question that should be asked then is whether one small community should be permitted to delay construction of a facility designed to serve several in which the majority are agreed on the basic concept and where need has been demonstrated. In other words, should intergovernmental cooperation be forced? At present it is not in California.

Cooperation is voluntary, but it is eagerly sought in our state. Before route studies are started written notices are given to each local legislator, to the appropriate local governing bodies and to affected local, state and Federal departments. Preliminary meetings are then held with local officials and their technical and planning staffs to announce studies, receive preliminary information and set the stage for continuing cooperation.

Notices of studies and meetings are given to local news media, and following this, if requested or if felt necessary, meetings may be scheduled with local civic groups such as garden clubs, Chambers of Commerce, homeowners' associations, etc.

It is the intent of these initial efforts that route studies be conducted in an atmosphere of close cooperation. In keeping with this, our district offices are directed to hold frequent meetings with local bodies "to correlate with their planning, to exchange information and to resolve possible points of conflict."

In the same directive, it is noted that in some instances, at the time of public hearing, evidence of conflict of planning is introduced, as in La Canada. It goes on to say that this appears to indicate a lack of cooperation at the local level.

California has its problems in this regard even, it seems, as do other states. At the Sagamore Conference on Highways and Urban Development in 1958, apparent lack of cooperation was the Conference's basic finding. In 1962 at the Hershey Conference on Freeways in the Urban Setting, a basic stimulus was a continuing difference in points of view and approach which constituted a handicap to orderly progress in urban communities.

The task of coordinating diverse points of view has been given to the Division of Highways and the California Highway Commission in our state. In my opinion this procedure is preferable to vesting such power in any other administrative group. The pressure of necessity keeps planning moving when the responsible agency is in charge. It seems unlikely that any other system could insure equal progress.

Freeway planning must necessarily start with lines on paper oriented to heavily traveled streets, missing major buildings, following traffic desire lines, and trying to follow lines of least cost. Then, however, three basic points of view can create conflict. Traffic planners understandably try to connect centers of activity; land-use planners try to organize activities and prevent nonhomogeneous encroachments such as, on occasion, highways, and the visual synthesizers attempt to bring the traffic facility into harmony with its environment. More often than not refusal to rationalize these three divergent viewpoints is a basic cause of conflict.

The dialogue is currently most heated between traffic planners and visual synthesis proponents. Citizen opposition seldom centers on freeway efficiency, but usually involves either selfish considerations or questions of aesthetic judgment. Both were major issues in La Canada.

Selfish considerations will be present to a greater or lesser extent in any route location proposal. Sound public relations, an unarbitrary approach to evaluation of alternatives, and special efforts to develop close working relationships with local public and private groups seem to be the only panaceas which can minimize controversy in this regard. In La Canada, none of these worked.

Questions of aesthetic judgment can only be handled individually by study and compromise. In La Canada, our own design engineers worked very closely with local civic groups to achieve a pleasing appearance. In San Francisco, for two separate freeway plans, two firms of landscape architectural consultants were hired to assist in the production of imaginative and pleasing designs. In Sacramento, in a difficult location situation, equally prominent engineering and city planning consultants were retained to assist with location and design.

A question which inevitably arises in these situations is how far a state highway department should go in expending planning funds to achieve local agreement on a routing. We have no answer other than to suggest that such problems require application of the highest level of administrative judgment.

In urban areas, two basic problems exist which aggravate fitting the freeway to its environment. In a recent publication entitled, "The View from the Road" the following paragraph categorized one problem:

The driving experience can now be described as being a sequence played to the eyes of a captive, somewhat fearful, but partially inattentive audience, whose vision is filtered and directed forward. It is a sequence which must be long, yet reversible and interruptible.

We are attempting to increase the pleasure of the driving experience by intensive, Division-wide training in aesthetic principles and by requiring, where appropriate, specific discussion of aesthetic qualities in project reports. In addition, each of our

offices now has a permanent Aesthetic Review Committee which comments on this aspect of all plans. The aesthetic problem is compounded by the fact that once the road is properly placed, if this formidable task can in fact be accomplished, the view from it can be quickly changed by uncontrolled development within the highway corridor.

One potential solution to this complicating problem has been suggested. The suggesters note that land-use zoning is an imperfect device and offer instead what is called the Planned Unit Development Approach. This would allow a local jurisdiction to exercise judgment and control over quality and character of development in a planning proposal, in addition to its control over land use. It is viewed as a much more flexible tool as opposed to the rather negative practice of zoning.

Unfortunately, no jurisdiction, to my knowledge, has attempted to implement the Planned Unit Development Approach. I am sure you can appreciate the potential legal problems inherent in such an approach however desirable it might be.

The second problem is the view of the road rather than from it, and this can be handled only by sensitive, perceptive designers highly trained to consider an aesthetic approach to their art.

Conflicts between traffic planners and land-use planners are on their way to being solved as both professions become more sophisticated and as more communities become involved in the planning process. In California, the planning staff of the City of Los Angeles is leading all other communities in planting guideposts for other planners to follow.

In February 1965, the City Planning Staff issued a report on land-use considerations adjacent to freeway ramps. In May 1966, the report was broadened to include land use adjoining freeways and their ramps. The report included ten "General Criteria for Freeway Route Location" which laid a base for excellent cooperation between the state and the community.

In February 1966, the city first utilized the criteria to evaluate a major route proposal for 14.6 miles of freeway, requiring displacement of over 2,000 family units and costing \$122 million. The planning report stated that none of the alternate routes were completely satisfactory but that the route recommended by the State Highway Engineer had the most advantages and fewest drawbacks.

The lack of controversy which has so far characterized this route location proposal is in part the happy result of early and thorough cooperation, in part the result of both the city and the state knowing what needed to be achieved in the community, and in part the fact that only two governmental units were involved.

In those many instances where more than one community is crossed by a route a relatively new device being tested in both Northern and Southern California may prove helpful. In the San Francisco Bay Area, the Association of Bay Area Governments (ABAG) has been formed to deal with transportation and other problems of mutual interest. Eight of nine counties and 72 of 86 cities have joined together in an attempt to come to agreement on area objectives, and to solve common planning problems which cross jurisdictional lines.

The Southern California Association of Governments (SCAG) is now being formed for the same basic purpose.

You can surmise the delicate negotiations required for formation of such associations. The sensitive question of home rule brings into play the same considerations which make an effective international system of justice so remote.

Both associations are, of course, considering the total transportation problem and seeking solutions which will provide a balanced system including automobile, bus, and rail facilities. Optimum transportation service and properly developed urban communities are not yet in sight, however. The solutions being proposed and considered are short-run, at best carrying us to 1990, only 24 years away.

Long-run solutions require a clear definition of urban objectives with all the ramifications possible in a free and diverse society. One try has been made in California to carry our viewpoints into the far tomorrow. The Governor retained a number of aerospace industrial consultants to think into the future and suggest directions in which both private industry and government could channel planning programs.

In the transportation field imaginative automation was one suggestion. This involves a high order of development in computer technology allowing clerical employees to work in a computer-equipped home connected to a similarly equipped headquarters, thus solving part of the transportation problem by eliminating the need for it.

Other suggestions included gravity and vacuum tubes underground and undersea, automatic highways and high-speed rail service. All are possible and may actually give direction to future planning.

An immediate possible development which can assist in ordering the urban corridor is air space development planning. The Division of Highways has developed procedures similar to the Planned Unit Development Approach mentioned earlier. We will retain control over quality and style to insure compatibility of any such development with both the freeway and the surrounding environment. We will not necessarily allow areas to be awarded to high bidders but will look for that proposal which seems to offer the greatest community benefit. Incidentally, the community will also be given a full veto over proposals which they feel are incompatible.

The necessity for this last consideration has been argued vigorously with opponents taking the position that such proposals on state-owned lands are under full control and authority of the state and should not be subject to any local veto. I leave it to you, however, whether or not a stand such as this will encourage intergovernmental cooperation.

I have tried to touch on some of California's problems and possible solutions with regard to coexistence in urban corridors: the multiple community route; the traffic, land-use, visual planner triangle; the shifting scene from the road problem; the far tomorrow, and others. The problems are old ones and none of the solutions are really new: planned unit development; ABAG and SCAG; aerospace technology and other consultants; city planners who actually plan practically; multiple uses of right-of-way; and sensitive, perceptive design with a consideration for amenities.

What is new, I think, is the realization finally that our problems are bigger than we can really handle individually. The spirit of cooperative planning suggested at Sagamore in 1958 and re-emphasized at Hershey in 1962 has finally seized many of us and firm movement toward this fundamental precept is beginning to show results in volume.

# Transportation System Corridors

E. WILSON CAMPBELL, Director, Chicago Area Transportation Study

•THE IDEA of mass transit and private vehicles sharing the same right-of-way is not new or unique. Many can remember riding down the middle of a street in a streetcar. An associate at CATS recalls that over 50 years ago trolley cars ran down Woodward Avenue in Detroit on their own grass median. The Hollywood Freeway had rapid transit in its median strip. Figure 1 shows it as it appeared in 1947. Ten years later, however, rapid transit had given way to the motor vehicle (Fig. 2).

The first indication of transportation corridor planning in Chicago came in a 1939 report titled "Comprehensive Plan for the Extension of the Subway System of the City of Chicago."

There have been many different proposals for this type of development in the Chicago area. They are in various stages of planning and development and represent several different concepts in corridor treatment. First, there is the Eisenhower corridor (formerly called Congress Street) which has been in operation since 1957. This has a fixed rail rapid transit system in the median strip of an expressway. Another concept involves a corridor with rail rapid transit (i.e., Chicago Transit Authority) sharing the right-of-way of a suburban railroad for several miles. A third represents a proposal for a median strip or separate lane operation for buses in a proposed expressway. Finally, there is a proposal for an expressway to be built over the air rights of an existing railroad.

This paper discusses planning considerations, legal framework, construction, operation and financing aspects of joint use of right-of-way for various modes of transportation.

## GENERAL PLANNING CONSIDERATIONS

The idea of transportation corridors which can handle great multitudes of people in various modes of transit has a very popular appeal. It is often looked upon as an economical method of providing needed right-of-way and conserving urban land. It is important, however, that the decision as to the joint use of right-of-way be based on long-run needs of the community rather than availability of right-of-way.

Studies of trip desire and modal choice coupled with future estimates of travel demand should provide the basis for route locations. The future trip estimates should consider future increases and distribution of population and use of land as well as estimates of other economic and social factors which bear on trip demand and mode choice.

A corridor including multiple modes should be developed only after all planning criteria are met, and further, there should be assurance that the planned route is in the best possible location to serve the community needs.

## EISENHOWER CORRIDOR (CONGRESS STREET)

### Planning

As indicated earlier, the recommendation for the Congress transportation corridor was made in a 1939 report. The following excerpt explains the proposal:



Figure 1. Hollywood Freeway, 1947.



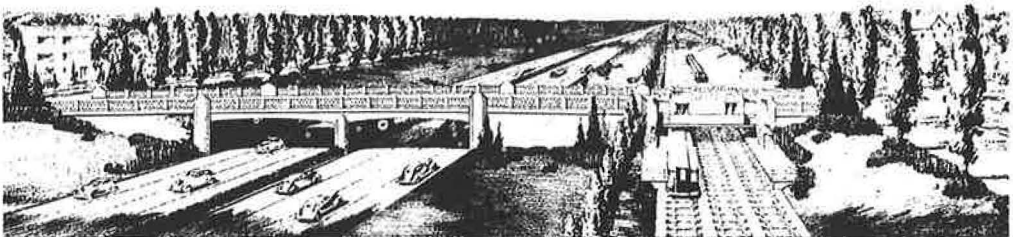
Figure 2. Hollywood Freeway, 1957.

An alternate plan has been prepared for the Congress Street subway extension and the West Side Superhighway, broader in scope and more costly, but with a number of advantages as compared with the plan described.... The alternate scheme differs from the original mainly in the extension of the subway westward in an open cut, parallel to the express roadways of the West Side Superhighway so as to extend the west side subway service from Halsted Street to Kedzie Avenue.

Figure 3 shows artist's conception of this transportation corridor.

The report dealt with the general development of Chicago and the distribution and growth of population, industry and commerce. It also considered the relationship of the proposed "superhighways" to the extension of the local common carrier transit facilities, and the coordination of the extended rapid transit system with a modernized and unified city-wide surface transit system. This proposal was part of a comprehensive transportation plan for Chicago.

The Congress branch was to replace, at least in part, an existing elevated rail transit line (Garfield Park branch) serving Chicago's West Side (Fig. 4). Thus, it would represent an improvement in service by providing a grade-separated right-of-way for the transit line. The planning decision was not difficult, since it did not represent the addition of a new transit facility, but merely replaced an existing rapid transit line. The suggestion of the corridor treatment possibly was the result of a happy coincidence. Nevertheless, it was the first instance in this country in which a



· CITY · OF · CHICAGO · · · DEPARTMENT · OF · SUBWAYS · AND · TRACTION ·  
 · A · SUGGESTION · FOR · THE · DEVELOPMENT · OF · A · WEST · SIDE · SUPERHIGHWAY ·  
 · ALTERNATE · PLAN ·  
 · PERSPECTIVE · NEAR · RAPID · TRANSIT · STATION ·

Figure 3. Artist's conception of West Side highway and transit (from 1939 comprehensive plan).

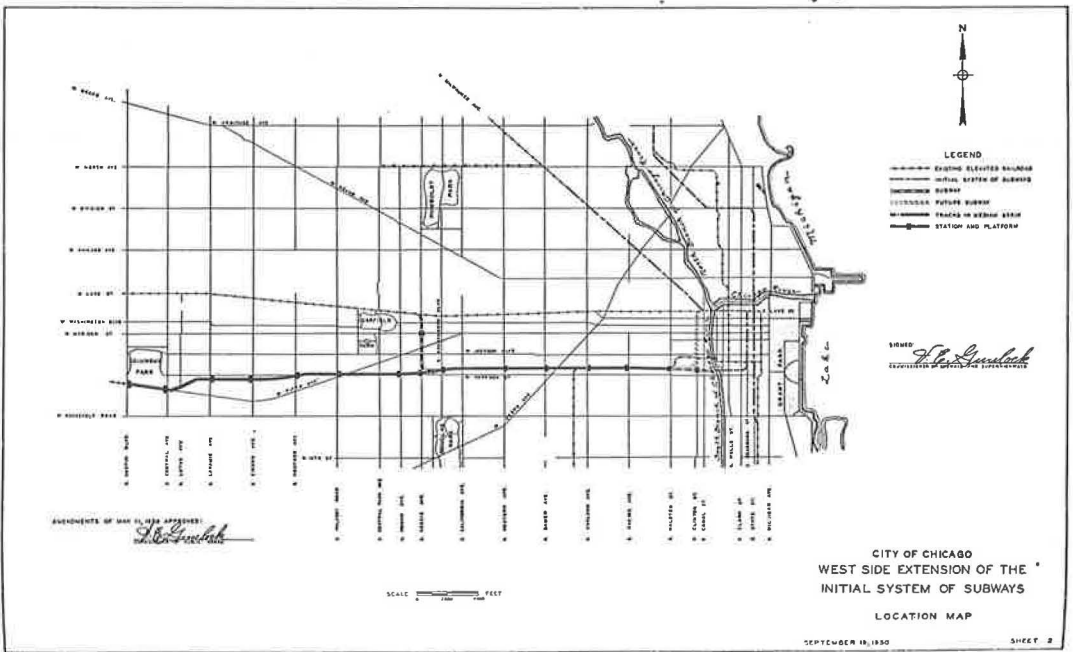


Figure 4. Map showing location of Congress rapid transit.

rail transit line and an expressway were constructed at the same time and in the same right-of-way. An interesting aside is that the cost of building this facility 20 years later was over  $3\frac{1}{2}$  times the amount estimated in 1939.

### Legal Authority

Several legal hurdles had to be cleared to permit rapid transit use of the median strip. First, the highway agencies had to agree to purchase the necessary right-of-way to permit rail transit operation. The median strip varies from 79 to 150 ft in width. Section 123 of Title 23 of the Federal Highway Act provides guidelines for the use of right-of-way as follows:

(a) Interest to be acquired. The State shall acquire rights-of-way of such nature and extent as are adequate for the construction, operation and maintenance of a project.

(b) Use for highway purposes. Except as provided under paragraph (c) of this section, all real property, including air space, within the right-of-way boundaries of a project shall be devoted exclusively to public highway purposes. No project shall be accepted as complete until this requirement has been satisfied. The State highway departments shall be responsible for preserving such right-of-way free of all public and private installations, facilities or encroachments, except (1) those approved under paragraph (c) of this section; (2) those which the Administrator approves as constituting a part of a highway or as necessary for its operation, use or maintenance for public highway purposes and (3) informational sites established and maintained in accordance with Section 1.35 of the regulations in this part.

(c) Other use or occupancy. Subject to 23 U.S.C. 111, the temporary or permanent occupancy or use of right-of-way, including air space, for non-highway purposes and the reservation of subsurface mineral rights within the boundaries of the rights-of-way of Federal-aid highways, may be approved by the Administrator, if he 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.

Approval of highway authorities for the Congress Expressway Rapid Transit facility was not difficult for the section west to Kedzie Avenue. Since the existing transit line



right-of-way was being taken for the expressway, they simply gave the median strip location in exchange. In other instances it required convincing the highway officials that a wide median would be desirable even if transit were not included.

Authorization by the City of Chicago came in an ordinance passed in December 1946 with subsequent amendments in 1950, 1954, 1956, 1957 and 1963. The amendments approved changes in construction plans, or station location, and in one case, authorized payments of over \$200,000 for right-of-way settlement either from superhighway bonds or motor fuel tax revenues. In general, the ordinance described the route of the subway, pledged that the City would provide for acquisition of the required real and personal property, fixed responsibility with the Commissioner of Public Works for drawing detailed specifications and plans, described the source of funds for financing the project, ordered all public utilities removed from the proposed subway location, and directed the Comptroller to set up separate bookkeeping accounts for the project.

Finally, there was an agreement between the City and the Transit Authority wherein the Authority "gives, grants and conveys to the City a perpetual right and easement" to the then existing transit line for use as part of the right-of-way for the Congress Expressway.

### Financing

As indicated, the right-of-way in the median was provided, in part, in exchange for the existing 75-ft two-track right-of-way. Funds for construction of the track, ballast, station platforms, walkways, etc., were provided by the City of Chicago. This was done through a \$25-million voter-approved bond issue in June 1952.

Under the ordinance creating the Chicago Transit Authority, the City of Chicago agreed to construct subways and other facilities to be operated by the Authority. The cost of all such structures, other than track and related facilities, was borne by the City. Fixed transportation equipment such as tracks, signals, communication and power station facilities required for operation of the system were paid for initially by the City, to be reimbursed by the Transit Authority. The City had to furnish about \$24 million and was to have been reimbursed approximately \$12 million for CTA's share of the cost.

There were some interesting exchanges during the planning of this facility. One already mentioned was the exchange of rights-of-way. Another included the City's purchase of a terminal turn-around and storage yard as a trade-off for not having to build a ramp to an existing CTA storage yard. The Authority had maintenance shops and a storage yard at Harrison Street and Laramie Avenue. To reach this yard from the median of the expressway would have required the construction of a very expensive ramp incline. Rather than build the incline, the City provided a terminal turn-around, storage yard and a 450-car parking lot at the terminal in Forest Park.

### Construction

Construction was complicated by the fact that the CTA service had to be maintained at all times. Several million dollars were spent to provide temporary rights-of-way for trains during the construction period.

Difficult problems were encountered in strengthening the foundation of the U. S. Post Office building through which the facility runs. The center line of the tube, under the Post Office, was situated in line with some of the sub-piers of the building. The piers had to be shored up at a subbasement level and removed from the tunnel. The full loads then had to be transferred to the tunnel arch. This was primarily a tunneling problem and not one caused by joint use of a transportation corridor. Figure 5 shows the completed facility.

### Operation and Maintenance

The expressway is maintained and operated by the Illinois Division of Highways. The transit line is maintained and operated by the Transit Authority. The State maintains the shrubbery, shoulders, fences, guardrail, storm drains, etc. There has



Figure 5. View of Congress rapid transit facility.

been an occasional joint problem when an automobile has negotiated the guardrail and fence and ended its trip on the transit track. This, of course, can be very disruptive to train schedules—not to mention traffic disruption on the expressways caused by gaping motorists.

#### Legal Problems

One official of the CTA made several suggestions where changes in the law or administrative procedure would enhance the operation of the transit line. The first involved the question of ownership. As it now stands, the City of Chicago owns the line and the CTA is the operator. Apparently there are problems connected with changing or modifying stations, ramps and other facilities due to City ownership. The operator is concerned with having the flexibility to make any physical changes required to enhance operations. The time involved in obtaining approval is apparently a problem.

Another problem revolves around the use of air rights over the facility. For example, the CTA wanted to build parking garages on air rights for Park 'n' Ride customers. Financing could have been arranged through certain oil companies which would have built a service station in connection with the parking lots. There is, however, an instructional memorandum issued by the Bureau of Public Roads, May 4, 1962, which clearly spells out the requirements of the "use of air space on the Interstate System."

Section 111 of title 23 of the United States Code, as amended by section 104 of the Federal-Aid Highway Act of 1961, approved June 29, 1961, provides as follows:

All agreements between the Secretary and the State highway department for the construction of projects on the Interstate System shall contain a clause providing that the State will not add any points of access to, or exit from, the project in addition to those approved by the Secretary. Such agreements shall also contain a clause providing that the State will not permit automotive service stations or other commercial establishments for serving motor vehicle users to be constructed or located on the rights-of-way of the Interstate System. Such agreements may, however, authorize a State or political subdivision thereof to use or permit the use of the airspace above and below the established grade line of the highway pavement for such purposes as will not impair the full use and safety of the highway, as will not require or permit vehicular access to such space directly from such established grade line of the highway, or otherwise interfere in any way with the free flow of traffic on the Interstate System.

Apparently the design, as recommended, did not meet the requirements of the highway agencies.

### OTHER CORRIDORS

Median strip rail transit is now committed for two other Chicago Expressways—the Kennedy and the Dan Ryan. In addition, there is a proposal being considered by the Chicago Plan Commission to build a 22-mi crosstown expressway over the Belt Railway on Chicago's West Side. A proposal by CATS suggested a rubber-tired rapid transit experiment in the form of buses in a median or a reserved lane for the crosstown expressway. Finally, there is the corridor owned by the Chicago and Northwestern Railway in Oak Park in which the CTA leases two tracks for their local operation.

#### Kennedy and Dan Ryan Subways

The successful operation of the Congress Rapid Transit Line and the availability of cheap right-of-way prompted the planning of a median strip rail transit operation in the Kennedy Expressway. It was determined that even though the location was selected primarily to serve highway traffic it would provide an excellent rapid transit service to Chicago's Northwest side. The recognition that rail transit typically serves the longer trip, and the availability of good bus feeders, along with the possibility of developing Park 'n' Ride facilities, overcame any objection to using a location not specifically selected for transit.

The decision, however, was not made until after the expressway had been designed. At that time it became apparent that the median as designed would be sufficient to permit two-track transit operation if retaining walls were added at certain points, and bridge abutments were lengthened to accommodate the rails. By agreement, these modifications were made at a cost of \$2.3 million to the City of Chicago. The average median width is 51 ft.

The Kennedy transit line was authorized by a city ordinance passed in March 1956. The ordinance was quite similar to the one passed in 1946 authorizing the Congress Line. Figure 6 shows the Kennedy Expressway with the median strip reserved for transit operation.

The Dan Ryan Expressway was designed to provide for tracks in the median strip. The median varies from 56 ft to 88 ft in width. The additional right-of-way needed for transit cost \$1.02 million—paid for by the City. Additional costs for construction amounted to about \$1.5 million, also paid for by the City.

The U. S. Bureau of Public Roads reduced its matching from 90 percent to 85 percent to account for the cost of the transit median. Figure 7 illustrates a typical section showing the vacant median reserved for rail transit.

It is estimated that the cost of the Kennedy rapid transit will be \$48 million. The Dan Ryan improvement is expected to cost \$27 million. On June 12, 1966 Chicago



Figure 6. View of Kennedy Expressway showing reserved median.

voters approved a \$28-million bond issue designated for rapid transit improvements on the Kennedy and Dan Ryan Expressways. It is anticipated that the remaining funds will come through a grant from the Department of Housing and Urban Development.

#### Crosstown Corridor

The crosstown corridor offers a slightly different concept in transportation corridors. It involves building an elevated expressway over an existing railroad which presently is used exclusively for freight movement (Fig. 8). This is not a definitely committed location, but is one being currently considered by the Chicago Planning Commission.

There are many problems connected with building a structure of this type. During construction the railroad would necessarily have to remain in operation to provide service to its spurs and sidings along the route. The right-of-way is narrow and would result in "squeezing" the expressway in order to provide the required number of lanes. For example, instead of a median there probably would be a barrier separating the two travel directions. The aesthetic problem of building such an elevated structure has already been publicly debated. Problems of traffic operation could be magnified by heavy commercial vehicles on long ramp grades.

There are no apparent legal problems. The Highway Department can legally build over air rights provided the design meets acceptable standards (Interstate in this case). The railroads involved have indicated their willingness to negotiate the cost for use of the air rights. The precedent of cooperation has been set and it appears entirely feasible to develop this kind of transportation corridor.



Figure 7. View of Dan Ryan Expressway showing reserved median.

### Lake Street Rapid Transit Corridor

A project completed in 1962 involved the relocation of  $2\frac{1}{2}$  mi of an existing transit line operating at ground level to an elevated right-of-way owned by the Chicago and Northwestern Railway. This eliminated 22 grade crossings in Chicago and Oak Park where trains had been operating at street level since 1901.

The cost of this improvement was \$4 million shared as follows: The U. S. Bureau of Public Roads and the State of Illinois (Division of Highways) \$1 million, County of Cook \$1 million, Oak Park \$800,000, the City of Chicago and the CTA \$600,000 each.

### OTHER USES

There is no reason to limit transportation corridors to the delivery of persons and goods. These corridors can be (and frequently are) combined with power transmissions, pipe lines, sewer and water, etc. The number and kinds of corridors which can be developed are limited only by our own ingenuity. For example, air space over rivers which could combine water transportation with highway or rail certainly is feasible.

Another example is shown in Figure 9. Here a small vehicle capable of being carried on railroad flatcars within urban complexes is suggested. This would permit the traveler ultimate flexibility and convenience. He would have the advantage of never leaving his seat from home to office, and of being delivered for the "line haul" share of his trip by rapid rail transit. A railroad official when asked about this idea would not volunteer that this was a good idea, but also offered the comment that it was not a bad idea.

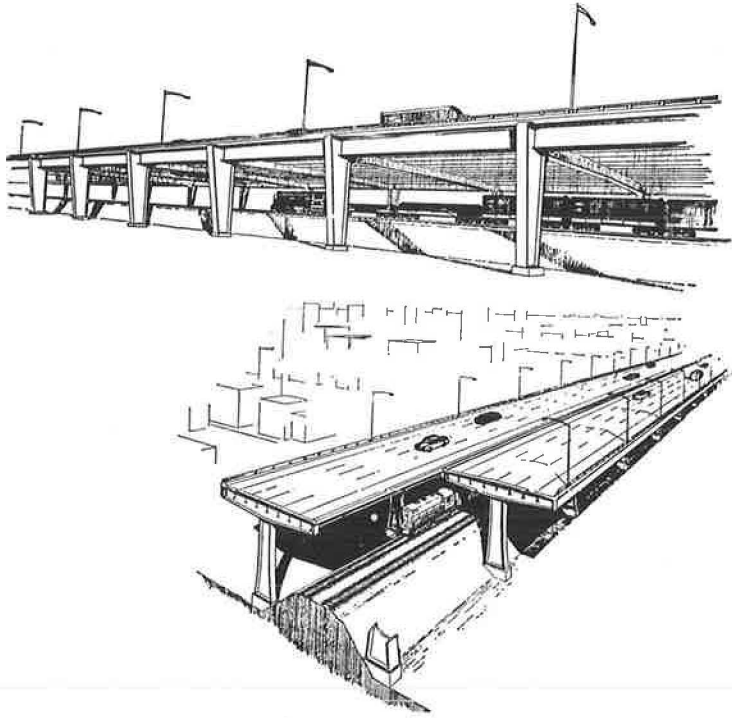
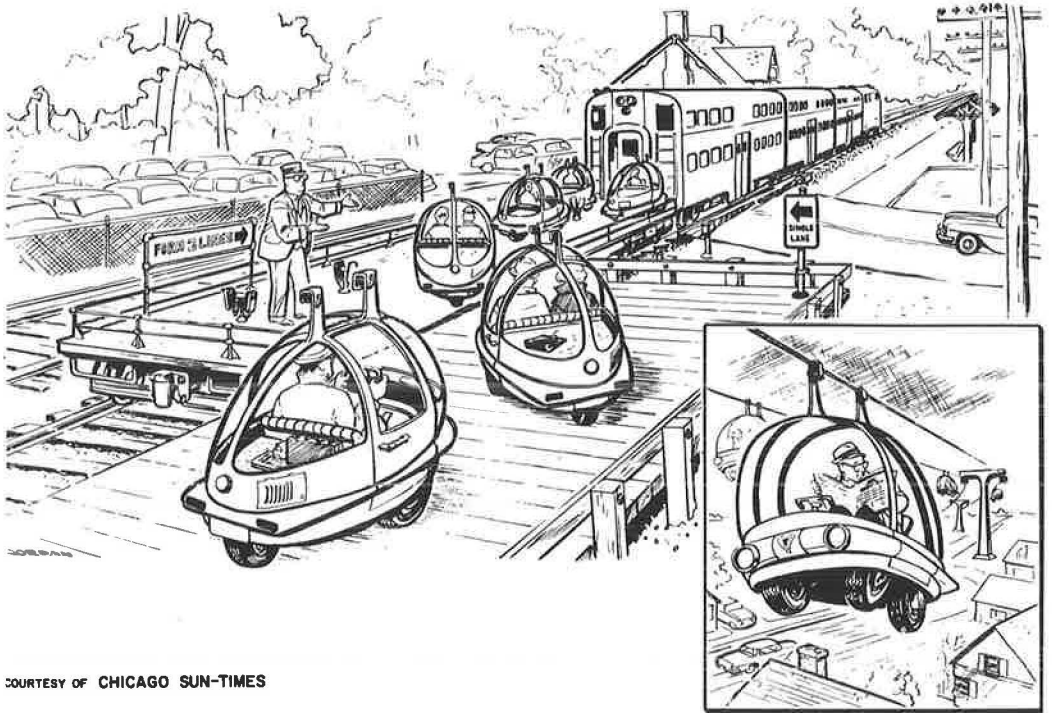


Figure 8. Artist's sketch of proposed Crosstown Expressway.



COURTESY OF CHICAGO SUN-TIMES

Figure 9. "CATSmobile."

The growing competition for space in our urban complexes certainly adds an urgent motive for making the best combined use of our transportation facilities—present and planned.

### SUMMARY

This paper has presented some considerations incident to planning transportation corridors and has recounted various experiences and problems encountered in actually constructing and operating several corridors. It was pointed out that corridors involving several transport modes should not be developed simply because cheap rights-of-way are available. An important planning consideration is the future travel demand as determined by a careful study of future distribution and increase of population, employment, use of land and other socioeconomic factors which influence travel.

At present, there seems to be an adequate legal enabling framework for the development of transportation corridors. In the case of rights-of-way for highways, the law provides the highway administrator with some discretionary power. That is, he may permit other joint uses if he is satisfied that they are in the public interest and that they will not interfere in any way with the free and safe use of the highway. The key issue does not involve the question of whether or not joint use should be permitted, but rather how right-of-way cost can be charged fairly to each mode.

The development of transportation corridors in Chicago has been a model of inter-governmental cooperation, flexibility in interpreting the law, and extreme patience on the part of responsible officials. Stanley Forsythe (General Superintendent of Engineering for the Chicago Transit Authority and currently with the Bay Area Rapid Transit District in San Francisco), who played a key role in development of the Congress Corridor, said, "The single most important factor in getting the job completed was the superb cooperation of all levels of government from federal to local, and the cooperative administrative interpretation of laws for the public good."

Properly planned and developed, transportation corridors have enormous potential in our crowded urban areas; the limitations are those of our own ingenuity and creative ability.

### ACKNOWLEDGMENTS

The author wishes to acknowledge the valuable assistance given by George DeMent, Chairman of the Board of the Chicago Transit Authority (and Commissioner of Public Works during construction of the Congress Corridor); George Krambles, Director of Planning for the CTA; Stanley Forsythe, Bay Area Rapid Transit District; Edward Carozza, Bureau of Engineering, City of Chicago; Henry Yamanaka, Illinois Division of Highways; William McConochie, Vice President of DeLeuw, Cather and Company; Fred Farrell, Regional Engineer, and Tad Comstock, Planning Engineer of the Bureau of Public Roads, Region No. 4. These gentlemen provided the author with copies of legal agreements, cost figures, and in general made the report possible.

# Acquisition of Scenic Easements

JOHN B. MATHENY, Assistant Chief Counsel, California  
Department of Public Works

•THE ability to affect a community's natural and man-made environment for better or worse is not a unique characteristic of the highway program. Other activities, for which state and local governments have assumed varying degrees of responsibility, also have this power to change the appearance of the community, and in various basic aspects all aesthetic programs are related to each other. The need to correlate programs in all of these areas in a comprehensive plan and set of working relationships was well set forth by President Johnson's special message to Congress on February 8, 1965,<sup>1</sup> when he said:

...[A]ssociation with beauty can enlarge man's imagination and revive his spirit. Ugliness can demean the people who live among it. What a citizen sees every day is his America. If it is attractive it adds to the quality of his life. If it is ugly it can degrade his existence.

Beauty has other immediate values. It adds to safety whether removing direct dangers to health or making highways less monotonous and dangerous....

\* \* \*

...[B]ut a beautiful America will require the effort of government at every level, of business, and of private groups....

I am hopeful that we can summon such a national effort. For we have not chosen to have an ugly America. We have been careless, and often neglectful. But now that the danger is clear and the hour is late this people can place themselves in the path of a tide of blight which is often irreversible and always destructive.

The President further went on to say that he was presenting a twofold program relating to highways. One purpose was to insure that the highways themselves would be attractive; the other was to see that more funds would be spent to develop highways that would take people to recreation and scenic areas. His message included recommendations for a comprehensive aesthetic program. Implementing his message, he requested Congress on May 26, 1965,<sup>2</sup> to pass legislation relating to scenic easements, the scenic road system, control of junkyards, greater access to recreation areas, and for greater emphasis on controlling outdoor advertising.

## THE CALIFORNIA PROGRAM

In California, scenic easements are not a new idea. More than 35 years ago the State of California acquired some areas that were called scenic easements. They were not acquired by eminent domain, but rather by purchase. And they were not acquired in relation to highways, but by the state park system in order to save certain areas for scenic preservation. These were very limited acquisitions, and probably were created because of special land interests, to insure that portions of the property would remain attractive and available for use, rather than as part of a planned program of acquisition.

Paper sponsored by Department of Legal Studies.

<sup>1</sup>The President's Special Message to Congress on Natural Beauty of Our Country, Feb. 8, 1965, 111 Cong. Rec. 2045.

<sup>2</sup>President's Letter to President of the Senate and Speaker of the House of Representatives, May 26, 1965.



In 1946, the California state park department made a different and perhaps unique type of scenic easement acquisition when it acquired property to rebuild a historic mining town as a state park. Portions of the scenic easements acquired were for purposes of landscape and architectural control. So far this has been a fairly successful example of multiple-purpose acquisition, and the experience may be helpful in future acquisitions.

The state Department of Public Works has also been actively interested in scenic development, and for many years has been acquiring and maintaining numerous scenic overlooks which will form an important part of the future programs.

It must be conceded, however, that California, like many of the other states, has lagged in carrying out the intentions of Section 319 of Title 23 of the United States Code. But California has not stood still in its aesthetic thinking and planning. In addition to the specific type of programs referred to in Section 319, and the legislation requested by the President, the state has had a highly developed landscaping program. A special section in the Division of Highways has existed for many years, carrying on a continual and expanding program of landscaping. The Division is now spending more than \$10 million per year, and has landscaped with complete plantings more than 950 miles of highways. In the short period of the last six years, the California legislature has authorized and otherwise given guidance for several aesthetic ventures. In addition to provisions authorizing some scenic areas, it enacted roadside rest legislation, established a scenic highway system, and expanded the outdoor advertising control program.

The scenic easement program started in 1963<sup>3</sup> with a limited authorization which provided for scenic acquisition in conjunction with the construction of the new Interstate Route 5, which runs the length of the state. Concurrently with the construction of this route, the state is constructing the California aqueduct, a gigantic canal which will convey water to the southern part of the state. While this canal must generally follow the land contours as a gravity-flow canal, it is somewhat parallel to the I 5 route. The legislature had the foresight to take advantage of this obvious opportunity for development by authorizing the various resources and finance agencies of the state, singularly or collectively, to accept property and acquire property in fee, or lesser interest. The authorization also included the use of condemnation for the purposes of improving or maintaining areas of significant scenic interest located between the Interstate highway and the California aqueduct. The Department of Public Works was further expressly authorized to acquire other properties for scenic easements when there are funds available pursuant to Section 319 of Title 23 of the United States Code, and where the funds could not otherwise be spent for highway purposes.

In 1957, a roadside rest program<sup>4</sup> was commenced with the Division of Highways furnishing the property and the then Department of Natural Resources being responsible for construction and maintenance. These were intended to be attractive stopping places for motorists. The administration and construction of these roadside rests were eventually transferred to the Department of Public Works, and at the same time additional legislation established 12 roadside rests at designated locations along the new Interstate Route 5. While these are not designed to be complete scenic areas, and there are restrictions on the type of design and uses, they are intended to be made attractive places for the traveling public.

Up to the present time, the planning by our landscaping department, other than the regular landscaping program, has been concentrated on the roadside rest program. We now have some 24 of these sites in operation, and approximately 250 are planned. The roadside rest program, while not a scenic easement program in the true sense, is instrumental in adding to the beauty and enjoyment of the use of highways in California. Roadside rests can also be utilized to implement a scenic highway system and can be coordinated in use with scenic areas.

<sup>3</sup>Cal. Govt. Code, Secs. 7000 and 7001.

<sup>4</sup>Cal. Public Resources Code, Secs. 5080-5092.

California's present scenic highway legislation<sup>5</sup> was adopted in 1963 and became effective on July 1, 1964. The initial recommended system was the result of a study by the Citizens Advisory Committee on Scenic Highways. There now is a continuing Advisory Committee on the Master Plan for Scenic Highways which advises the Department of Public Works in regard to establishing and applying planning and design standards for development of scenic highways. Some of the guidelines and standards developed in California for this scenic highway system can be equally used in planning a scenic easement acquisition and in developing a broader program. The basic considerations of the plan are that special attention should be given to both the impact of the highway on the landscape and the visual appearance of the highway itself. In brief, the additional standards are:

1. Location to preserve the natural environment and to unfold new scenic locations;
2. A design to fit the character of the area minimizing unsightly scars on the terrain;
3. Avoid cutting valuable trees and growth insofar as suitable alternatives are available and utilizing timber screens to hide unsightly views;
4. Wide medians, curvilinear alignment, and independent roadways on multilane facilities;
5. Consideration of bridges, tunnels, and artistic retaining walls in lieu of cuts and fills;
6. Additional flattening of slopes and planting of ground cover;
7. Careful consideration to location and design of structures;
8. Avoid old material sites;
9. Concealment of drainage facilities where possible; and
10. Careful landscaping of interchange areas, particularly with the use of indigenous growth.

The scenic highway corridor created in this system will undoubtedly indicate the future location of many scenic acquisitions.

Another major program, the Outdoor Advertising Act,<sup>6</sup> will probably have to be amended in the future in order to accomplish the purpose ultimately desired, but at the present time it can provide the means of removing many of the unsightly billboards over a period of time.

In the 1965 legislative session an attempt was made to expand on all of the state's aesthetic programs. In particular, legislation was introduced<sup>7</sup> which would specifically authorize the acquisition of scenic easements without limit to statewide location. It would have permitted acquisition of property in fee, or any lesser interest, adjacent to highways for the specific purpose of preserving the natural beauty or for establishing scenic overlook areas. However, during the course of hearings, it was necessary to limit this legislation to acquisitions where Federal funds were available for reimbursement.

When presenting this legislation before the legislative committees which were required to give hearings on the proposed legislation, several interesting comments were made on various aspects of it. For example, the chairman of one committee felt such legislation should be preceded by a scenic easement area plan or system. While the desirability of having a plan or system is obvious, and even necessary for a long-range program, the Division of Highways did not feel that it should be so limited at this time. There are many areas now available for acquisition and which would be consistent with any statewide plan. An amendment to require a plan was offered to the committee, but was not adopted.

There was further feeling that there should be a defined corridor of some specified width within which the scenic easements must be located. Widths of 660 feet and more were considered, but, again, no limited corridor was amended into the bill.

<sup>5</sup>Cal. Streets and Highways Code, Sec. 264.

<sup>6</sup>Cal. Business and Professions Code, Secs. 5200-5325.

<sup>7</sup>Senate Bill 363 of the 1965 Cal. Legislative Session.

It was also suggested, and without question determined, that in California just compensation must be paid for such interests when they were acquired.

There were other suggestions that the legislation should indicate the specific types of properties that could be acquired for scenic easements. Some of the examples discussed were forest areas, farms, and points designated as being of specific interest. Again, no such enumeration was placed in the bill.

However, the bill came to an unfortunate end. In the last day of the legislative session, a technical amendment was added to the bill in the State Assembly, after it had already passed the State Senate, which required the bill to be returned to the Senate for concurrence. Because of the many hundreds of bills awaiting final passage on the last day of the legislative session, this one became lost in the shuffle, and it was not learned until the final minutes of the mandatory time for adjournment that this bill had not been returned to its house of origin for concurrence. The hour was too late. The many other proposals to amend other aesthetic programs were also unsuccessful. Unfortunately the legislature, like many others meeting that year, was faced with the serious problem of reapportionment and raising of revenue. These problems alone caused many important bills to fail.

### THE ELEMENTS OF SCENIC EASEMENT PLANNING

Having described the background of California's scenic development program, and some of the problems involved in providing a suitable legislative framework to carry on such a program, it may be appropriate to mention some of the many factors involved in a long-range program of acquiring scenic easements. The principal steps to be considered may be listed as follows:

1. Classifying or defining scenic easements;
2. Preparing a plan including (a) location of the easements, and (b) size of the area;
3. Providing for availability of funds;
4. Assuring existing authorization for acquisition in California and the other states;
5. Defining the scope of any new legislation;
6. The use of eminent domain;
7. Determining the type of title to be acquired; and
8. The acquisition document.

To some extent it may be helpful to look for precedents in the roadside rest program, but I believe that preparing a scenic easement plan will be more difficult. There is a limit to what can be accomplished by looking at maps, measuring distances, and looking at local jurisdictional boundaries to determine where many of the roadside rests can be located. In the scenic program it is almost essential to actually view the natural scenic areas and overlooks after classifying the types to be considered in order to prepare an acquisition plan. It is very similar to studying proposed highway route alternatives.

#### Types of Scenic Easements and Their Location

Defining the types or scope of scenic easements or areas within the meaning of applicable legislation may present difficulties. Section 319 of Title 23, U. S. Code, as well as the present proposed amendments to that section, seems to refer to scenic easements as a type of strip acquisition adjacent to the highway. This interpretation may be very appropriate when the purpose of the easement is merely to screen off what otherwise might be considered an unattractive view, but in most cases this will not include the necessary area required to develop the scenic quality of a particular location.

In this regard, the Bureau of Public Roads' Policy and Procedure Memorandum 21-4.6 probably is the best guide to the types and size of natural conditions that should be considered in acquiring scenic easements. While the memorandum refers to the fact that the scenic area should be of limited width and adjacent to the highway, it also points out that the taking line should be governed by natural boundaries of the feature itself. An example is provided by the case of a stream running adjacent to a highway.

Here easement acquisition lines should be to the opposite side of the stream and to the top of the slope of a hillside beyond in order to protect the stream and the hillside in its scenic beauty. In special situations, widths of several hundred feet or even greater may be necessary. Other types of topographic features which typically require easements of extensive width are wildwoods and groves of trees, lakeshores and rivers, mountains or similar vistas, rock outcrops, and perhaps such other unique features as swamps and islands.

Location of scenic easements must be determined with consideration for both beauty and safety. For example, a scenic outlook must be located so that a motorist may conveniently and safely enter and leave the outlook area. Existing natural areas must be considered in their relationship to practical locations of new highways.

### Financing Scenic Easements

Two major factors in the development of a scenic easement plan are the availability of funds and the type of title that can or should be acquired. Insofar as funds are concerned, California has not as yet made money available for this specific program. In this respect it has been like most other states where highway funds have been more urgently needed and used for acquisition of right-of-way and construction. As noted earlier, however, this has not prevented a certain amount of scenic development activity, including scenic acquisitions, with funds available through non-highway sources. Aside from the subject of availability of funds for land acquisition, consideration should be given to preserving existing scenic areas through other means such as encouraging local zoning to be further extended, increasing outdoor advertising restrictions and taking advantage of natural areas in public ownership.

### Authority to Acquire

Important questions must also be considered in regard to the title of property being acquired for scenic enhancement. What is the extent of the title that can be acquired under existing state law, and what title will best accomplish the purpose? These questions must be considered in the light of the state's fundamental law as well as some of the other existing laws in the state by which it acquires scenic areas.

### Choice of Acquisition Methods

California has a constitutional provision<sup>8</sup> which specifically authorizes purchase or condemnation of property within limited areas which can be used for scenic purposes or otherwise kept in a condition to make the public works more attractive in its environment. It is not limited to highways, and includes most other types of public improvements. Pursuant to this provision, entire parcels up to 150 feet from the boundaries of the project can be acquired and if the property lies partially within and partially outside of the 150-foot limitation, the boundary may be extended to 200 feet. Specifically, it further authorizes the agency acquiring property pursuant to this provision to convey out property so acquired with any desirable restrictions on its use.

California also has a statute<sup>9</sup> specifically relating to the state Department of Public Works which contains similar provisions and limitations, and another which pertains to cities and counties.<sup>10</sup>

Up to the present time the state has not used these provisions for scenic purposes nor has it entered into the practice of conveying property back with restrictions designed to preserve the natural beauty or view. This type of legislation is suitable for certain types of acquisitions and uses (for example, providing property for scenic outlooks), but it does not have the flexibility of other types or forms of legislation.

<sup>8</sup> Cal. Const., Art. 1, Sec. 14-1/2.

<sup>9</sup> Cal. Streets and Highways Code, Sec. 104.3.

<sup>10</sup> Cal. Govt. Code, Sec. 190-191.

There are also inherent practical problems. For example, specification of an exact width on the extent of the acquisition may result in leaving the property owner with no feasible way to use the remainder. In ordinary acquisitions, the highway department could take such land as excess and avoid high severance damages. If, however, the intention is to let the owner have use of the property subject to certain restrictions that will preserve the scenic effect, then this type of legislation may be very useful. For example, one of the types of land uses that has been considered to be scenic in nature is farm properties that are attractively and naturally landscaped. The strip acquisition might be quite compatible with the use that the owner is making of the property at the time of acquisition, and the restrictions could insure the continued preservation. However, other types of legislation offer equally great advantages of flexibility. In Mississippi there is scenic legislation<sup>11</sup> which authorizes the acquisition and construction of scenic easements of up to 50 acres per mile. This, of course, would permit areas of several acres to be acquired at one location when it is desirable for scenic purposes.

There are also provisions in California law<sup>12</sup> that authorize the Department of Public Works to accept gifts of money or property for maintaining memorials at places of scenic, historical, or cultural interest. Things that could be acquired pursuant to this provision could be exemplified by memorial redwood groves. The state is also authorized<sup>13</sup> to specifically enter into cooperative agreements with counties to develop and maintain roadside parks which can lie both in and outside of the highway right-of-way.

#### Title Acquired

Another interesting provision<sup>14</sup> in California law deserves attention and interpretation. The principal statutory declaration of what public uses will sustain the right of eminent domain provides in one section that public use includes "standing trees and ground necessary for the support and maintenance thereof along the course of any highway with a maximum distance of 300 feet on each side of the center thereof." This provision was added in 1915, and now appears to have been enacted with great foresight at that time since it apparently was to encourage the scenic appearance of the highways. It may be queried, however, whether this now limits the highway to a 600-foot corridor where the purpose of acquisitions adjacent to the roadway is to purchase trees or areas to plant trees. The question has not been raised, and perhaps will be avoided by the interpretation of other specific legislation relating to scenic programs.

In looking at the legislation in other states as it expressly relates to scenic easements, the laws presently existing may be put into three categories. The first category is comprised of those states that have specific authorization, and includes Mississippi, Missouri,<sup>15</sup> Wisconsin,<sup>16</sup> and Oregon.<sup>17</sup> In the second category are those states which authorize the acquisition of scenic property which might be extended to cover scenic easement, but which authority is vested with their parks or conservation departments. Three of these states are Virginia,<sup>18</sup> Tennessee,<sup>19</sup> and Kentucky.<sup>20</sup> The legislation in each of these states has three things in common: (a) authorization is given to acquire the land or any interests therein; (b) acquisition may be made by purchase, or through the exercise of the power of eminent domain; and (c) it is not required specifically

<sup>11</sup> Miss. Code Ann., Sections 5964-5984.

<sup>12</sup> Cal. Streets and Highways Code, Sec. 155.

<sup>13</sup> Cal. Streets and Highways Code, Sec. 131.5.

<sup>14</sup> Cal. Code of Civil Procedure, Sec. 1238(18).

<sup>15</sup> Mo. Stat. Ann., Secs. 226.310 and 226.350.

<sup>16</sup> Wis. Stat. Ann., Sec. 84.105.

<sup>17</sup> Ore. Rev. Stat., Sec. 366.345.

<sup>18</sup> Va. Code Ann., Secs. 10-21.

<sup>19</sup> Tenn. Code Ann., Secs. 11-105-11-305.

<sup>20</sup> Ky. Rev. Stat. Ann., Sec. 148.060.

that the land be acquired for use as park or recreation areas. There are many other states that have provisions authorizing the acquisition of scenic lands but they are not as comprehensive as the legislation in the above three states in that they lack one or more of the above characteristics. Among these states are New York, Florida, Minnesota, Maine, Georgia, Montana, and Utah. In a third category are many states that have no legislation expressly authorizing acquisition of scenic lands. However, many of these statutes appear to be broad enough to permit acquisition of scenic properties. In these cases, it is the parks or recreation type departments that are vested with the authority. An example of some of these states is Delaware, Ohio, and Alabama.

In the drafting of legislation for scenic acquisition, the limited experience to date suggests several things that should be considered by the draftsman. While it is not certain that a declaration of purpose would be essential, I believe it would be advisable. California's original scenic easement law provided in part: "The Legislature hereby declares that the acquisition of interests or rights in real property for the preservation and conservation of the scenic lands and areas. . . constitutes a public purpose for which public funds may be expended or advanced."

If the state constitution permits it, the legislation should provide for acquiring property in fee, or any lesser interest, and by negotiation or condemnation. If a provision is included which limits the expenditure of funds, it should be so drafted that other reasonably related expenditures required by Federal legislation could be used. If a width for the scenic corridor is included, then it should be such that it can conform to any change in Federal legislation. If a definition of scenic easement is included, it should be broad enough to be in conformity with Federal laws and regulations. In general, therefore, legislation should be flexible enough to take full advantage of Federal legislation.

There remains the potentially serious question of whether there are constitutional restrictions on condemning property strictly for scenic areas. It would appear that in California the state highway department can obtain scenic areas by eminent domain pursuant to the appropriate legislation, and that the state courts will follow the trend to permit use of eminent domain to accomplish aesthetic objectives. This trend to greater recognition of aesthetics can be seen in the many recent zoning, billboard, and redevelopment cases, following the famous urban redevelopment case of *Berman v. Parker*.<sup>21</sup> While the authors who have written about this decision do not all agree as to the full meaning of the language in Justice Douglas' opinion, it is generally conceded that the concept of using eminent domain for purely aesthetic purposes can be upheld.

When scenic areas are acquired by and for the public, whether by negotiated purchase or condemnation, both the constitutions and the statute law require payment of just compensation. The question of the amount of compensation which must be paid and the type of title acquired appear to be closely related. Experience in California seems to indicate that acquisition of any type of a permanent easement costs the state about the same as if it had acquired the fee. However, perhaps scenic easements are a little different because provisions can be made to permit the owner to retain substantial use. Cases will probably have to be considered individually, and perhaps the most analogous situation to this will be the transverse crossing with railroads.

#### Instruments of Conveyance

An article by William H. Whyte, Jr.,<sup>22</sup> contains several suggestions for preparation of instruments transferring title where something less than the fee interest is acquired. The use of a combination of any of the suggestions may result in benefits to the owner which would make it desirable for him to agree on compensation substantially lower than fair market value. This, of course, would also be true if the same provisions

<sup>21</sup> *Berman v. Parker*, 348 U.S. 26 (1954).

<sup>22</sup> W. H. Whyte. *Securing Open Space for Urban America: Conservation Easements*. Urban Land Inst. Tech. Bull. 36, Dec. 1959.

were so described in an eminent domain proceeding, but the effect of what is being done may be hard for a condemnation jury to appreciate. Condemnation trial experience with slope easements suggests this conclusion. Various unusual appraisal problems may be involved depending upon which provisions are used. Some of the items, which are similar to those he suggested, are as follows:

1. A clear statement of the purpose to be served by the easement;
2. Prohibition against erecting buildings;
3. Restrictions against altering private roads or drives;
4. Prohibition of destruction or removal of trees, shrubs, or other greenery;
5. Restriction to the present uses that may be consistent with the type of scenic area;
6. Prohibition of outdoor advertising;
7. Prohibition of the dumping of any type of materials on the property;
8. Provision stating what would be the effect if the state abandons the purpose for which the easement was acquired;
9. A provision terminating easement in the event the property is condemned by another agency;
10. Prohibition of any use which would alter the present drainage, erosion, or flood control; and
11. Provision regarding maintenance.

Most of the foregoing items are self-explanatory, with the exception of the provision for termination of an easement when property is condemned by another agency. An example of this would be if an owner conveys an interest across his farmland as a scenic area. Sometime in the future it might be necessary for some public agency to acquire property for a more necessary public use. Property restricted with the scenic easement might be less valuable than other adjoining property. Therefore, an attempt may be made to acquire the property that is subject to the easement for the more urgent public purpose. If, however, the easement terminates upon the initiation of any eminent domain proceedings, such property would have just as much value as any other property and thus the incentive may be lost. This could be a substantial factor in determining the compensation an owner expects.

A possibly significant provision which is absent in the check list is a flexibility provision. Such a provision would be difficult to draft, but its purpose would be to cover unforeseen developments that might arise in the future. One possible way to cover such eventualities might be to permit the highway department to authorize some change of status upon request. It might even go so far as to permit some method of adjudicating the reasonableness of the denial in the event the request is denied.

### CONCLUSION

Given a choice between carrying out a scenic easement acquisition program by negotiated purchase or by eminent domain, which is the more desirable method? In most respects, negotiated purchases seem to be preferable since they permit flexible treatment of the landowner's personal problems within the framework of the public agency's policies and objectives. For one aspect of the acquisition process, however, such a generalization cannot safely be made at the present time. In the matter of valuation of scenic easements, experience has not yet indicated whether just compensation is more realistically determined through negotiation or through condemnation litigation using a judge, a panel of commissioners, or a jury. The answer to this question will depend on how well the restriction of use which the scenic easement involves becomes understood—and how quickly this understanding comes. Studies of the effect of scenic easements on land value will be important in this matter.

# Valuation of Scenic Area Easements

E. R. LORENS, Engineer of Right-of-Way, Minnesota Department of Highways

•IN a proposal dated May 8, 1966, the Committee on Right-of-Way of the American Association of State Highway Officials offered certain guidelines for valuation of rights to be acquired and property damaged by implementation of the various provisions of the Highway Beautification Act of 1965.<sup>1</sup> With regard to taking of rights for landscaping and scenic enhancement, this proposal calls for just compensation measured by recognized valuation practice:

Just compensation shall be paid the owner of any area within or adjacent to the highway right-of-way for the taking of such rights as may be necessary for the restoration, preservation, and enhancement of scenic beauty, including acquisition of publicly owned and controlled rest and recreation areas, and sanitary and other facilities. Where applicable to partial acquisition, the evaluations of such rights shall be the difference in the market value of the property from which the rights are taken in its condition as part of the whole before the taking and its market value after the taking together with damages, less special benefits.

Section 305 of Title III of the Highway Beautification Act of 1965 provides as follows with regard to taking of buildings located within the limits of scenic areas:

Nothing in this Act or the amendments made by this Act shall be construed to authorize the use of eminent domain to acquire any dwelling (including related buildings).

This would seem to mean that although buildings cannot be acquired by condemnation proceedings, this section of the act does not prohibit acquisition of buildings by direct purchase if the state and the owner can come to terms on a price agreement for the buildings. This interpretation is desirable for removal of certain old delapidated buildings that may be within the limits of a scenic area, and where there is no intent to acquire by condemnation any farmsteads or other buildings for clearance of a site desired for a wayside area, an overlook, vista control, or similar purposes.

## VALUE BEFORE TAKING

Valuation procedure along newly constructed Interstate Highways is a comparatively simple process. On these projects the appraisals used for acquisition within the past two to five years furnish an excellent starting basis for valuation of the entire property affected by proposed scenic area needs. Reference to the appraisal of after value for the original taking provides a starting point for the scenic easement's appraisal. In some cases ownership may have changed since the construction of the highway, particularly if a remnant parcel has been isolated or separated from the farmstead.

The complicating factor introduced by changes in ownership after the first acquisition makes it very desirable to acquire scenic controls at the time of the original right-of-way purchase.

Paper sponsored by Department of Legal Studies.

<sup>1</sup>Public Law 89-285, Oct. 25, 1965.



On trunk highways other than the Interstate System, it is likely that many scenic areas will necessarily have to be acquired long after the original acquisition. In these instances it will be necessary to start from the beginning to make a full-scale appraisal of the entire property before the taking, and another in recognition of the restrictions for scenic easement or possible total taking in fee simple.

#### VALUE AFTER TAKING

The value of the entire property after imposition of scenic area easement restrictions must consider the effect of those restrictions. Paragraph 1 in the Minnesota Scenic Area Easement, and the paragraph reserving to the owner the right to develop the lands in accordance with certain specified conditions, impose restrictions that must be considered for each parcel individually.

This requires one value estimate for best possible use without restriction, and a second estimate based on the allowable use. In transitional lands adjacent to a municipality, careful judgment must be exercised in predicting future development and present value of the property based on possible future uses such as industrial, commercial, and residential. A second value estimate is then required for the parcel based on allowable use. Total damage for scenic area easement is the difference between these two estimates. At present, the classic example of this type of easement is that established for the Merrywood Estates on the Potomac Palisades in Washington, D. C.<sup>2</sup>

A similar before and after approach must be used for lakeshore property with development potential. If certain types of cabins, prescribed lot sizes, boat landings, or private dock facilities are to be allowed by specific provision in the easement, the damages naturally will be considerably less than if this type of development is to be totally restricted. If the lakeshore has no potential of development, and would reasonably continue for many years in its present condition, payment for scenic easement would be nominal. Special consideration may be necessary, however, if it is reasonable to expect that the owner might choose to clear the land for agricultural use. In this case payment should be the difference between value for agricultural use less cost of clearing, with consideration of stumpage value, if any. The possibility of agricultural use must also be considered by the same approach for continuous strips of easement in forested areas.

Payment for restriction on dumping, as in paragraph 2 of the Minnesota Scenic Area Easement, should normally be only by token payment.

Restriction on removal of trees and shrubs requires payment based on judgment. This type of restriction in the front yard of a farmstead may require special provision, with assurance that the state will likewise be restrained from cutting any specimen trees or shrubs. Certainly development of residential or lakeshore property will require some tree cutting, and the easement should be specific beyond all reasonable doubt as to those privileges and payments allowed to each of the parties.

Restriction of utility poles and pole lines should require no substantial payment inasmuch as it is generally expected that payment by a utility company for its easement is for the value of such easement as a burden on the property. Their restriction by terms of scenic easement would simply require placement of a utility line beyond the limits of the controlled area with payment therefor by the company, unless allowed within the scenic area by permit from the Commissioner of Highways.

The foregoing procedures would seem to apply especially to scenic areas other than those in corridor development. For a scenic corridor, mass appraisal practice is practical, although even by this method a "before value" of the property should be established either from the previous appraisals, or by mass evaluation and basic land value for various types of land in an entire project. It is totally impractical to require detailed individual parcel appraisals for a lengthy corridor project if controls are to

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<sup>2</sup>This case has been reported in three issues of *The Appraiser*, published by the American Institute of Real Estate Appraisers in Dec. 1963, Feb. 1964, and Nov. 1964.

be by scenic area easement. It is expected that the amount of money involved for each parcel will be comparatively small, and will come within the limits allowed by the U. S. Bureau of Public Roads for value findings in appraisal and acquisition of nominal cost tracts. These will be based on good judgment by competent personnel.

#### EFFECT OF TAKING

The effect of scenic area easement restrictions must be based on judgment unless adequate documentation is available in support of value after taking. Certainly judgment must be used as the only basis for payment for simple restriction on tree cutting in rural areas or in a farmstead. As of this date there are no available studies of after value similar to those which are now very common for remainder tracts sold after basic right-of-way acquisition and highway construction.

Several years ago the effect of partial takings and restrictions of access for ordinary right-of-way acquisition was based on judgment only, but it can now be based on comparison with actual sales of remainder tracts. We can reasonably expect that within a few years there will be similar data available to show the effect of scenic area easement restrictions.

Future studies may show that there are special benefits due to scenic area controls just as there are by highway construction. It is possible that these controls will be even more effective than present zoning ordinances in holding values at consistent level. Zoning is subject to change, whereas scenic area easements will be permanent. Even now some owners are very receptive to the idea of scenic area control for that very reason.

For the purpose of illustration, four hypothetical appraisals have been prepared and are submitted as examples of valuation of scenic area easements and fee acquisition: (a) safety rest area and scenic area easement (Appendix exhibits 2 and 4); (b) scenic area easement only (Appendix exhibit 3); (c) scenic easement in corridor and river area (Appendix exhibit 5); and (d) scenic easement—river frontage (Appendix exhibit 6).

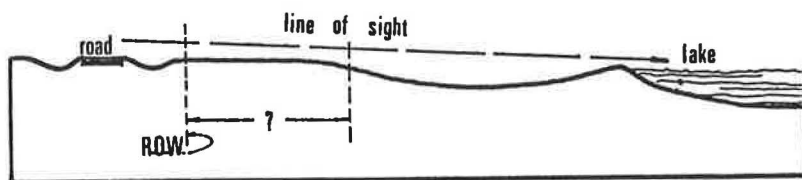
These appraisal examples include a parcel sketch and appraisal data for one parcel along the Chippewa River in Wisconsin. This information was provided by B. J. Mullen, Director of Right-of-Way in Wisconsin.

For better presentation and understanding of the types of control to be acquired, air photos of projects in Minnesota are shown as examples of the various types previously described (Appendix). These are the same parcels on which illustrative appraisals and parcel sketches have been prepared based on hypothetical ownerships.

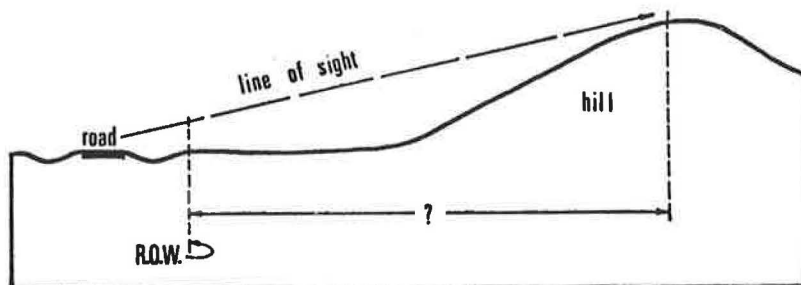
## Appendix

### EXHIBITS

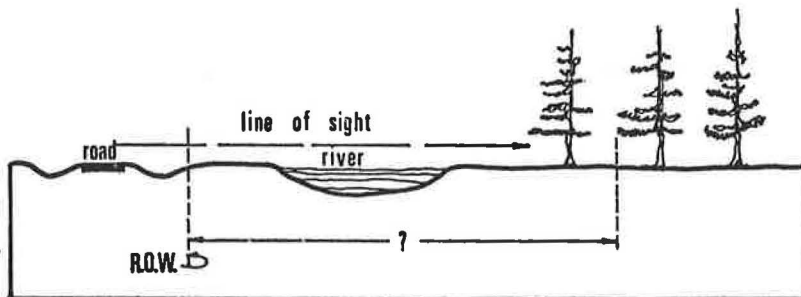
#### 1. Typical Sections—How Far Should a Scenic Easement Extend?



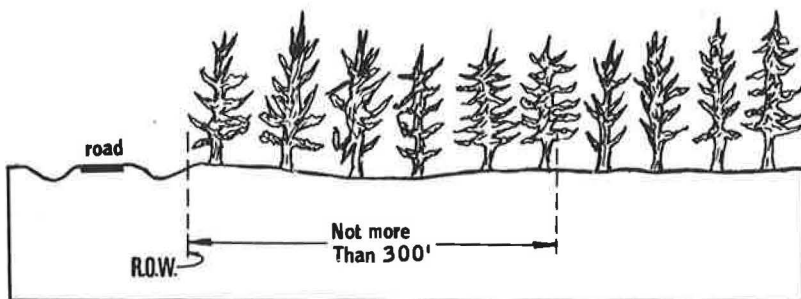
A DOWNHILL



B UPHILL

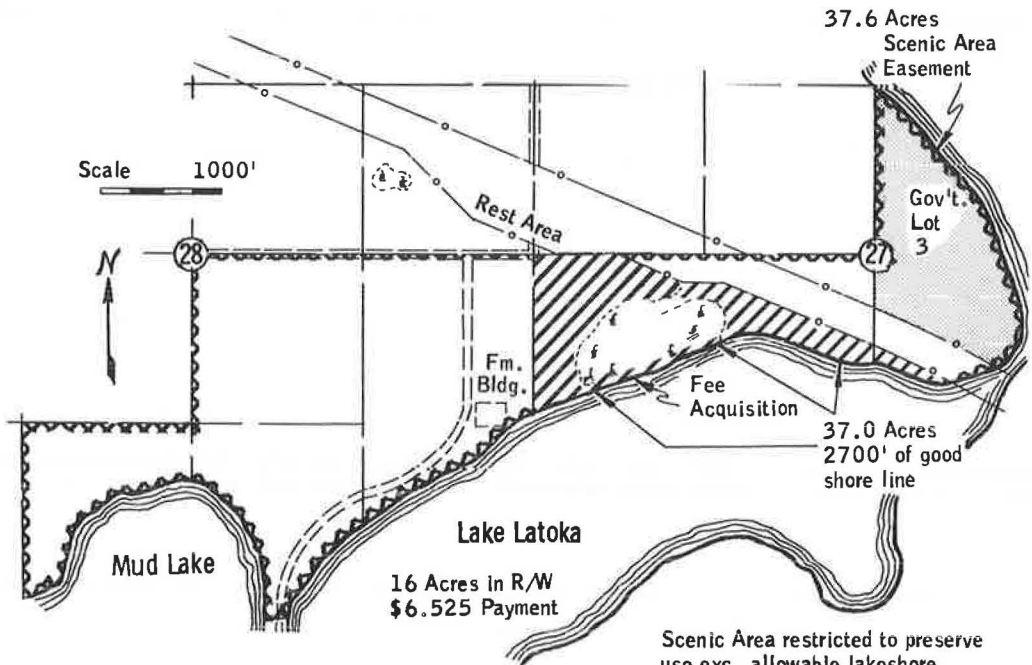


C FLATLAND



D HEAVY TIMBER

2. Safety Rest Area and Scenic Area Easement, Lake Latoka



Scenic Area restricted to preserve use exc. allowable lakeshore improvement with certain type cabins and selected timber cutting by permit

<u>BEFORE VALUE</u>	163 A. SOUTH OF HIGHWAY	136 A. Tillable	\$125/A	\$17,000	
		9 A. Lakeshore	400/A	3,600	
		18 A. Waste	5/A	90	
		Buildings		<u>3,200</u>	\$23,890
	37.6 A. NORTH OF HIGHWAY (isolated)	9 A. Lakeshore	\$200/A	\$1,800	
		28A. Wooded	25/A	<u>700</u>	
		Pasture			<u>2,500</u>
					\$26,390
					Rounded to \$26,500
<u>AFTER VALUE</u>	126 A. SOUTH OF HIGHWAY	126 A. Tillable	\$125/A	\$15,750	
		Buildings		<u>3,200</u>	\$18,950
	37.6 A. NORTH OF HIGHWAY (Isolated)	9 A. Lakeshore	\$100/A	\$ 900	
		28 A. Wooded	25/A	<u>700</u>	
		Pasture			<u>1,600</u>
					\$20,550
					Rounded to \$20,500
					Total Damages \$6,000
<u>BREAKDOWN OF DAMAGES</u>					
Scenic Area	9 A. Lakeshore	\$100/A	\$	900	
Fee acquisition	10 A. Tillable	125/A		1250	
	18 A. Waste	5/A		90	
	9A. Lakeshore	400/A		<u>3600</u>	
	Total		\$5840		Rounded to \$6000

LAKE LATOKA

Before value of this 200 acre farm is based on the after value of this parcel as found in the parcel file for original taking. Basic values have been verified as current value as shown in parcel sketch and hypothetical appraisal.

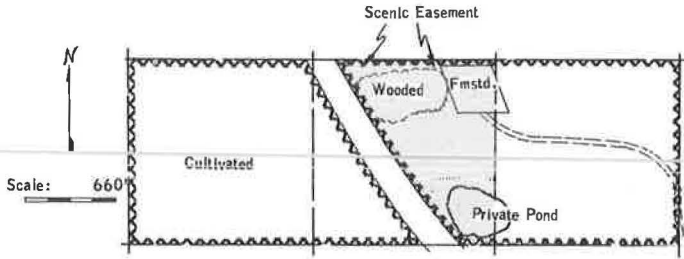
Appraisal narrative refers to lakeshore frontage south of highway valued at \$400 per acre for 9.0 acres and 18 acres of waste land at \$5 per acre. This area is to be acquired in fee for expansion of safety rest area. The farm buildings are unaffected by proposed taking.

Scenic area easement includes 37.6 acres of wooded area north of highway. This area was isolated from the home tract by highway taking and includes 9.0 acres of lakeshore property valued at \$200 per acre because of isolation. Scenic easement for this area will allow lakeshore improvement with one cabin on each 200 feet frontage and selective tree cutting permitted for that type of development only. This restriction will cause a 50% depreciation in value (already depreciated by 50% due to isolation). Continued present use of the remainder with tree cutting restriction, should cause no damage more than that allowed for lakeshore restriction.

This is a good example of tailoring to fit special conditions.

Appraisals must be on before and after basis - recognizing highest and best use in each case.

3. Scenic Area Easement



<u>BEFORE VALUE</u>	<u>EAST OF HIGHWAY</u>	
20 A. Cult.	\$75/A	\$1500
25 A. Pasture	65/A	1625
10 A. Pond	5/A	50
Bldgs.		4000
		<u>\$7175</u>
	<u>WEST OF HIGHWAY</u>	
50 A. Cult.	\$70/A	<u>\$3500</u>
	<u>TOTAL VALUE</u>	<u>\$10675</u>

Total restriction on cutting hardwood  
Timber Pasture

<u>AFTER VALUE - EAST OF HIGHWAY</u>		
20 A. Cult.	\$75/A	\$1500
25 A. Pasture	50/A	1250
10 A. Pond	5/A	50
Bldgs.		3500

<u>WEST OF HIGHWAY</u>		
50 A. Cult.	\$70/A	<u>3500</u>
<u>AFTER VALUE</u>		<u>\$9800</u>

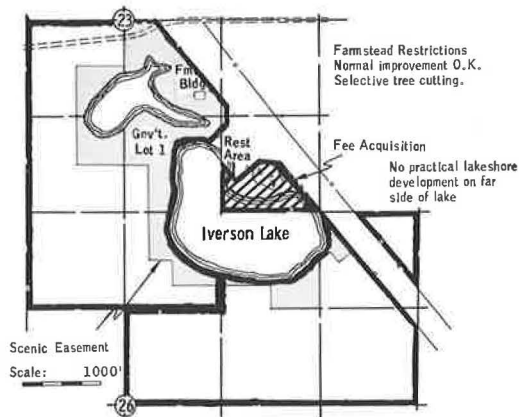
Total Damages \$875

BREAKDOWN

Scenic Easement	25 A. Pasture	\$15/A	\$375
	Farmstead		<u>500</u>
	<u>TOTAL</u>		<u>\$875</u>

SCENIC EASEMENT FARMSTEAD - Basic value of \$75 per acre east of the highway is based on consideration of comparison sales data for cultivated land in the vicinity of the farmstead east of the highway. Comparison sales were also considered for establishment of value west of the highway in recognition of separation from the farmstead. \$15 per acre damage is allowed for scenic easement rights within the 25 acre tract between the farmstead and the highway. This is considered adequate allowance for total restriction on cutting hardwood timber in a very fine timber pasture. It will also preserve scenic rights in the vicinity of the small private pond. \$500 allowance is made for restriction of timber cutting and change from present scenic features in the immediate vicinity of the farmstead. This includes allowance for restriction on dumping of refuse and placement of unsightly buildings not in keeping with the quality of the farmstead.

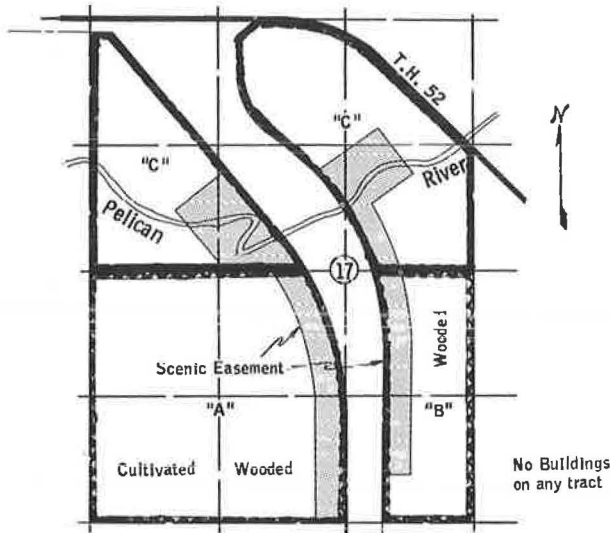
#### 4. Safety Rest Area and Scenic Area Easement, Iverson Lake



<u>BEFORE VALUE</u>	120 A. Cult.	\$80/A	\$9600	
	30 A. Pasture	30/A	900	
	9 A. Isolated	10/A	90	
	15 A. Fmstd.-Bldgs.		5500	
	<b>TOTAL</b>		<u>\$16090</u>	
 <u>AFTER VALUE</u>	120 A. Cult.	\$80/A	\$9600	
	30 A. Pasture	25/A	750	
	15 A. Fmstd.-Bldgs.		5000	
	<b>TOTAL</b>		<u>\$15350</u>	
	<b>TOTAL DAMAGES</b>	\$740	ROUNDED TO	\$750
 <b>BREAKDOWN OF DAMAGES</b>	Fee Acquisition	9 A Isolated	\$90	
	Fmstd. Easement		500	
	Scenic Easement	30 A \$5/A	150	
	<b>Total Damages</b>		<u>\$740</u>	

**LAKE IVERSON** - This 174 acre farm includes considerable timbered area adjacent to Iverson Lake. The lake itself has no potential lakeshore development. There are 9 acres of land directly adjacent to the present rest area that have been isolated from the remainder of the farm tract and separated from the farm buildings by the present rest area. Value of this nine acre tract was estimated in previous acquisition at \$10 per acre and is to be acquired in fee. Total payment in this taking should be the same. \$500 allowance is to be made for farmstead restrictions but with allowance of nominal improvement in keeping with the quality of the farmstead. Selective cutting will also be allowed but only by permit from the Commissioner of Highways. Scenic allowance of \$5.00 per acre for 30 acres along the lakeshore is considered reasonable because of limited restrictions as to tree cutting only with allowance for continued use as pasture.

5. Scenic Corridor and River Area, Pelican River



Tract "A"	Cult.	80 A.	\$80/A	\$6400
	Wooded	75 A.	30/A	2250
	Easement area	18 A.	20/A	360

Total Restriction on Cutting - Clearing Cost \$50/A  
Pasture rights Reserved

Tract "B"	Same Basic Value			
	Easement Area	16 A.	\$20/A	\$320

Tract "C"	River Bottom Land = Value	\$20/A	
	Easement Area	25A	\$20/A \$500

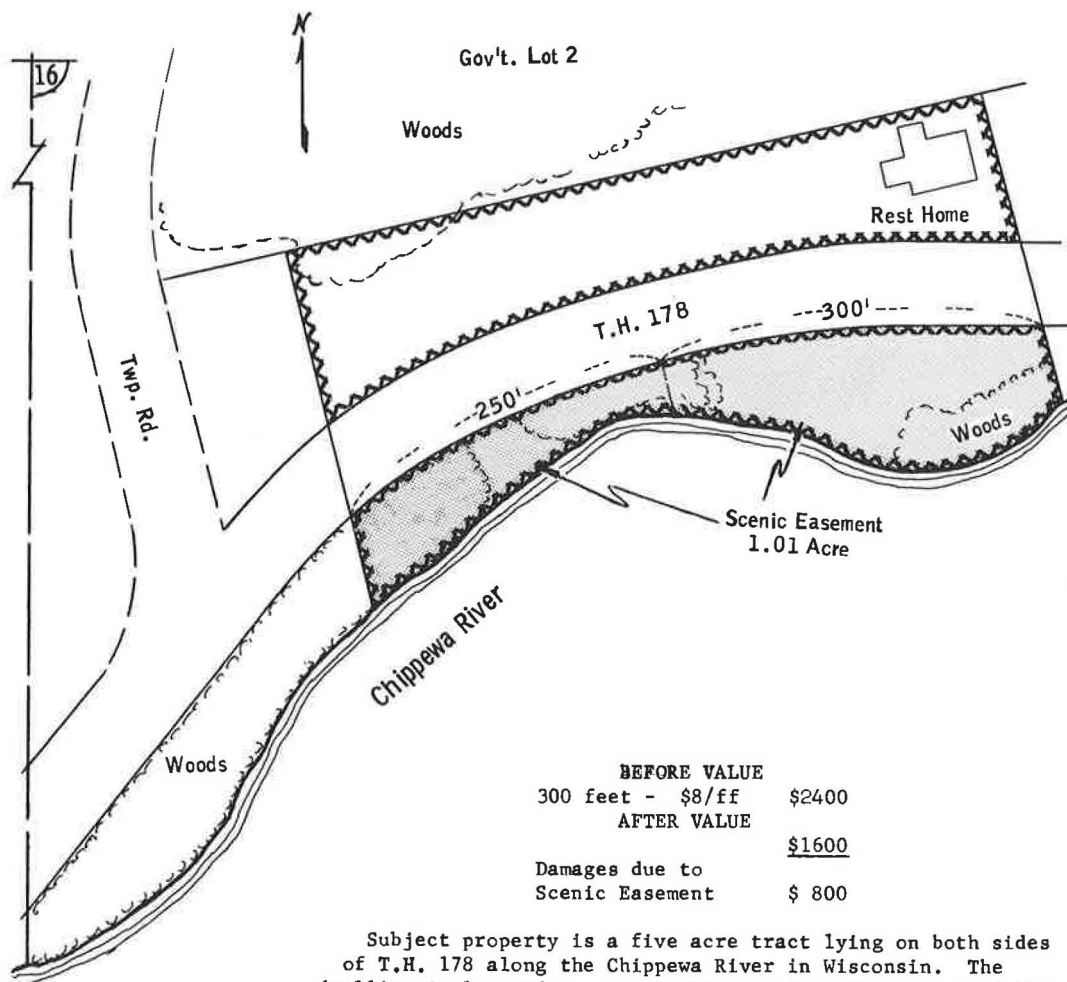
Restrictions Equal Fee Value

PELICAN RIVER - Much of this tract is low bottom land. This is the part adjacent to the river. Some of the bottom land is also heavily wooded. The tract has adequate water all summer long and makes an ideal calf pasture. Valuation at \$20 per acre for that part in the vicinity of the river is reasonable. The wooded tracts affected by scenic corridor easement are high land suitable for agricultural use if cleared. Therefore basic value at \$30 per acre is reasonable in consideration of the cost of clearing to make the land available for agricultural use. Estimated payment for scenic easement at \$20 per acre is in consideration of selective cutting and restriction for other use.

This parcel has special stumpage value for timber. Value approach is the same as for forest land.



## 6. Scenic Easement—River Frontage



Subject property is a five acre tract lying on both sides of T.H. 178 along the Chippewa River in Wisconsin. The dwelling is located across the highway from the river and the surrounding grounds along the area directly across the highway are well landscaped. Area between the highway and the river will be covered by scenic easement and due to the fact that the easement will not adversely affect the home tract, that portion is not considered in the appraisal.

The easterly 100 feet of the easement area averages about 100 feet in depth and has a steep bank to the river. The balance of the easement area is very narrow and has little use other than providing a view and access to the river.

By comparison with other sales of river frontage the value of the easterly 100 feet was estimated at \$800 per foot or \$2400 for 300 feet of frontage. To estimate value after restrictions of scenic easement have been imposed, the appraiser assumed that the owner would want no buildings nor mobile homes in the area across the highway from the house but on the other hand, he felt it could be very possible that another prospective purchaser may be more interested in revenue from rental of trailer stalls or sale of cottage sites. Scenic easement as tailored for this parcel, permits use of shoreline for private boat landing, dock or bathing beach. No mobile homes, house trailer or other portable structures will be allowed. Selective tree cutting by the owner is allowed by permit only.

The appraiser felt that restrictions of the easement depreciated the value of the tract by one-third and made a total allowance of \$800 for scenic easement damages. He made no allowance whatever for the westerly 250 feet of the easement area.

# Valuation of Advertising Rights

JON R. KERIAN, Special Assistant Attorney General, North Dakota State Highway Department

•"ADJACENT to the heath, and facing a certain road, is a public house called the Princess of Wales; and on the heath and close to the public house, and on the opposite side of the road, is a signpost fixed into the soil of the heath, with the sign and name of the public house or other inscription relating to the public house."<sup>1</sup>

The signpost had stood for many years but blew down one night, and Mrs. Hoare, the innkeeper, started to erect a new one. The Metropolitan Board brought an action against Mrs. Hoare for violating the Metropolitan Commons Act of 1866 regarding encroachments on the heath. The Act also provided that no estate or right of a profitable or beneficial nature could be taken without consent unless compensation was paid.

The Court found that Mrs. Hoare was not guilty of violating the Act because, as Justice Blackburn said, "The question is, whether the right to erect and repair the signpost is an estate, interest or right in, over or affecting the heath. It is difficult to see why it is not. It is a right which the lord of soil could grant."<sup>2</sup>

Because Mrs. Hoare's sign was a valuable property right, compensation must be paid for its proscription.

This case may not be the wellspring of our troubles, but it was the earliest one I could find which held the placing of a sign to be a valuable property right.

How do we regulate and control these judicially pronounced rights but legislatively determined eyesores?

Two tools resorted to are eminent domain and police power.

"The effectiveness of eminent domain is restricted by the necessity that the purchase must be for public use, by the complexity of administrative precedures [sic] and by the high cost of reimbursing property owners,"<sup>3</sup> but "police power is not restricted to the suppression of nuisances. It includes the regulation of the use of property to the end that the health, morals, safety and general welfare may not be impaired or endangered."<sup>4</sup>

The use of police power to eliminate what have come to be regarded as property rights has been closely scrutinized by the courts, all of which seem to need at least one of the magic ingredients of health, welfare or morals present, in varying degrees, before the remedy of police power is considered constitutional. Anything that falls short is a deprivation of property without compensation.

Holmes admonished in 1922 that, "we are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."<sup>5</sup>

Fortunately, the courts are rapidly retreating from the bellwether New Jersey case regarding the control of advertising based in part on aesthetics, in which the Court said, "we think the control attempted to be exercised is in excess of that essential to effect the security of the public. It is probable that the enactment. . . of the ordinance was due rather to aesthetic considerations than the considerations of the public safety," and held the ordinance invalid.<sup>6</sup>

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Paper sponsored by Department of Legal Studies.

<sup>1</sup> Hoare v. The Metropolitan Board of Works, LR. 9 QB 296 (1874).

<sup>2</sup> Id. at 300.

<sup>3</sup> Grant v. Mayor and City Council of Baltimore, 212 Md. 301; 129 A. 2d 363, 365-66.

<sup>4</sup> City of Los Angeles v. Gage, 274 P. 2d 34, 38 (1954).

<sup>5</sup> Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

<sup>6</sup> City of Passaic v. Paterson etc., 72 NJL 285, 6 Atl. 267, 268 (1905).

Although the courts have not adopted a rule whereby the aesthetic is the sole factor in a valid exercise of police power, most courts confronted with the problem have wed the aesthetic to a suitable mate—safety or morals—to form an acceptable union. In most instances these are shotgun weddings, and an oft-quoted adage points this out succinctly: "Beauty may not be queen but she is not an outcast beyond the pale of protection or respect. She may at least shelter herself under the wing of safety, morality or decency."<sup>7</sup> *Berman v. Parker*, however, gives an indication of what the United States Supreme Court might do if cases are brought before it where aesthetics alone is the basis for the exercise of police power.<sup>8</sup> And the Kentucky Supreme Court has gone so far as to say with respect to the billboard industry's efforts to show that signs along the highway are not inimical to traffic safety, that even if it "chipped a stone [it] could not destroy the mosaic of public welfare."<sup>9</sup>

The 1958 Highway Act spawned much litigation, but the attacks on legislation regulating outdoor advertising adjacent to the Interstate Highways were generally parried by the argument that "the safety, well-being and legitimate enjoyment of the public in the use of the highways is the paramount consideration of the bill."<sup>10</sup>

In retrospect, it now seems so simple when all we had to do was to regulate advertising along a highway that was not yet built, when the "valuable right" was worth little or nothing. Now we are called on to control and remove signs presently in existence. How will the courts view the use of police power or condemnation for the elimination of these signs?

We have seen where the control of outdoor advertising adjacent to an Interstate was an important public gain. Is that gain less because it is to be derived from beautiful and safe primary highways rather than from beautiful and safe Interstate highways? Maryland's highest court seems to think this makes no difference.

The distinction between an ordinance that restricts future uses of land and one that requires existing uses to stop after a reasonable time, is not a difference in kind but one of degree, and in each case, constitutionality depends on overall reasonableness, on the importance of public gain in relation to the private loss.<sup>11</sup>

The United States Supreme Court has said that "police power is the least limitable of the powers of government. . . and extends to all the great public needs."<sup>12</sup> We must operate on the assumption that the same public needs are present for primary highways as many of today's courts have held those needs present for Interstate highways.

"The earnest aim and ultimate purpose of zoning was and is to reduce nonconformance to conformance as speedily as possible with due regard to the legitimate interest to all concerned."<sup>13</sup> Nonconforming uses were allowed so as not to antagonize the owners of the very things the zoning laws sought to eliminate. It was expected that they would be few and would quickly disappear. Because there is a greater value in

<sup>7</sup>*Perlmutter v. Greene*, 259 N.Y. 327, 182 N.E. 5, 6 (1932). See also *New York State Thruway Authority v. Ashley Motor Court, Inc.* 10 N.Y. 2d 151, 176 N.E. 2d 566 (1961) (any showing of considerations such as "maximum safety," the prevention of "unreasonable distraction" or "confusion" coupled with aesthetics is a valid exercise of police power), and *In Re Opinion of Justices*, 103 N.H. 268, 169 A. 2d 762 (1961).

<sup>8</sup>"Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it," 348 U.S. at 32.

<sup>9</sup>*Moore v. Ward* (Ky.) 377 S.W. 2d 881, 884.

<sup>10</sup>*In Re Opinion of Justices*, 103 N.H. 268; 169 A. 2d 762 (1961).

<sup>11</sup>*Grant v. Mayor and City Council of Baltimore*, 212 Md. 301; 129 A. 2d 363, 369.

<sup>12</sup>*People v. Nebbia*, 26 N.Y. 259, 270; 183 N.E. 694, 699; *Affd.* 291 U.S. 502.

<sup>13</sup>*Grant v. Mayor and City Council of Baltimore*, 212 Md. 301, 129 A. 2d 363, 365.

having a monopolistic nonconforming use, as highway lawyers know from condemnation experience, and because of the many abuses by zoning boards granting variances, these nonconforming but lawful uses have not vanished.

Pre-existing lawful nonconforming uses have not faded out or eliminated themselves as quickly as has been anticipated, so "zoning zealots" have been casting about for other methods or techniques to hasten the elimination of nonconforming uses. In this process, the eminent domain power has been used only on rare occasions, primarily because of the expense of compensating damaged property owners. At the same time, however, increasing emphasis has been placed on the "amortization" or "tolerance" technique which conveniently bypasses the troublesome element of compensation. The "amortization" technique the Missouri court referred to in a recent case is nothing more than this: the cessation of the extraneous use after a certain period of time based on the normal useful remaining life of the use.<sup>14</sup> Judge Van Vorhees in his dissent in *Harbison v. City of Buffalo* (4 N. Y. 2d 553; 152 N. E. 2d 42) called the term an "empty shibboleth" because it was not based on an amortization theory, and does not have the same meaning in zoning that it has in law or accounting. It is true that the zoning meaning is different from the accounting meaning, but it is proving to be an increasingly useful concept in land-use control. Amortization in zoning could be called the legislated limits of a person's patience.

One California Court has said, "it would seem to be the logical and reasonable method of approach to place a time limit upon the continuance of existing nonconforming uses, commensurate with the investment involved and based on the nature of the use; and in cases of nonconforming structures, on their character, age and other relevant factors."<sup>15</sup> The use of the amortization method of eliminating nonconforming uses has been sustained in many instances.<sup>16</sup> Other courts, although not ruling on the validity of the amortization theory directly, have indicated that it would be sustained in a proper case.<sup>17</sup>

"Aesthetic considerations are of sufficient potency for the legislature to find a public necessity for this type of legislation," the Kentucky court has declared. "We have recently considered that question and have accepted the aesthetic considerations as justifying the exercise of police power."<sup>18</sup>

One of the most important and far-reaching developments in Kentucky within recent years has been the construction and improvement of its major highways. Many concepts of twenty years ago are obsolete. Concepts today may be obsolete twenty years from now. This is where the legislature

<sup>14</sup> *Hoffman v. Kineally*, 389 S.W. 2d 745, 750 (1965). While the Special Judge A.P. Stone in writing for the Court (Hyde dissenting) uses language generally found in a sour grapes dissent, he does recognize the problem of getting that famous "pig" out of the parlor and back in the barnyard (*Euclid v. Ambler Realty Co.* 272 U.S. 365), but he conveniently harks back to the body of law which has grown up since the "zoning zealots" first let a nonconforming use stay, and closes his eyes on the laudable purpose of zoning.

<sup>15</sup> *City of Los Angeles v. Gage*, 274 P. 2d 34.

<sup>16</sup> *Standard Oil Co. v. City of Tallahassee*, 183 F. 2d 410, cert. den. 340 U.S. 892; *Livingston Rock etc. Co. v. County of Los Angeles*, 483 Cal. 2d 121, 272 P. 2d 4.; *City of Los Angeles v. Gage*, 274 P. 2d 34; *State ex rel. Dema Realty Co. v. MacDonald* 168 La. 172, 121 So. 613 (1921); *State ex rel. Dema Realty Co. v. Jacoby*, 168 La. 752, 123 So. 314 (1921); *Grant v. Mayor and City Council of Baltimore*, 212 Md. 313, 129 A. 2d 363; *Harbison v. City of Buffalo* 4 N. Y. 2d 553, 152 N. E. 2d 42.

<sup>17</sup> *Village of Oak Park v. Gordon*, 32 Ill. 2d 295, 205 N.E. 2d 464; *Stoner McCray System v. Des Moines*, 247 Iowa 1313, 78 N. W. 2d 843, 58 ALR 2d 1304.

<sup>18</sup> *Jasper v. Commonwealth*, 375 S. W. 2d 709, 711 (Ky.). Here the Court held "the obvious purpose of this act is to enhance the scenic beauty of our roadways by prohibiting the maintenance of unsightly vehicle graveyards within the view of travel thereon. While there may be a public safety interest promoted, the principle objective is based upon aesthetic consideration. Though it has been held that such considerations are not sufficient to warrant the invocation of police power, in our opinion the public welfare is not so limited."

plays its part in the social order. Automobile traffic and highways play a bigger role in public life everyday. The extent or method of their regulation must be left to the legislature if the means bear reasonable relationship to a legitimate end.<sup>19</sup>

The Kentucky statutes under consideration in the Moore case regulate outdoor advertising within 660 feet of the right-of-way of an interstate or limited-access highway, and the statutes were upheld.<sup>20</sup> Could the Kentucky court take an opposite view of the state's police power when the question of regulation of signs adjacent to primary highways comes under consideration? I do not see how it could consistently do so, nor could the other states which have pronouncements on this question. Kentucky, in its billboard act, used a five-year tolerance or amortization period; on the expiration of that time, existing signs erected prior to the act must be removed. In this respect the state of Kentucky did what the city of Baltimore did in its municipal ordinance in the Grant case, where the city sought the removal of lawful nonconforming billboards in a residential area, and set five years as the amortization period. The Maryland court held that this was a valid exercise of police power.

Most cases upholding the amortization method involve municipalities, but this fact does not weaken the parallel between the two types of regulations.

A municipality has no inherent power to enact a zoning ordinance. The power to do so results from statutory or constitutional authorization. The governmental authority known as the police power is inherently an attribute of state sovereignty that belongs to the subordinate governmental division when and as conferred by the state either through its constitution or valid legislation.<sup>21</sup>

Some courts which are hesitant to allow the control of outdoor advertising by police power have no difficulty where the exercise of eminent domain is used for the same purpose. Where eminent domain is used, it appears that aesthetics alone will be sufficient to show public necessity for the taking.

The Missouri court demonstrates this in two recent cases.<sup>22,23</sup> The Hoffman case refused to allow the city of St. Louis to use the amortization method in eliminating a nonconforming use; but in 1923 the court allowed Kansas City to acquire a strip of land by condemnation adjacent to a street to prohibit any use of the property except as a greensward, saying:

[T]here is not a single argument or reason advanced in favor of the constitutionality of an act or ordinance providing for a public park, or for a parkway along the street between the city block and the driveway, over which the public cannot travel, which does not apply to the ordinance in this case.

The parkway along the street is not traveled; it is not taken in possession by the public in the sense that the public occupies it; it is merely ornamental, that tends to enhance the attractiveness of the street and the value of the property upon the street; it has an educational value that promotes the physical enjoyment of the people who travel the street.<sup>24</sup>

The U. S. Supreme Court has said:

<sup>19</sup> Moore v. Ward, Ky., 377 S.W. 2d 881, 884.

<sup>20</sup> KRS 177.830-177.990 (1960).

<sup>21</sup> Peterson v. Vasak, 162 Neb. 498, 76 N.W. 2d 420, 422. See also Schloss v. Jamison, 136 S.E. 2d 691, 695.

<sup>22</sup> Hoffman v. Kineally, 389 S.W. 2d 745 (1965).

<sup>23</sup> In Re Kansas City Ordinance No. 39946, 298 Mo. 169, 252 S.W. 404, 28 ALR 295 (1923).

<sup>24</sup> Id. at 409.

It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.... Once the object is within the authority of Congress the right to realize it through eminent domain is clear.<sup>25</sup>

An earlier statement on the same subject can be found in the case of *Commonwealth v. Boston Advertising Co.*,<sup>26</sup> which held:

[T]hat the promotion of the pleasure of the people is a public purpose for which money may be used and taxes laid even if the pleasure is secured merely by delighting one of the senses.... The question here is not the power of the state to expend money or to lay taxes to promote aesthetic ends, or to regulate the use of property with a few to promote such ends. It is the right of the state by such regulation to deprive the owner of property of a natural use of that property without giving compensation for the resulting loss to the owner.

Also the Minnesota Supreme Court, in upholding condemnation for purely aesthetic purposes where no land was actually taken but the use of the land restricted, has said, "It is time for the courts to recognize the aesthetic as a factor in life."<sup>27</sup>

The definitive treatise on municipal corporations states as a general proposition "that the use of the power of eminent domain to effect zoning may be essential to cause the removal of existing structures which are entitled to constitutional protection against removal under police power. The use of condemnation to zone occurred in some instances before complete recognition was given by the courts to the full power of zoning under the police power."<sup>28</sup>

In the vast majority of the states, eminent domain is predicated solely as an attribute of sovereignty and no constitutional provision is needed for its exercise, but it exists in absolute and unlimited form.<sup>29</sup> As with zoning, the power of eminent domain has to be delegated to lesser subdivisions to cloak them with the authority to condemn property for public uses.<sup>30</sup>

No court in deciding the constitutionality of a zoning act which gives the state agency the power to zone adjacent to highways throughout the entire state could hold that a state has less power in this respect than its municipalities. The state must have at least as much power as it can delegate. This must hold true for a state's acquisition of advertising rights by eminent domain function.

Since 1959 North Dakota has acquired all advertising rights 660 feet on either side of the Interstate right-of-way limits. Fifty dollars per mile for each side of the Interstate has been the amount used in the state's appraisals, and the state highway department has been successful in having this accepted by the landowners. Naturally, if the landowner goes to court, his damages for the loss of advertising rights trebles, but the landowners and their appraisers have not been persuasive in convincing the jury of their loss.

<sup>25</sup> *Berman v. Parker*, 348 U.S. at 33.

<sup>26</sup> 188 Mass. 348; 74 N.E. 601; 69 LRA 817; 108 Am. St. Rep. 3 (1905). Massachusetts mellowed sufficiently by 1935 to hold a statewide use of police power to prohibit signs which interfered with natural beauty or historic sites valid saying: "It is, in our opinion, within the reasonable scope of the police power to preserve from destruction the scenic beauties bestowed upon the Commonwealth by nature in conjunction with the promotion of safety or travel on the public ways and the protection of travelers from the intrusion of unwelcome advertising." *General Outdoor Advertising Co. v. Department of Public Works*, 289 Mass. 149 193 N.E. 799, 816 (1935).

<sup>27</sup> *State ex rel Twin City etc. v. Houghton*, 144 Minn. 1, 176 N.W. 159, 162.

<sup>28</sup> 8 McQuillen, *Municipal Corporations*, Sec. 25.33 (1965 rev. vol.).

<sup>29</sup> 1 Nichols, *Eminent Domain*, Sec. 1.14 (2) 3d ed.

<sup>30</sup> *Spencer v. Village of Wallace*, 153 Neb. 536, 45 N.W. 2d 473, 478; *Emmanuel v. Twinsburg Tp.* 94 Ohio App., 114 N.E. 2d 620; *Richardson v. Cameron County (Texas)* 275 S.W. 2d 709.

North Dakota, like Kentucky, has the power to control billboards only adjacent to Interstate and limited-access highways.<sup>31</sup> The use of highway funds for the purchase of advertising rights has been challenged on antidiversion grounds and the Supreme Court in the case *Newman v. Hjelle* upheld the constitutionality of such acquisitions.<sup>32</sup>

To control advertising on the primary highway system North Dakota will have to have appropriate legislation as, undoubtedly, will most other states. North Dakota needs both police power legislation and eminent domain legislation to deal effectively with the primary highway system. It needs police power legislation to designate the highway commissioner to be the zoning authority for the whole state highway system to implement an amortization basis for existing structures. But, more importantly, our eminent domain statute needs to be amended to include acquisition of advertising rights along primary highways as well as the Interstates. It is felt that North Dakota, apart from being able to control advertising adjacent to Interstates, has the authority to prohibit signs from being erected adjacent to the primary system now that the Commissioner has exercised what police power he has.

On December 3, 1965, the Commissioner acting pursuant to Section 24-04-01 NDCC<sup>33</sup> promulgated an order under the Administrative Agencies Practices Act (the order has the stamp of legality by the Attorney General), prohibiting the erection of billboards after that date from an area within 660 feet of the nearest edge of the right-of-way along both the primary and Interstate system, unless his permission is obtained. A companion order was also issued prohibiting the establishment of junkyards within the 1,000 feet prescribed by the Highway Beautification Act.

Manipulation of the statute relied upon by the Commissioner's authority to control the erection of billboards subsequent to the promulgation of the order was held to be a valid type in the case of *Brown v. McMorran* 257 N. Y. S. 2d 74 where the court said:

[I]n our opinion, Sec. 85 of the Highway Law directs the Superintendent of Public Works to do all acts necessary to comply with the Federal Aid Highway Acts (23 U.S. Code, Sec. 101 et seq.) and the rules and regulations promulgated thereunder. The state statute (Highway Law, Sec. 85) evinced the clear intent of the state legislature to secure all the funds allotted to the state by the Federal Government for construction of roads in the Interstate system. Therefore, unless the State Superintendent of Public Works complied with the conditions imposed by the Federal Highway Administrator and secured the latter's approval, the intention of the legislature would be defeated.

The outdoor advertising industry in North Dakota has abided by the highway department's ruling on this matter. But this does not include billboards in existence before the issuance of the Commissioner's order, for he feels he should have a clear statute granting him that power.

Naturally, if this legislation is passed in 1967 the state can purchase advertising rights on every mile of primary highways, and the Commissioner will be able to set a five-year amortization basis on all signs. However, inasmuch as this legislation will be enacted in 1967 the five-year amortization period will bring us into 1972, or a few years beyond the date set by the Beautification Act for the accomplishment of its purpose. To obviate the loss of any income by the states' failure to live up to the

<sup>31</sup> NDRC 24-01-32.

<sup>32</sup> 133 N.W. 2d 549 (1964).

<sup>33</sup> Assent to Federal aid given.—The legislative assent required by section 1 of the act of Congress approved July 11, 1916, Public Law No. 156, entitled "An Act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes," is hereby given. The commissioner is authorized and empowered to make all contracts and to do all things necessary to co-operate with the United States government in the construction of roads under the provisions of the said act or other act of Congress that hereafter may be enacted, including the Federal-Aid Highway Act of 1950 regarding secondary roads.

Beautification Act, our new legislation will be created for one purpose: to merge police power and eminent domain for the cheapest and most effective removal of non-conforming signs. The five-year amortization period will be placed on existing structures and eminent domain will be used to acquire the remaining years of the amortized signs rather than purchasing the remaining economic life of the advertising devices. Hopefully, North Dakota will be able to purchase only the amortized remaining life which will be anywhere from 0 to 5 years, and this will cut the cost of acquisition considerably.

Based on one example of a new, well-constructed sign, the following table shows the difference between acquisition costs for the remaining economic life without an amortization period and acquisition of the sign whose life is fixed at five years by police power:

Estimated net income per annum	\$100.00		
Estimated economic life of sign	20 years		
Age of sign	2 years		
Cost of ground lease per annum	35.00		
Cost of sign	500.00		
	<u>18 Years</u>	<u>5-Yr Life</u>	<u>2 Years of 5-Yr</u>
	<u>Remaining</u>	<u>Amortized</u>	<u>Life Expired</u>
\$100 per annum income capitalized at 12%	\$725.00	\$360.50	\$240.00
Ground lease of \$35.00 capitalized at 7%	352.06	143.50	91.84
Less salvage value	(15.00)	(25.00)	(25.00)
Estimated market value for acquisition of advertising rights	1,062.06	479.00	307.04
\$100 per annum income capitalized at 20%	481.20	299.00	210.60
Ground lease of \$35.00 capitalized at 7%	352.06	143.50	91.84
Less salvage value	(15.00)	(25.00)	(25.00)
	<u>\$818.26</u>	<u>\$417.50</u>	<u>\$277.44</u>

This is what the North Dakota highway department expects to do with the sign companies, and as far as the landowner is concerned the state will treat his claims on the "before and after" basis which was held valid in the rehearing of *Fulmer v. State Department of Roads*,<sup>34</sup> where the Court rules

[A]lthough there was evidence to the contrary, the state produced evidence that there was no difference in the value of the land before and after the taking of the easement; that the use of the land for advertising purposes would interfere with its use for agricultural purposes to some extent; and that the income produced from advertising use would be so small in comparison to the income received from agricultural use that in the negotiation

<sup>34</sup> 134 N.W. 2d 798 (Neb., 1965).



of the sale of the land the income from advertising use would be disregarded. This evidence supports the finding that the landowner was not damaged by the taking of the easement and is sufficient to sustain the verdict and judgment.

If North Dakota seems excessively parsimonious in its approach to removal of advertising signs, it is because the Federal law threatens the state with loss of highway funds if national standards for control are not put into operation. Apart from the practical inducement, however, the state believes what was said 30 years ago in the great Massachusetts billboard case:

[T]he only real value of a sign or billboard lies in its proximity to the public thoroughfare within a public view.... The object of outdoor advertising in the nature of things is to proclaim to those who travel on highways and who resort to public reservations that which is on the advertising device, and to constrain such persons to see and comprehend the advertisement.... In this respect the plaintiffs are not exercising a natural right,...they are seizing for private benefit an opportunity created for a quite different purpose by the expenditure of public money in the construction of public ways.... The right asserted is not to own and use land or property, to live, to work or to trade. While it may comprehend some of these fundamental liberties, its main feature is to use the superadded claim to use private land as a vantage ground from which to obtrude upon all the public traveling upon highways, whether indifferent, reluctant, hostile or interested, an unescapable propaganda concerning private business with the ultimated design of promoting patronage of those advertising. Without this superadded claim, the other rights would have no utility in the matter.<sup>35</sup>

Additionally the much heralded words of the early Philippine Island Court provides an epilogue: "We can see that the regulation of billboards and their restriction is not so much a regulation of private property as it is a regulation of the uses of the streets and other public thoroughfares."<sup>36</sup>

<sup>35</sup> General Outdoor Advertising v. Department of Public Works, 298 Mass. 149, 193 N.E. 799, 808.

<sup>36</sup> Churchill and Tait v. Rafferty, 31 P.I. 580. 609, appeal dismissed 248 U.S. 591.

# Valuation Problems in Roadside Areas: Junkyards

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•LA CROSSE, Wisconsin, is located on the scenic Mississippi River Parkway, and is the southerly of the two Interstate highway entrances into Wisconsin from Minnesota. A little over four years ago the plans for the Interstate highway interchange with US 53 and other local roads at La Crosse were completed. The city of La Crosse was immediately faced with the prospect of having a blight mar this scenic approach to the State of Wisconsin. In addition to the aesthetic values in this scenic portion of Interstate and Great River Road highways, local topography and ground elevations confined prospective commercial development and availability of travel services to a somewhat restricted portion of the overall area (Fig. 1).

In the center of the area having development potential was a tract of approximately 8¼ acres which had been used continuously, and with some degree of increasing intensity, as a junkyard. For many years it had become a classic example of an auto graveyard, with the usual marks of the trade, such as a furnace for reducing car hulks, baler, strewn car hulks, and minimal ineffective fencing or other screening (Figs. 2 and 3).

Junkyards are not new in Wisconsin or anywhere else in the country. Recent reports indicate that there are more junkyards (535) on the main portions of the primary state trunk system in Wisconsin than there are waysides (272), scenic overlooks (15) and historical markers (69) combined. Fourteen of these junkyards are along the Interstate system in Wisconsin. The La Crosse site was therefore somewhat of a first for Wisconsin, and set off a realization and thought process that was a little painful and rather enlightening. Considerable "soul searching" had to be done. In the La Crosse area direct contact with a particular junkyard was necessary because a portion of it was needed to accommodate construction of the proposed Interstate interchange facilities. The thought processes ran the usual route, considering the possibility or feasibility of resolving the matter by a screening, by zoning, the nuisance approach, and ultimately to acquisition and the problem of valuation.

## ALTERNATIVES TO ACQUISITION

### Screening

In appropriate cases a certain degree of success could be obtained by screening established within the highway right-of-way. In many cases, however, grades of roadways, either of the highway or of a grade separation or on interchange structures, prevent any effective screening from within the right-of-way or located on adjacent private lands. In approximately half of the cases, although not in the La Crosse instance, screening of some sort will afford relief, whether the screening is from within the highway right-of-way or located on adjacent privately-owned land. In Wisconsin, as in most other states during the past year, a rather substantial program of planting and landscaping for screening purposes has been underway, relative not only to junkyards, but also to other areas where elimination of particular views may be aesthetically desirable. Relative to privately-owned lands, the usual difficulties arise as to the nature of the covenant which would be effective yet conveniently enforceable. Uncertainty as to whether the state would take the initiative or require landowners by statute



Figure 1.

to screen the operation from public view within their own lands, and the practical impossibility of screening the subject site, caused this approach to be discarded from practical points of view.

Coincidental in point of time, legislation was proposed in Wisconsin which would have had the net effect of putting out of business those enterprises operating legally but incapable of being effectively screened due to local topography or elevation of the business enterprise or of the roadways. Wisconsin's bill would have required that ". . . All automobile junkyards shall be hidden from state, federal and county highways by an artificial or natural screening or by the natural topography. Screening may be effected by a fence or the foliage of shrubs, hedges or flowering plants." The act was to take effect ". . . two years from the date of its publication. . . ." The bill, however, was not reported out of committee. Even if successful, this type of screening requirement as a police power regulation would be somewhat tenuous, and several cases have already appeared to hold unconstitutional attempts to use police power to require screening within a stated period of years.<sup>1</sup> All in all, the screening possibility did not appear feasible, and was abandoned.

### Zoning

The present case involved a junkyard which had continued for some 27 years, and was licensed by the municipality. However, a nonconforming feature was that the operations (by area or quantity) of the operator had exceeded the area and/or quantities licensed by the municipality. The condition had continued, however, and either no attempt had been made or no successful attempt had been prosecuted by the municipality concerning this nonconforming phase. The particular land in question was zoned

<sup>1</sup>See *Farley v. Graney*, W. Va., 119 SE (2d) 833 (1960).



Figure 2.



Figure 3.

"industrial," which locally included ordinary commercial usage. Although the business was operated under a license from the city, three attempts in the past few years by the operator to obtain a license for expanded use had been rejected by the municipality after rather considerable objection on the part of the local residents and operators of other businesses. On each occasion the petition objecting to the expanded use was quite a voluminous document.

The proposed Wisconsin statute coincidentally would have been applicable to the present situation in another aspect. The statute specified that ". . . the permit issued by the common council or county, village or town board shall specify the quantity and manner of accumulation and storage of salvage or junked vehicles or parts thereof. The permit shall be revocable at any time. . . after a hearing at which it has been found that the permit holder has failed or refused to comply with an ordinance or restriction on the accumulation or storage or both of salvage or junked vehicles (which includes farm implements) or parts thereof. . . ." Thus the proposed law provided a remedy through zoning administration for nonconforming junkyards.

### Nuisances

Under the particular facts of this case it might have been a relatively simple task to "arrange" legal process to eliminate the junkyard operation, considering the almost militant objection of the area residents and other businessmen to applications to increase the scope of the operation. Presumably the action could have been founded on the nonconforming phase—the operation exceeded the terms of the license as issued by the municipality in scope, quantity and area—or merely on the offensive and obnoxious character of the business. Such a suggestion raises several questions. Should the state underwrite such a course of action, by agreement carrying the costs to litigate the issue, close it, and terminate the operation as a nuisance? Aside from the legality of a state agency underwriting such costs, such a course of action would of course expose the state to charges as a meddling outsider. This possibility was not even seriously considered.

### AUTHORITY FOR ACQUISITION

All of these possible approaches, therefore, after being carefully weighed in the light of pertinent legal and practical aspects, led to selection of acquisition as the best solution. This, of course, involved a rather substantial problem of valuation, and successful negotiations with the owner/operators. The portion of the total property required for highway purposes (and which accordingly could be condemned) was about one-fourth of the total area. The balance could not be condemned, but could be acquired under existing Wisconsin statutes where the public interest appeared and damages would be minimized. In the present case, the relatively limited area, the inability to expand the operation to adjacent lands, and the reduction of the licensed area due to highway taking, would have created an especially difficult valuation problem. Presently proposed legislation would grant authority to the State Highway Commission to condemn in situations such as this. The particular statute (Section 84.09, Wis. Stats. "Acquisition of Lands and Interests Therein") was to be expanded essentially as follows:

(1) The State Highway Commission may acquire by gift, devise, purchase or condemnation any lands for establishing, laying out, widening, enlarging, extending, constructing, reconstructing, improving and maintaining highways, streets, roadside parks and weighing stations which it is empowered to improve or maintain, or interests in lands in and about and along and leading to any or all of the same, including such lands or interests therein as may be deemed necessary under Section 15.60, and to effectively control outdoor advertising signs, displays and devices, junkyards, automobile graveyards, dumps and sanitary land fills, to effectively screen, control or eliminate such areas as may be deemed necessary or desirable in order to effect the preservation, restoration, or enhancement of natural beauty, landscaping and scenic enhancement along said highways and streets, as the legislature has directed, or may from time to time direct;....

The statute continues in present form concerning disposal of property deemed unnecessary for further highway purposes, perpetuating the constitutional provisions which are almost identical to the statutory text.

The new portion of the text (underscored) would appear to summarily resolve the problem. Under existing legislation, however, such "excess condemnation" would not be permissible. Nor was there any statutory authority to condemn for scenic or aesthetic considerations, except in strict compliance with established legislative priorities along the Mississippi River Parkway or Great River Road. The determination of necessity (or, as the statute would read: ". . . to effectively screen, control or eliminate such areas as may be deemed necessary or desirable in order to effect the preservation, restoration and enhancement of natural beauty. . . .") in effect gained advance support from a Wisconsin supreme court decision filed June 7, 1966. *Kamrowski et al v. State of Wisconsin (State Highway Commission)*<sup>2</sup> involved condemnation of a scenic easement along State Highway 35, The Great River Road, on the Wisconsin shore of the Mississippi River. The landowners in this case challenged the constitutionality of the scenic easement statute (Section 84. 105 Wis. Stats.) and Section 15. 60 of the laws involving allocation of funds "to protect scenic resources along highways,"<sup>3</sup> and claimed that the public use implied a possession or occupancy and enjoyment of the land by the public. The court held, however, that the occupancy in this case was visual, and that "the enjoyment of the scenic beauty by the public which passes along the highway seems to us to be a direct use by the public of the rights in land which have been taken in the form of a scenic easement, and not a mere incidental benefit from the owner's private use of the land." The following further language of the court is of interest:

We are aware of the doctrine that zoning restrictions imposed under the police power cannot be based solely on aesthetic considerations, although the court has expressed a doubt whether this is any longer the law (citing *State ex rel. Saveland P. H. Corp. v. Wieland* (1955), 269 Wis. 262, 271, 69 N.W. (2d) 217). Plaintiffs do recognize of course that the imposition of restrictions on use involved here is not an exercise of police power. The state is taking a portion of plaintiff's property rights, and just compensation will be paid for what is taken.

Whatever may be the law with respect to zoning restrictions based upon aesthetic considerations, a stronger argument can be made in support of the power to take property, in return for just compensation, in order to fulfill aesthetic concepts, than for the imposition of police power restrictions for such purposes. More importantly, however, we consider that the concept of preserving a scenic corridor along a parkway, with its emphasis upon maintaining a rural scene and preventing unsightly uses, is sufficiently definite so that the legislature may be said to have made a meaningful decision in terms of public purpose, and to have fixed a standard which sufficiently guides the Commission in performing its task.

In answering the landowner's claim of denial of equal protection of the laws the court concluded:

<sup>2</sup>142 N.W. 2d 793 (Wis., 1966).

<sup>3</sup>This statute gave first priority to completing scenic easements along the Great River Road. Thereafter priorities related to scenic easements along highways adjacent to Lake Michigan and Green Bay, Lake Superior, and along the Chippewa, Wisconsin, Fox, Milwaukee and Wolf rivers, and in the lake and forest country of northern Wisconsin, and through the Menominee Indian Reservation and the Kettle Moraine area.

We consider, however, that once it has been determined that the use for which property rights are taken is a public use, and that the taking is necessary for such use, neither a property owner whose property is taken in return for just compensation nor a property owner whose property is not so taken is in a position to claim that he is denied equal protection of the laws.

The court quoted the following statement from *Berman v. Parker* (1954), 348 U. S. 26, 35-6, 75 S. Ct. 98, 99 L. E. 27, as follows:

...It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.

Having therefore determined the legality of acquisition of this junkyard parcel, several additional factors were considered which removed any doubt that the expedient procedure would be to acquire by negotiation the entire property. These collateral factors were as follows:

1. A portion of the abandoned C. M. St. P. & P. RR., comprising approximately 3.40 acres abutting the junkyard property, was owned by the city of La Crosse. Upon completion of acquisition of the required take from this property, the vehicular access from existing US 53 and the ultimate ramp roadways would effectively landlock the remaining portion of the junkyard operation. However, the operators owned other lands along an interior street designated as George Street, and such property was separated from the junkyard operation by the abandoned railroad right-of-way. A license had been granted to the junkyard operators by the municipality to use this means of access also in conducting their business. The state was unable to obtain a firm commitment from the city that a permanent easement would be granted so that an appraisal could be made on the basis of the remaining tract having vehicular access to a system of public roads. Severe damages would therefore have been involved in a partial take without such commitment.

2. A storm sewer problem existed in the overall area which involved a considerable portion of lowlands separated from the river by existing US 53. A portion of the lands was needed for reconstruction of storm sewer facilities by the municipality. An opportunity of negotiating for a portion of the abandoned railroad right-of-way which had been conveyed to the city of La Crosse therefore existed. The balance of the remnant lands remaining after a whole taking would not be landlocked, and would allow reasonable recoupment to the state upon ultimate disposal. The area needed by the municipality for storm sewer purposes ran through the entire remnant portion of the property not necessary for highway purposes.

3. Estimated damage claim item, under Section 32.19 Wis. Stats., concerning removal or realignment of personal property, would have been quite substantial. Removal of such property to another site (in case of a whole taking) was conservatively estimated at a cost of \$10-12,000 on a total property of around \$100,000; by statute, however, such item was limited to \$2,000. Realignment on the same site (in case of a partial taking) was estimated at \$38,000. There is no statutory limitation on the amount of claimed compensation for realignment of personal property on the same site.

4. Contracts for relocation of public utility facilities in the area were considerable in total amount, and would require relocation of such facilities to accommodate construction of the interchange. This would involve additional lands for relocation of the facilities. The portion of the whole taking not needed for the highway would accommodate such facilities, and would eliminate necessity of the municipality or utility making its own acquisitions to provide comparable rights. And since the state would require relocation of existing facilities the highway department would have to pay, one

way or another. Granting a comparable easement over remnant state lands would be a good negotiating tool to obtain a comparable right for permanent access to the otherwise possibly landlocked state remnant lands.

5. After eliminating the junkyard operation, the lands remaining to the state presumably would have some value upon ultimate disposal after completion of the project. Recent sales in the area had indicated a rather sharp land value increase at the prime commercial potential locations. Most of such sites were presently committed, and local topography and ultimate accessibility of property in the interchange are as indicated that the lands remaining to the state would enjoy about No. 2 priority as concerns development potential. The lands were accessible, and, although somewhat low (as all lands in the area were) filling was a relatively simple and inexpensive operation, utilizing sand fill from the water by way of "perpetual" dredging operations. Areas were filled at a cost of approximately \$1,000 per acre-foot, and resulting land-use potential in the area was in effect limited to the immediate area including the junkyard operation.

#### VALUATION: THE ELEMENTS OF VALUE

In approaching the valuation problem two independent fee appraisals were obtained, one of which was to be furnished by a larger appraisal company operating in the Midwest, and the other to be furnished by a local appraiser. The landowner also obtained two fee appraisals at his own cost and submitted the reports for review by the Highway Commission. The figures arrived at for the entire property and, on the basis of a partial taking, the value of the required right-of-way, are given below along with, substantially in the language of the appraiser, the thought process which apparently went on during their own valuation.

The owner's appraisers came in with a valuation for the entire property of \$144,350 and \$171,833. Their valuation of the portion needed for highway purposes was \$136,100 and \$165,073, respectively.

The appraisals obtained by the State Highway Commission valued the entire property at \$104,500 and \$95,350. The valuation of the required right-of-way was \$56,000 and \$46,350, respectively.

The narrative property analysis of one of the state's appraisals stated the basic elements substantially as follows.

The property is an irregular-shaped parcel located east of US 53 and west of George Street at the north end of the city of La Crosse. It is about 250 ft east of the Black River (which constitutes a channel of the Mississippi River in this area), and approximately 600 ft northerly of the new George Street intersection at grade with US 53. The property is zoned industrial and commercial, but had received a special permit for the operation of an auto-wrecking and junkyard enterprise which, in the opinion of the appraisal company, was its highest and best use both before and after the taking.

The irregular-shaped property consists essentially of three main tracts. The first tract contains 7.65 acres and abuts the east side of US 53 for approximately 815 ft and has varying depths from 555 ft on the south end to about 435 ft at the northerly limits. This portion of the property was used for auto salvage and is bordered on the east by an abandoned railroad right-of-way now owned by the city of La Crosse.

The second tract, containing approximately 0.69 acre, abuts George Street for approximately 230 ft and is abutted on the west by the same abandoned railway right-of-way.

The third tract, containing approximately 0.43 acre, is an irregular-shaped vacant tract fronting on George Street, and is also adjacent on the westerly side to the abandoned railroad right-of-way.

The major tract is zoned industrial, which includes commercial usage in the locality; the two smaller tracts abutting George Street are zoned commercial. The combined tracts contain a total area of 8.77 acres. The 0.43-acre tract was owned by the owners and operators of the Carl Patros & Sons Auto Wrecking & Salvage Business located on the 7.65-acre tract and the 0.69-acre tract. The two larger



tracts were owned by the salvage business as such, and the smaller tract was owned by the individuals as partners. Inasmuch as the same individual owners were involved, the combined three tracts were considered as one ownership for appraisal purposes.

The combined properties were divided into two parts for management purposes. The largest tract, with direct access onto US 53, was the auto salvage portion of the business and was required for storage of wrecked autos. Improvements on this major tract included the usual modest size office, frame shelters, protective board fencing, with the open shelters in generally poor and unsightly physical condition. Other structures included a gravity baler forging press and an 18-ft diameter steel furnace. Numerous land improvements were involved including buried steel tanks, high-voltage power feed lines, the baler, sewage systems, wells, etc. All but the southerly 100 ft of this site had been filled with about 7 ft of sand, and the site was still about 5 ft below grade level of US 53. The surface of existing US 53 was only about one foot above the all-time high water mark of the Black River tributary during the recent floods (Figs. 4 and 5). Two points of access existed from this 7.65-acre tract to US 53, only one of which was used for the auto salvage business.

The 0.69-acre tract was used as the junkyard portion of the business, and was a level site at grade with the local access street (George Street). Structures on the site included an office and storage warehouse, frame canopies and shelters over a Canton No. 5 shear, and a 42,500-lb capacity Toledo scale. High-voltage power lines served the site for operation of the crane and shear; board fencing protected the site.

The 0.43-acre site, also located on George Street, was level and at local street grade. No improvements were on the site and it was not used in connection with the junkyard operation.

Access between the two tracts used for the junkyard business was provided by a driveway over the abandoned railroad right-of-way separating the two properties. A permit was granted by the city to cross the city-owned portion of the property. The permit was issued by the city Board of Public Services for a yearly fee of \$5, and was



Figure 4.



Figure 5.

revocable at the termination of any yearly term. The permit had been renewed annually for the past nine years.<sup>4</sup> Operation of a junkyard in the locality involved three licenses—the main license for a junkyard at a cost of \$100 per year, and two other licenses for authority to buy and to sell junk, at a cost of \$25 and \$42 yearly, respectively. The main license specified the boundaries permitted for the yard, and was enforceable by both the building inspector and the local Board of Health.

For the purposes of the appraisal, various listed items used in the business were classified as personal property, and not included in valuation of the property. The gravity baler forging press (Model CB-103-1500) was owned by Gravity Baler, Inc., La Crosse, and loaned to the business for experimental purposes. The primary stockholder of Gravity Baler, Inc., and the inventor of the press, was also co-owner of the property.

The site had been used continuously as a junkyard for the past 27 years, and the auto salvage business had been conducted continuously for the past 9 years. The owners claimed the existing size of the property was a basic minimum, and any reduction would make the operation of the salvage business impossible. In recent years three separate attempts to increase the yard size had failed as neighbors petitioned against the increase.

<sup>4</sup>Incidentally, this comprises the nature of the permit concerning which the City of La Crosse would make no commitment to the State Highway Commission for continued authorization in the event of a partial taking, so that the basis of the highway taking would not in effect result in additional damages for this item. Also, the municipality was reluctant to make a firm commitment, in the event of a whole taking, to grant a perpetual right across the abandoned railway right-of-way so that on subsequent disposal of the property, access could be had by way of George Street to the combined tracts, inasmuch as direct vehicular access with US 53 in the immediate interchange area was prohibited by the project.

## VALUATION: THE PROOF OF VALUE

The required taking for highway purposes involved an irregular strip, varying in width from about 65 ft at its southerly limits adjacent to US 53 to over 200 ft in depth at its northeast edge on US 53, and also included an irregular strip along the north property line. The taking was for the southeast ramp of the North La Crosse Interchange of I90. The total area required for the taking was approximately 2.01 acres, leaving a remainder of approximately 6.76 acres of the total combined tracts. Approximately 1.77 acres and both access points would be taken from the large US 53 tract; about 0.24 acres would be taken from the northerly tract along George Street; and no taking was involved from the 0.43-acre of vacant land, also on George Street.

Improvements located within the 2.01 acres of the required taking included parts of the board fence surrounding the yards, one office structure, three shelter structures, one warehouse, and the combined office and warehouse structure, as well as the involved septic systems, water systems, power feed wiring, supporting poles, etc.

Damages to the property resulted from loss to the larger tract of frontage on US 53, due to taking of access and reduction in area, and loss in value to the 0.45-acre tract remaining on George Street because of its reduction in size and the substantial increase in grade of the highway along the property, and the loss in value to the 42,500-lb Toledo scale because of the land taking, and improper alignment due to taking contiguous structures. No land was taken from the smallest of the three tracts, but a driveway along the north property line would have to be constructed to provide access to the large one inasmuch as direct vehicular access with US 53 from any of the tracts was prohibited by the taking. This reconstructed driveway would effectively reduce the usable area of the remaining tract.

The State Highway Commission had indicated that it would attempt to purchase that portion of the abandoned railroad property presently owned by the City of La Crosse and issue a firm easement across the old railroad right-of-way to provide access to the 5.88-acre remaining tract No. 1, for convenient interior access on a permanent basis in light of the prohibited access to US 53 in the immediate interchange area. The 0.69-acre tract would be a logical additional location for the junkyard portion of the operation; however, the 0.69-acre portion of the total combined tracts was not within the licensed junkyard area. The appraiser felt that the taking would therefore interfere with the junkyard business, but since the business was essentially controlled by local licensing authorities and business loss being noncompensable under Wisconsin statutes, it was not considered as an essential item in the appraisal report.

Junkyard and auto salvage yards are ordinarily classified by most municipalities as obnoxious industries, and as such, the local authorities ordinarily attempt to limit the number of yards within their jurisdiction by permit or license requirements. Often the prospective junkyard operator must obtain the signatures or approvals of neighboring landowners before the permit will be issued. Operators who have obtained such licenses and permits often find ". . . that they enjoy an exclusive franchise, since the city is reluctant to approve additional licenses," the appraiser noted.

The appraisal concluded with the following observation:

As the population of a city increases, most operators feel the need to expand their operations in a growing economy. However, they are caught in a similar situation to that of an applicant for a license—neighbors have petitioned against the license to increase the capacity of the yard.

In an expanding economy it is not unusual for an existing operator to find that the size of his operation is directly related to the size of his land area. Without additional land the storage capacity of his yard restricts the volume of his operations.

[The owners here] have made three separate attempts in recent years to increase the size of their yard; however, all attempts were unsuccessful because the neighbors petitioned against the increase. As a result, the existing property before the taking is now used to maximum capacity. Therefore, the reduction in the land area due to the taking will decrease the utility of the remaining improvement.

The baler press, Canton shear and furnace room will not be physically damaged by the taking. However, the improper orientation and alignment combined with the reduced utility of these improvements is considered to reduce their after value.

The high cost of moving the existing operation to another site, as well as the almost impossible task of securing additional licensed area for junkyard and auto salvage operations, indicate that the existing operation must continue at its present location on the reduced size of the remainder parcel and at a reduced capacity.

The shear and baler press will require new power feed wiring; the existing fences will need to be tied into the fenced right-of-way and a new road will have to be constructed in order to resume operation. The huge supply of auto parts and wrecked autos will also need to be moved. Since this material is personal property, moving costs have not been computed in the damages.

No special benefits accrue to this property as a result of a proposed Interstate highway improvement.

The principal state contract appraiser felt that the income approach was not applicable for valuation of this type of property. Listed information indicated that gross profits for the business for the past 12 years varied from \$43,000 to less than \$3,000. The high income of \$43,782 operating profit in 1951 less \$2,798 depreciation item left a net profit of \$40,984. The cycles of income rise and fall (leaving a 12-year average of approximately \$17,400 net) varied directly with market changes in scrap prices and local repair requirements, and generally was not considered applicable to reflect the value of the real estate. The appraisal company therefore decided its approach should be valuation on the basis of comparable land sales in the vicinity (industrial lands located along the US 53 frontage, and commercial lands concerning the George Street frontage). The value of improvements would be represented by the cost of reproduction less depreciation from all causes, with due regard to current real estate market conditions.

Based on recent sales adjusted to the subject property in the area, a market value was indicated for the total land of \$36,650 before the taking, and \$7,500 after the taking, assuming completion of the proposed highway improvement. The breakdown was as follows:

	<u>Land Tract</u>	<u>Valuation Before</u>	<u>Valuation After</u>	<u>Loss and Damage</u>
1	(7.65 acres)	\$30,800	\$4,400	\$26,400
2	(0.43 acre)	2,250	1,500	750
3	(0.69 acre)	3,600	1,600	2,000
	Totals	\$36,650	\$7,500	\$29,150

The appraisal company then proceeded to value the improvements by the cost approach. For office, shelter, and storage structures the cost of reproduction was based on the appraisal company unit cost in place system. This system, which has come to be widely accepted in the Midwest, utilizes tested and industry-accepted formulas (according to the appraisal company) which are checked against known construction costs of new structures with various phases of the building industry. The factors are continuously under survey, and correcting factors are introduced into the formulas at semiannual intervals. It is a simple method for the appraisal industry, inasmuch as it eliminates a great deal of additional field inspection in a quantity survey of materials and labor for each appraisal problem. Depreciation was based on existing physical condition, remaining economic life, and general market conditions. The indicated before value of all improvements was \$58,718, with an after value indicated at \$41,488.

The major equipment item was a gravity baler forging press (Model CB-103-1500), invented by one of the owners, and loaned to the salvage yard operation by Gravity Baler, Inc., for test purposes. The foundation was reinforced concrete with horizontal and vertical dimensions of 12 by 12 by 12 ft. A 4-in. steel plate 5 ft down from the surface was installed. Additionally, a  $\frac{3}{8}$ -in. gage 14 by 18 ft diameter steel furnace for reducing car hulks was on the premises, and there was a 4-in. steel capacity shear (Canton Shear No. 5). None of these items was within the required taking on the basis of a partial take; however, all appraisers agreed that in spite of the fact that no physical taking or damage would occur, there would be reduced utility.

The steel gravity baler, valued at \$43,200 new (based on a recent sale of the same model in Minnesota) was given a 10 percent severance damage, and reduced to \$35,950 after value. The shear, valued new at \$19,000, was also given a 10 percent severance damage, as was the 18-ft diameter furnace, with a new cost of \$4,105. These items were included in the appraisal as a part of the before valuation, although acquisition was not contemplated or needed for highway purposes. Additionally, the landowner had indicated a desire to retain these items, even in the event a total acquisition was ultimately made. The "realty vs personalty" problem was in the background, but was actually avoided in this case by virtue of the negotiated acquisition of the entire property on agreed terms, whereby the owner wanted to retain this heavy equipment.

The state had estimated realignment or moving costs mainly on the basis of moving the car hulks and scrap, taking the position that the major machinery items, beyond the limits of the required taking, would not have to be moved, and that a relatively efficient operation could be maintained by leaving these major items in the same location after the taking. The state's appraisals allowed \$10-\$12,000 for this item. The landowners' appraisers, however, had placed considerable cost on the realignment factor involving \$16,000 for dismantling, removing, and reassembling on a new foundation the gravity baler; \$12,700 for moving the car hulks, and various lesser sums for moving loose parts, separated quality scrap metals, etc., for a total estimated realignment cost of \$38,250. Under Wisconsin law there is no ceiling on cost of realignment on the same site.

The net realignment item would have ultimately been determined by litigation, in the event of condemnation. Realignment of personal property constitutes an "additional item payable" under Section 32.19 of the Wisconsin Statutes, which defines it as "the cost of realigning personal property on the same site in partial takings or where realignment is required by reason of elimination or restriction of existing used rights of access." These items are compensable as damages materializing after the fact, and may be claimed within two years of the time the condemnor takes possession of the property. The wide variance between the \$10,000 figure and the \$38,000 figure would of course have been finally resolved only by way of litigation resulting from the denial of a claim under the mentioned statutory procedure. It would very likely have resulted in a "Battle of the Expert Witnesses," and in any event would have been a difficult situation in a geographic area where juries had been historically liberal toward landowners.

The wide variance between the landowners' and the state's appraisers in the total valuation was not limited to relocation or realignment costs. The basic land values, predicated by state appraisers on the basis of highest and best use involving continuation of the existing legal nonconforming use of junkyard operation, as against the owners' appraisers setting forth highest and best use as commercial (predicating values upon a recent filling station sale site of approximately \$40,000 for the traditional 1-acre package) left much room for litigation. The wide spread in value of the owners' appraisers was accentuated also, it seems, by the increase in the before values of the commercial potential, adding the junkyard operation as a "bonus." The wide variation in values also, however, allowed considerable room for negotiation, even though under Wisconsin law the "one price" system is in effect.

Ultimately, the differences were resolved through negotiation. Upon being presented with the state's jurisdictional offer in the amount of \$51,000, the landowners countered with an offer somewhere between their two appraisers' valuations of the required taking, between \$136,000 and \$165,000. The Commission-approved alternate offering price,

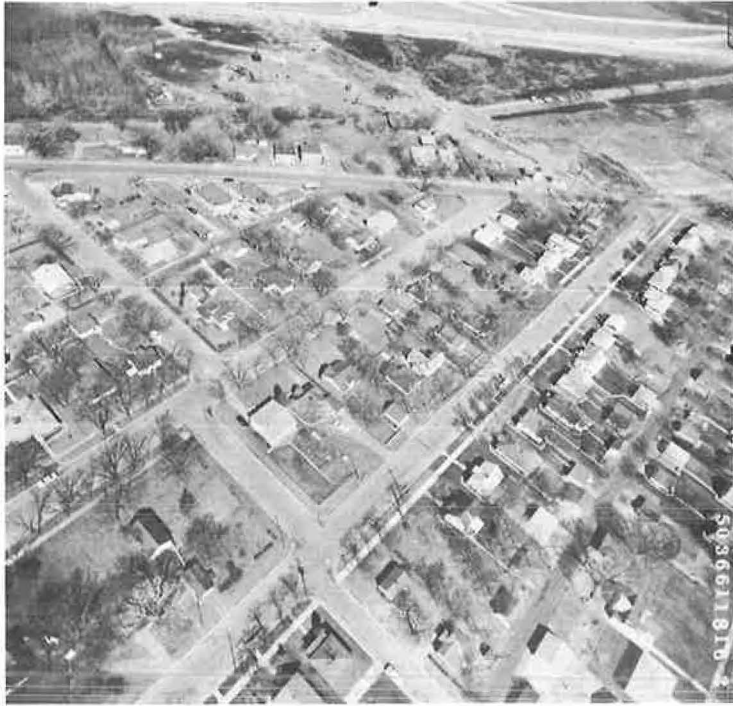


Figure 6.

constituting total compensation for a whole taking, was \$105,000. The landowners indicated that they would be agreeable to negotiation for acquisition of the entire property, retaining, however, the principal heavy machinery equipment. A purchase agreement was ultimately executed, providing for payment over a three-year period, and also including provisions designed to eliminate subsequent claim items by way of moving costs. These provisions allowed the owner to remain in operation on portions of the property for up to an 18-month period, to reduce the inventory and remove the junk and salvage materials, thus delivering a cleared site to the state at the time of possession.

Acquisition was therefore completed for a total dollar consideration of \$105,000, on the following basis:

1. The City of La Crosse was exceedingly interested in eliminating the junkyard eyesore on this approach to the city. The state and the municipality in effect exchanged instruments: the municipality conveyed to the state approximately 3.4 acres of abandoned railway right-of-way which it had acquired, affording a permanent means of access and additional acreage between the remnant and the George Street local thoroughfare in the interchange area; and the state granted an easement to the municipality for relocation of its storm sewer facilities. This eliminated land cost on this item, and added materially to the sale potential of the now state remnant lands. The ultimate grantee of the remnant lands from the state would not have to depend upon a license or year-to-year permit to cross the city lands to reach the tract.

2. An occupancy agreement was executed in accordance with the provisions of the purchase agreement, granting to the owners and operators a period of up to 18 months occupancy to eliminate the inventory and clear the site at no cost to the state relative to the realignment claim item or removal to a new site. Recent aerial photos (Figs. 6 and 7) show the site to be essentially clear and ready for construction of the interchange loop.

3. The state may make arrangements to fill the lower areas of the remnant tracts

by the relatively inexpensive sand fill piped into the area lands from the river by permit from the Corps of Engineers and the State Public Service Commission. As indicated, this amounts to approximately \$1,000 per acre-foot, and the state may now reasonably anticipate a substantial recoupment of its investment.

### CONCLUSIONS

In reviewing this case with the highway department's negotiators and review appraisers, and considering all factors that arose during this episode, several conclusions became evident.

1. First, a salvage operation of this type, initially located on an outer fringe of a municipality, frequently finds itself some time later well within the expanded corporate limits, and generally well situated in an area which has undergone zoning changes to relatively high-type land use. Therefore, a municipality is one day faced with the problem of an undesirable land use existing in an area where good planning would dictate its removal. But the municipality may be either reluctant or unable to accomplish this purpose without substantial expense. Outside assistance, such as the opportunity involving state acquisition of lands for a major highway improvement program, is generally welcome to the municipality as a solution to the problem. With cooperation, reasonable objectives can be accomplished for the benefit of both the municipality and the state, in conformance with good planning principles and current beautification programs.

2. Second, although a municipality may seize upon a specific instance to reap what benefits it can to the local community,<sup>5</sup> the problem can be resolved with some degree

<sup>5</sup>In this case, for example, the municipality was exceedingly reluctant to grant any permanent type access to serve the interior tract which would be landlocked by a partial taking—either if the state acquired the entire property or to serve the lands remaining to the junkyard operator.



Figure 7.

of firmness. In the present case, the state had indicated that mutual easements could be granted to mutual advantage (from the state to the municipality for storm sewer purposes, and from the municipality to the state for acreage and access purposes to serve the remnant tract). Or, if the city persisted in its refusal, then indication was given that the state would (a) acquire only that portion of the junkyard property needed for highway purposes, leaving the balance to the owner-operators of the junkyard facilities, and (b) condemn a portion of the abandoned railway right-of-way property owned by the city, as necessary to serve the lands remaining to the owners after the partial taking. This would have in effect perpetuated the junkyard operation, would have afforded a permanent right of access for the continued operation, would have formed a firm basis of appraisal relative to acquisition of access rights to US 53, and would have minimized the damage to the remainder.

3. Third, each specific instance of a property of this type will present circumstances individual to such case. Appraisers will vary in their opinions even more widely than they did in the present case. A great deal of latitude for negotiation exists, however, even in the case of a firm offering price procedure such as Wisconsin statutes require. Litigation will presumably be required to clarify some of the rules in this specialized area. Dissemination of information and case study results is needed by appraisers in a continuing effort on their part to arrive at some degree of insight into the problem, and uniformity of application of appraisal techniques.

4. Fourth, and this is equally applicable to any scenic easements, scenic highways, or general highway programs, deeds should include a specific junk or salvage clause to eliminate this type of operation on remaining lands. Also, consideration should be given to modified conveyancing procedures applicable to selective right-of-way acquisition when the cost is likely to be its lowest. This could also be applicable to advertising rights, access rights, and preservation of scenic values. All too frequently we hear the comment that in the case of access rights, for example, there is not sufficient volume of traffic on the highway at the present time to warrant access controls, either through police power or by acquisition. Similarly, existing scenic roads which have no, or relatively little, advertising or other objectionable aspects bring the comment that there is no problem yet and therefore no action is necessary or supportable at the present time. From the standpoint of the public purse, it seems obvious that this would be the time to acquire such moderate interests or rights as may be necessary to perpetuate the roadway as an attractive, convenient, and efficient thoroughfare.

5. Fifth, this new area of responsibility for highway departments will need to be defined more completely. One of the principal approaches will of course be new laws, or modification of present laws. And here one should remember that even in light of the adverse position that the industry has been placed in, the state is dealing with a legitimate business, and regulations on this business must be carefully considered to do what is needed to protect the public, but not to exceed this amount of restriction and cause unnecessary economic hardship.