National Cooperative Highway Research Program

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Relocation Assistance Under Chapter Five Of the 1968 Federal-Aid Highway Act

A report submitted under ongoing NCHRP Project 20-6, "Right-of-Way and Legal Problems Arising Out of Highway Programs," for which the Highway Research Board is the agency conducting the research. The report was prepared by John C. Vance, HRB Counsel for Legal Research, serving as principal investigator under the Special Projects Area of the Board.

Final Report

THE PROBLEM AND ITS SOLUTION

A major and continuing need of State Highway Departments involves the assembly, analysis, and evaluation of operating practices and legal elements of special problems involving right-of-way acquisition and control and highway law in general. With the enactment of the 1968 Federal-Aid Highway Act, Congress has seen fit to greatly increase the amount of compensation which may be paid to displaced persons. Furthermore, Chapter Five of that Act requires total compliance in all Federal-Aid highway programs after July 1, 1970. Most states are presently unable to comply with the new relocation assistance provisions of the said Act. The sanction for failing to comply with the provision is withholding of all Federal highway assistance after that date.

Following is a discussion on the rule that compensation is for property taken and not as payment to the owner, and is a discussion on constitutional authority to provide for payment of compensation in excess of the just compensation required by the Fifth Amendment. Included is a synoptic review of Chapter Five of the 1968 Federal-Aid Highway Act and the extensive requirements of IM 80-1-68 issued by the Bureau of Public Roads covering the administration of said Chapter. Furthermore, there is a discussion and comparison of statutes that have been enacted to comply with the new relocation assistance provisions, and an analysis of constitutional and other problems which may be expected to be encountered by the States in securing compliance.

A Proposed Act has been prepared which closely parallels Chapter Five of the 1968 Federal-Aid Highway Act.

FINDINGS

The Fifth Amendment of the United States Constitution guarantees the payment of just compensation when private property is taken for a public use. It reads:

> ... nor shall any person be deprived of property, without due process of law;
> ... nor shall property be taken for public use, without just compensation.

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* *The full text of the agency report is presented in this Research Results Digest. Therefore, no report loan copies are available.*

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Under the due process provisions of the Fourteenth Amendment, the above guarantee is made applicable to the States. In addition, all but two States have constitutional provisions which assure the payment of just compensation when private property is taken for public use, and in those two States this principle is firmly established by statute law and court decision.

The United States Constitution does not define the terms "just compensation" or "public use" as set forth in the Fifth Amendment. Consequently, it has been left to the courts to establish the standards for determining such questions as whether property has been "taken," what constitutes a "public use," and the measure of just compensation. A brief review of some of the leading decisions in this area is deemed pertinent by way of introduction to the subject matter under review herein.

Rule That Compensation Is for Property Taken and Not as Payment to the Owner

In Monongahela Nav. Co. v. United States, 148 U.S. 312, 37 L.Ed. 463, 13 S. Ct. 622 (1893), the Supreme Court established the rule that the Fifth Amendment requires payment only for property which is taken, and that compensation is for the property and not to the owner. The Supreme Court said:

> And this just compensation, it will be noticed, is for the property, and not to the owner. Every other clause in this Fifth Amendment is personal. "No person shall be held to answer for a capital, or otherwise infamous crime," etc. Instead of continuing that form of statement, and saying that no person shall be deprived of his property without just compensation, the personal element is left out, and the "just compensation" is to be a full equivalent for the property taken. (p. 326.)

Incidental Expenses

The "payment for property taken" rule, as set forth in Monongahela, has been interpreted to deny payment for incidental losses or expenses incurred by property owners or tenants as a result of the taking of real property. Thus, in the absence of a statute expressly so providing and authorizing, the courts have consistently denied recovery for, inter alia, the following losses and expenses:

1. The cost of moving personal property and the cost of disconnecting, dismantling, and reinstalling structures, machinery, and equipment.

2. Transportation costs and other expenses incurred in moving a displaced family to replacement housing and the expenses incurred in searching for replacement housing or other types of property.

3. Expenses incidental to the transfer of title to real property required by the Government, such as recording fees, clerk fees, transfer taxes, etc.; penalty costs for prepayment of a mortgage and real property taxes paid to a taxing entity which are allocable to a period subsequent to the transfer.

4. Loss of going concern value, goodwill, or livelihood, where a business cannot relocate without a substantial loss of its patronage; or the loss incurred due to business interruption.

5. Loss of employment due to the relocation or discontinuance of a displaced business.

6. The increased cost necessary to acquire a substitute home, farm or business, or the increased cost of rent for a substitute dwelling or other property.

7. The loss of rental or other income between the time of announcement of a public improvement and the time of taking.

8. Loss of home ownership because of inability to obtain financing within the financial means of the displacee, or the loss of opportunity to continue in business.

9. Loss due to less favorable financing in acquisition of replacement housing.

See: Mitchell v. United States, 267 U.S. 341, 69 L.Ed. 644, 45 S.Ct. 293 (1925); United States ex. rel. T.V.A. v. Powelson, 319 U.S. 266, 87 L.Ed. 1390, 63 S.Ct. 1047 (1943); United States v. Petty Motor Co., 327 U.S. 372, 90 L.Ed. 729, 66 S.Ct. 596 (1946).

There have been some exceptions to the general rule of not allowing compensation for incidental losses or expenses in the case of leaseholds. Two such exceptions were established in United States v. General Motors Corp., 323 U.S. 373, 89 L.Ed. 311, 65 S.Ct. 357 (1945), and Kimball Laundry Co. v. United States, 338 U.S. 1, 93 L.Ed. 1765, 69 S.Ct. 1434 (1949), where recovery for the payment of moving expenses and the going concern value of a displaced business were allowed. Both cases are limited, however, in that only a partial taking of the tenants' interest was involved. The Supreme Court affirmed the general rule that the Fifth Amendment does not require payment for incidental losses or expenses where the Government takes the entire interest of a tenant. The Court went on to say that if the Government takes only a part of a tenant's term, it must pay the value which a hypothetical long-term tenant in possession would

require when leasing to a temporary occupier requiring his removal. In determining the market value of such interest, the Court said that it was appropriate to consider the reasonable cost of moving the personal property from the premises, the cost of storage of the goods, and the cost of returning the property to the premises. Thus, the general rule laid down in Monongahela was merely narrowed by these decisions.

Constitutional Authority to Provide for Payment of Compensation in Excess of the Just Compensation Required by the Fifth Amendment

Although the courts have generally denied recovery for incidental losses and expenses incurred by property owners and tenants as the result of the taking of real property, it was made clear at an early date that Congress has the authority to authorize the payment of compensation in addition to the "just compensation" required by the Fifth Amendment. Such authority was held to be based on the constitutional power of Congress to determine whether or not claims upon the Public Treasury are founded on moral obligation, and on principles of right and justice. [Joslin Mfg. Co. v. Providence, 262 U.S. 668, 67 L.Ed. 1167, 43 S.Ct. 684 (1923); Mitchell v. United States, 267 U.S. 341, 69 L.Ed. 644, 45 S.Ct. 293 (1925)]

Mitchell v. United States, supra, was an action to recover for loss of business as a result of a taking by the Federal Government. In the opinion rendered therein, the Supreme Court made clear the authority of both Congress and the State legislatures to authorize recovery for certain costs, expenses, and damages incident to the taking which are in excess of the payment of fair market value for the property taken. The Court said:

> ... To recover, they must show some statutory right conferred. States have not infrequently directed the payment of compensation in similar situations. The constitutions of some require that compensation be made for consequential damages to private property resulting from public improvements. Chicago v. Taylor, 125 U.S. 161; Richards v. Washington Terminal Co., 223 U.S. 546, 554. Others have, in authorizing specific public improvements, conferred the right to such compensation. Ettor v. Tacoma, 228 U.S. 148; Joslin Mfg. Co. v. Providence, 262 U.S. 688. Congress had, of course, the power to make like provision here. (pps. 345, 346.)

Joslin Mfg. Co. v. Providence, supra, is significant in firmly establishing the constitutionality of State legislation which authorizes the recovery of consequential damages. Joslin involved a Rhode Island statute which authorized the City of Providence to acquire land for a source of pure water. In addition, the statute provided that: (1) the owner of any mill upon any land taken could surrender the machinery therein to the City within 6 months after taking, and that the City would become liable to pay its fair value at the time of delivery, as part of the damages for the taking; or such special damages as might be suffered as a result of a compulsory removal before the passage of a reasonable time; or if the machinery were not surrendered, for the reasonable cost of removing it to a new location and setting it up anywhere within the New England States; (2) for payment of the fair market value of furniture and building equipment in any building belonging to the town of Scituate, which it might surrender; (3) for payment of the cost of additional police protection in any town or city in consequence of carrying on construction work; (4) for damages due to the decrease in value of lands not taken, but contiguous to lands taken; (5) for limited damages in certain cases for loss of employment due to the taking of the manufacturing establishment in which eligible persons were employed; and (6) for injury to businesses on land in certain localities which were established prior to the passage of the act.

The above statute was attached on a number of counts as contravening the Fourteenth Amendment of the United States Constitution. In rejecting all contentions, the Supreme Court said:

> In respect of the contention that the statute extends the right to recover compensation so as to include these and other forms of consequential damages and thus deprive plaintiffs in error, as taxpayers of the city, of their property without due process of law, we need say no more than that, while the legislature was powerless to diminish the constitutional measure of just compensation, we are aware of no rule which stands in the way of an extension of it, within the limits of equity and justice, so as to include rights otherwise excluded. (pps. 676, 677.)

Thus, State legislation authorizing the payment of moving costs and related expenses was upheld as not being in contravention of the Fourteenth Amendment.[1]

As mentioned previously, Congress has broad powers over all aspects of land acquisition for Federal and Federally-assisted programs. Likewise, Congress has broad authority to impose conditions on the distribution of funds in Federally-assisted programs. Under these powers, Congress has seen fit gradually to expand the scope of payments for losses and damages suffered beyond the "just compensation" required by

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[1]Prominent among the costs and expenses not recoverable except pursuant to statutory authorization are costs of litigation and attorneys' fees. See discussion of the various State statutes authorizing the same in Highway Research Board Special Report 59, Condemnation of Property for Highway Purposes, Part III (1960).

the Fifth Amendment. This expansion is well evidenced in the Federal-Aid Highway Acts of 1956, 1962, and 1968. The 1968 Federal-Aid Highway Act is of the utmost importance to State highway officials since it greatly increases the amount of compensation which may be paid to displaced persons over and above the requirements of "just compensation" under the Fifth Amendment.

Chapter Five of the 1968 Federal-Aid Highway Act

Chapter 5 of the Federal-Aid Highway Act of 1968 amends section 30 of Title 23, United States Code, by adding Chapter 5 in its entirety to the Code. Chapter 5 provides, as a part of the cost of construction of a project under any Federal-aid highway program, that the State and local government agencies administering such programs provide certain relocation payments, services, and housing assurances as a condition of payment of Federal funds.

The 1968 Federal-Aid Highway Act authorizes Federal sharing in relocation payments paid by States to displaced individuals, families, businesses, or farm operations. Thus, the actual payment of relocation expenses to displacees is made by an individual State and is therefore dependent on a State's enactment of legislation authorizing the making of such payments.

At the present time most States have not enacted legislation which fully complies with the requirements of Chapter 5 in respect to the relocation payments therein prescribed and provided. All States are able to partially comply with the provisions of Chapter 5, but in most instances this partial compliance is limited to providing relocation advisory assistance or providing moving payments limited to the amounts that are Federally reimbursable under the 1962 Federal-Highway Act, 23 U.S.C. Sec. 133.

The Federal-Aid Highway Act of 1962 provides that prior to approval of any Federal-aid highway program, the Secretary of Commerce shall require the State highway department to give satisfactory assurance that relocation advisory assistance will be provided for families displaced by a project. In addition, the 1962 Act provides that, to the extent authorized by State law, the Secretary of Commerce may approve, as part of the cost of construction of any Federal-aid highway program, payments for moving expenses made by a State highway department to people or businesses displaced from real property acquired for a project. The maximum amounts eligible for reimbursement are $200 for a family or individual and $3,000 for a business, farm operation, or non-profit organization. Under the Federal-Aid Highway Act of 1962, then, relocation payments are not required and Federal reimbursement is limited by the maximum amounts as set forth in the Act.

The provisions for relocation advisory assistance and relocation payments, as set forth in Chapter 5 of the 1968 Act, greatly expand the scope and nature of relocation assistance as set forth in the 1962 Act. Under Chapter 5 of the 1968 Act, the maximum amounts eligible for Federal reimbursement are increased and a supplementary housing payment not to exceed $5,000 is added. What is more important, however, is that the provisions of Chapter 5 of the 1968 Federal-Aid Highway Act are mandatory upon the States after July 1, 1970.

On August 23, 1968, the provisions of Chapter 5 became effective to the extent that the individual States were able to legally comply with the provisions thereof. After July 1, 1970, the provisions of Chapter 5 become totally effective in all Federal-aid highway programs. As mentioned previously, few States are presently able to legally comply with Chapter 5. Thus, it is imperative that those States which presently lack the legal capacity to comply with the requirements of Chapter 5 rectify this situation before July 1, 1970. The sanction for failing to comply with the provisions of Chapter 5 by July 1, 1970, is withholding of all Federal highway assistance after that date.

The reason given by most States for their inability to comply with the provisions of Chapter 5 of the 1968 Act is a lack of statutory authority to expend State funds for relocation purposes. In addition, one or two States anticipate the necessity of a State constitutional amendment in order to comply with the provisions of Chapter 5. A review of the provisions of Chapter 5 and the standards that will be used to measure compliance under these provisions is necessary to aid in drafting appropriate legislation and to plan for the responsibilities imposed on State highway departments by the 1968 Federal-Aid Highway Act.

Assurances Required Under Chapter Five of the 1968 Federal-Aid Highway Act

Under the 1968 Act, the Secretary of Transportation is required to obtain various assurances from a State highway department before approving a Federal-aid highway project for that State. The 1968 Act amends Chapter 1, Title 23, Section 141, to provide that the Secretary of Transportation, prior to approving a project, shall obtain from the State highway department the following assurances:

1. That every reasonable effort shall be made to acquire the real property by negotiation.

2. That the construction of projects shall be so scheduled that to the greatest extent practicable no person lawfully occupying the real property shall be required to move from his home, farm, or business location without at least 90 days' written notice from the State or political subdivision having responsibility for such acquisition.

3. That it will be the policy of the State, before initiating negotiations for real property, to establish an amount which is believed to be just compensation, under the law of the State, and to make a prompt offer to acquire the property for the full amount so established.

The real property acquisition policies as set forth above are self-explanatory and no State should encounter legal difficulties in making assurances to the Secretary of Transportation in accordance with this section.

Paragraph 502 of Chapter 5 of the 1968 Act, however, requires that a State highway department make certain other assurances to the Secretary of Transportation before approval can be obtained for a Federal-aid highway project. The assurances that are required to be made under Sec. 502 prevent most States from legally complying with Chapter 5 of the 1968 Federal-Aid Highway Act.

Sec. 502 provides as follows:

> The Secretary shall not approve any project under section 106 or section 117 of this title which will cause the displacement of any person, business, or farm operation unless he receives satisfactory assurances from the State highway department that --
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> 1. Fair and reasonable relocation and other payments shall be afforded to displaced persons in accordance with sections 505, 506, and 507 of this title.
> 2. Relocation assistance programs offering the services described in section 508 of this title shall be afforded to displaced persons.
> 3. Within a reasonable period of time prior to displacement there will be available, to the extent that can reasonably be accomplished, in areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families and individuals displaced, decent, safe, and sanitary dwellings, as defined by the Secretary, equal in number to the number of and available to such displaced families and individuals and reasonably accessible to their places of employment. (Underscoring supplied.)

Instructional Memorandum 80-1-68

On September 5, 1968, the United States Department of Transportation issued Instructional Memorandum (IM) 80-1-68, which covers the administration of the Highway Relocation Assistance Program established by Chapter 5 of the 1968 Federal-Aid Highway Act. This IM will shortly be incorporated into a Department of Transportation Policy and Procedure Memorandum (PPM). Although an IM and PPM are subject to change, they establish the standards that the Department of Transportation will use to measure State compliance under the 1968 Federal-Aid Highway Act. It is therefore necessary briefly to review the standards set forth in said IM 80-1-68. The following is a synoptic review of the Department of Transportation standards for Secs. 502, 505, and 506 of Chapter 5. IM 80-1-68 should be consulted for a more detailed description of these and other sections.

Sec. 502 (1) of Chapter 5 reads:

> Fair and reasonable relocation and other payments shall be afforded to displaced persons in accordance with sections 505, 506, and 507 of this title.

Sec. 505 - Relocation Payments or Moving Expenses

Any individual, family, business, or farm operation displaced by a Federal-aid highway project is entitled to receive a payment for reasonable moving expenses. The distance of the move shall be reasonable, not to exceed 50 miles. [IM 80-1-68, No. 8-a.]

Displaced Individuals and Families

A displaced individual or family is entitled to receive a payment for actual reasonable expenses incurred in moving himself and his family. Such payments must be supported by receipted bills or other evidence of expenses incurred.

In lieu of actual reasonable expenses, an individual or family may elect to accept a moving expense allowance not to exceed $200, which must be determined according to a schedule prepared by the State agency and approved by the Director of Public Roads. In addition, a dislocation allowance of $100 is allowed. [IM 80-1-68, No. 8-c]

If it is necessary for a displaced person to store his personal property pending location of replacement housing, the cost of such storage shall be eligible for Federal participation as a moving cost, provided the property is stored for a reasonable time, not to exceed one year. [IM 80-1-68, No. 8-d]

Displaced Business or Farm Operation

A displaced business or farm operation is also entitled to receive actual reasonable moving expenses. Likewise, these payments must be supported by receipted bills or other evidence of expenses incurred. In the case of a self-move, an alternate procedure may be used whereby a business or farm operation may be paid an amount to be negotiated between the State agency and the displaced business or farm operation. This amount may not exceed the lower of two firm bids or estimates obtained by the State agency or prepared by qualified estimators.

In lieu of the above payment, a displaced business (including a displaced business which is discontinued) or a displaced farm operation may elect to receive an amount equal to the average annual net earnings of the business or farm operation or $5,000 whichever is the lesser. In order for the owner of a business to be eligible for this payment, the State agency must determine that: (a) the business cannot be relocated without a substantial loss of existing patronage and (b) the business is not part of a commercial enterprise having at least one other establishment which is not being acquired by the State or the United States and which is engaged in the same or similar business. [IM 80-1-68, No. 8-b.]

Sec. 506 - Replacement Housing

In addition to the relocation payments authorized by Sec. 505, individuals and families displaced from dwellings on real property acquired for a Federal-aid project are entitled to supplementary payments for replacement housing. [IM 80-1-68, No. 9-a.]

Payment to Owner-Occupants

A displaced owner-occupant of a one-, two-, or three-family dwelling actually owned and occupied by the owner for not less than one year immediately prior to the initiation of negotiations for such property, is eligible for a supplementary payment not to exceed $5,000 if the amount for which the State acquired his dwelling was less than the average price of a dwelling which is:

(a) As a minimum, decent, safe, and sanitary;

(b) Adequate to accommodate the displaced owner;

(c) Reasonably accessible to public services and places of employment; and

(d) Comparable to the dwelling being taken. A comparable dwelling is one which is substantially equal regarding all major characteristics and functionally equivalent to the dwelling being taken with respect to: (1) the number of rooms; (2) the area of living space; (3) the same type of construction; (4) age; (5) state of repair; (6) in the same type of neighborhood; and (7) equally accessible to public services and places of employment.

The payment, which may not exceed $5,000, is the amount, if any, which when added to the acquisition payment equals the average price required for a comparable dwelling as defined above. [IM 80-1-68, No. 9-b, (1), (2), and (3).]

Methods Used to Establish an Average Price of a Comparable Dwelling

Any of the following methods may be used to establish the average price of a comparable dwelling:

1. A State may make a locality-wide study which will develop the average market selling price of various classes of dwelling units.
2. A State may make a determination on an individual parcel basis by using the services of an appraiser or other qualified individual to select comparable dwellings available on the private market and relate them to the property being acquired. At least three comparables shall be selected for each dwelling unit acquired. If true comparables are not available, dwellings most nearly comparable shall be selected and adjustments shall be made which reflect the differences between the dwelling unit being acquired and the selected comparables.
3. A State may develop some other equitable method of determining the average price of a comparable dwelling and submit it to the division engineer for review and acceptance. [IM 80-1-68, No. 9-b, (3)]

Eligibility of an Owner-Occupant for Replacement Housing Payment

In order for an owner-occupant to be eligible for a replacement housing payment he must have:

(a) Owned and occupied the dwelling for not less than one year immediately prior to the start of negotiations for the acquisition of such property; and
(b) Must have purchased and occupied a decent, safe, and sanitary replacement dwelling within one year subsequent to the date on which he was required to move from the dwelling unit acquired for the project.

In addition, the State must have the replacement dwelling inspected and determine that it meets the

standards for decent, safe, and sanitary housing. In instances where an owner-occupant qualifies for a replacement housing payment except that he has not yet purchased or occupied a suitable replacement dwelling, the State shall state to any interested party, financial institution, or lending agency, that the owner-occupant will be eligible for a replacement housing payment provided he purchases and occupies a proposed replacement dwelling by a specified date, which shall be one year from the date on which the owner was required to move from the dwelling taken for the highway project. The State agency must inspect the proposed dwelling and determine that it meets the standards for decent, safe, and sanitary dwellings. [IM 80-1-68, No. 9-b, (4) and (5)]

Owner-Occupants Who Have Not Owned and Occupied a Dwelling for at Least One Year Immediately Prior to the Start of Negotiations for the Acquisition of Such Property

An owner-occupant who is not eligible for payment because he has not actually owned and occupied his dwelling for at least one year prior to the acquisition of that property by the State or has chosen not to purchase a new property, shall be entitled to the following payment provided he has lawfully occupied the dwelling taken for at least 90 days prior to the initiation of negotiations for such property.

The payment shall be a sum equal to the difference, if any, between the cost of renting, for a period not to exceed two years, a decent, safe, and sanitary dwelling which is adequate to accommodate him and his family in an area not generally less desirable in regard to public utilities and commercial facilities than the area from which he was displaced and 12 percent of the acquisition price of the property taken, but in no event may this payment exceed $1,500. This payment may be used as a rent supplement or for a down payment on the purchase of a dwelling. [IM 80-1-68, No. 9-c, (2)]

Individuals or Families Who Are Occupying Rental or Leased Space

In addition to moving expenses allowed under Sec. 502, an individual or family renting a dwelling for 90 days prior to the initiation of negotiations for such property, is entitled to a payment to enable him to rent or purchase decent, safe, and sanitary housing.

The amount of the payment shall be determined by subtracting 24 times the amount which the displaced individual or family paid in rent for the last month immediately before being required to move, or 24 times the economic rent as established by the States' appraisal process for his dwelling unit, whichever is the lesser, from the amount necessary to rent a decent, safe, and sanitary dwelling for the next two years. In no event shall this amount exceed $1,500. [IM 80-1-68, No. 9-c, (1)]

Hardship Cases

In cases of extreme hardship or other similar extenuating circumstances, exceptions to the decent, safe, and sanitary characteristics of replacement housing may be permitted and the displaced individual or family may still qualify for a replacement housing payment. Such exceptions will only be made with the written concurrence of the Regional Federal Highway Administrator. [IM 80-1-68, No. 9-g]

Standards for Decent, Safe, and Sanitary Housing

The following minimum requirements must be met in order for a dwelling to be classified as decent, safe, and sanitary by the Department of Transportation:

1. The dwelling must conform with all applicable provisions for existing structures that have been established under State or local building, plumbing, electrical, housing, and occupancy codes and similar ordinances or regulations applicable to the property in question.

2. Have a continuing and adequate supply of potable safe water.

3. Have a kitchen or an area set aside for kitchen use which contains a sink in good working condition and connected to hot and cold water, and a sewage disposal system. A stove and refrigerator in good operating condition shall be provided when required by local codes, ordinances or custom. When these facilities are not so required by local codes, ordinances, or custom the kitchen area or area set aside for such use shall have utility service connections and adequate space for the installation of such facilities.

4. Have an adequate heating system in good working order which will maintain a minimum temperature of 70 degrees in the living area under local outdoor design temperature conditions. A heating system will not be required in those geographical areas where such is not normally included in new housing.

5. Have a bathroom, well lighted and ventilated and affording privacy to a person within it, containing a lavatory basin and a bathtub or stall shower, properly connected to an adequate supply of hot and cold running water, and a flush water closet, all in good working order and properly connected to a sewage disposal system.

6. Have provision for artificial lighting for each room.

7. Be structurally sound, in good repair, and adequately maintained.

8. Each building used for dwelling purposes shall have two safe unobstructed means of egress leading to safe open space at ground level. Each dwelling unit in a multi-dwelling building must have access either directly or through a common corridor to two means of egress to open space at ground level. In buildings of three stories or more, the common corridor on each story must have at least two means of egress.

9. Have 150 square feet of habitable floor space for the first occupant in a standard living unit and at least 100 square feet of habitable floor space for each additional occupant. The floor space is to be subdivided into sufficient rooms to be adequate for the family. All rooms must be adequately ventilated. Habitable floor space is defined as that space used for sleeping, living, cooking or dining purposes, and excludes such enclosed places as closets, pantries, bath or toilet rooms, etc. [IM 80-1-68, No. 13-a]

Alternatives

In lieu of the standards listed above, the agency providing the relocation assistance may submit for approval by the Director of the Bureau of Public Roads a local housing code by means of which the decent, safe, and sanitary nature of replacement housing for a project is to be judged. Any code so submitted must be reasonably comparable to the list of standards described above. In addition, the Director of the Bureau of Public Roads may approve exceptions to the standards as set out above where unusual conditions exist. [IM 80-1-68, No. 13-c,d]

As mentioned previously, the above is merely a brief summary of some of the standards established by IM 80-1-68. It is, however, illustrative of the scope and complexity of Chapter 5 of the 1968 Federal-Aid Highway Act.

State Constitutional Problems

In drafting legislation necessary to comply with the provisions of Chapter 5 of the 1968 Federal-Aid Highway Act, various constitutional problems may be encountered. For example, questions may arise as to whether such legislation would violate constitutional provisions or underlying principles of law relating to equal protection and uniformity of classification, prohibitions against special or private acts, inhibitions against private emoluments, contracting debts for works of internal improvement, the grant of special or exclusive privileges, immunities or franchises, and others.

It is beyond the scope of this report to consider all these in detail. They are merely noted before proceeding to a brief discussion of what would appear to be the chief avenues of attack on legislation enacted to comply with Chapter 5 of the 1968 Federal-Aid Highway Act. These are:

1. Whether a statute which complies with the provisions of Chapter 5 would be repugnant to a State constitutional provision prohibiting the State from giving or lending its credit in aid of private individuals or corporations.

2. Whether a statute which complies with the provisions of Chapter 5 would contravene a State constitutional prohibition against the diversion of funds for non-highway purposes.

These constitutional questions came under review in cases dealing with the validity of legislation enacted to comply with the provisions of the Federal-Aid Highway Act of 1956, relating to utility relocation. Some of these cases are considered in the following.[2]

Utility Relocation Provisions of the Federal-Aid Highway Act of 1956

The Federal-Aid Highway Act of 1956 provides that if a State pays for the nonbetterment cost of relocating utility facilities displaced by a Federal-aid highway project, Federal funds can be used to reimburse the State in the same proportion that Federal funds are expended on the overall highway project. A State is eligible for Federal reimbursement provided that such State payment violates neither State law nor contracts between the State and the utility.

In order to secure Federal funds available for this purpose, a number of States passed enabling statutes which permitted the expenditure of State money for the nonbetterment relocation costs of utilities. In 1958, such legislation was tested in the courts of Tennessee, New Mexico, and Minnesota. The result was that the Tennessee and New Mexico statutes were held to be repugnant to State constitutional provisions prohibiting the State from giving or lending its credit in aid of private individuals and corporations, but the constitutionality of the Minnesota statute was upheld.

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[2]For a more complete discussion, see HRB Special Report 91, Relocation of Public Utilities, 1955-1966.

Constitutional Provisions Prohibiting Pledge of State's Credit

In State Highway Comm'n of New Mexico v. Southern Union Gas Co., 65 N.M. 84, 332 P.2d 1007 (1958), the Supreme Court of New Mexico rejected the contention that it is for the Legislature to determine what are and what are not compensable damages. In holding the State utility relocation statute unconstitutional, the New Mexico Supreme Court said that the Legislature could not merely classify relocation expenses as "damages" and then properly pay such "damages." This was held to be a circumvention of the State constitution by a "play of words." Finally, the statute was held unconstitutional because it violated a constitutional prohibition against donation of State funds in aid of private corporations.[3]

Likewise, in State v. Southern Bell Tel. and Tel. Co., 204 Tenn. 207, 319 S.W. 2d 90 (1958), cert. denied, 359 U.S. 1011 (1959), a utility relocation statute was struck down as repugnant to the Tennessee constitution because it violated a constitutional provision prohibiting the giving or lending of the State's credit to private individuals and corporations.

Minneapolis Gas Co. v. Zimmerman, 253 Minn. 164, 91 N.W.2d 642 (1958), involved an action brought by the Minneapolis Gas Company against the Highway Commissioner of Minnesota for the payment of nonbetterment relocation costs of utilities, as authorized by a State enabling act passed in 1957.

In response to the contention that the Minnesota Act was in violation of constitutional provisions prohibiting the State from lending or giving its credit in aid of individuals, associations, or corporations, the court held that the expenditure of public monies for relocation of utility facilities during the course of highway construction was for a public not a private purpose, and hence that such expenditure did not constitute a giving or lending of the State's credit to a private corporation.

Constitutional Anti-Diversion Provisions

The reimbursement act, sub judice, in Minneapolis, supra, was further attacked on the ground that it violated the Minnesota constitutional prohibition against the diversion of earmarked funds for non-highway purposes. In holding that nonbetterment relocation costs of utilities are a normal and necessary part of highway construction costs and hence that such costs could properly be paid out of State highway funds, the Court said:

> Clearly since the Cater decision (60 Minn. 539, 63 N.W. 111) in 1895, Minnesota has been definitely committed to the view that the use of rights-of-way by utilities for locating their facilities is one of the proper and primary purposes for which highways are designed even though their principal use is for travel and the transportation of persons and property.

The Court went on to list the following practical arguments in support of the expenditure of public funds for relocation of utility facilities:

1. The realities of the situation are that the people of Minnesota would suffer economically if the state failed to take advantage of Federal aid made available to the privately and municipally owned utilities of this state...

2. If the utilities located in this state must undertake relocation of their facilities without a right to reimbursement, their costs will be substantially increased and this in turn will be reflected in higher utility rates in Minnesota communities.

3. ... to the extent that other states effectuate Federal aid to their utilities and Minnesota does not, the people of Minnesota will be paying Federal taxes which will benefit the people of the other states but which will not benefit the people of Minnesota.

The Maine and New Hampshire Senates sought the opinions of their highest courts in an effort to determine the constitutionality of similar proposed legislation which would allow utilities displaced by highway projects to recover nonbetterment relocation costs. The New Hampshire Supreme Court was of the opinion that the Legislature could validly declare that relocation of utility facilities is a part of highway construction and can therefore be paid out of highway funds. [Opinion of the Justices, 101 N.H. 527, 132 A.2d 613 (1957).] The Maine court, on the other hand, stated that an act which reimbursed utilities for relocation costs was constitutional, but that funds for this purpose would have to come from a source other than highway funds. [Opinion of the Justices, 152 Me. 449, 132 A.2d 440 (1957).][4]

Although the provisions of the 1956 Federal-Aid Highway Act relating to relocation payments to utilities are analogous to the relocation assistance provisions of the 1968 Federal-Aid Highway Act for displaced persons, a distinction may perhaps be drawn insofar as utilities are under a duty to relocate at their own expense. However, the distinction seems somewhat tenuous, and the utility relocation cases yield instruction in respect to the question of whether legislation enacted to comply with Chapter 5 of

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[3]The act was later amended and as amended held constitutional in State v. Lavender, 69 N.M. 220, 365 P.2d 652 (1961).

the 1968 Federal Act would contravene constitutional inhibitions against the pledge of a State's credit, or anti-diversion clauses found in State constitutions.

At the risk of making an ad hominem argument, it is suggested that a court of last resort should not, in the public interest, ignore the practical considerations which the Court in Minneapolis, supra, made plain in the following language quoted with approval from Department of Highways v. Pennsylvania Pub. Util. Comm'n., 185 Pa. Super. 1, 136 A.2d 473 (1957):

> ' .... Thus, if state A receives from the federal government 90% of the cost of other utility relocations on Interstate highways because the policy of that state is to bear this cost, while state B receives nothing from the federal government for utility relocations because its policy is not to bear this cost, the citizens of state B will pay on their utility bills for utility relocations in their state, and will also pay in their federal gasoline tax for a part of the cost of relocating utilities in state A.'

It is patent that the consequences of non-compliance with the Federal-Aid Highway Act of 1968 are far more drastic, in that they involve the potential of the denial of all Federal highway aid, if acceptable assurances cannot be given with respect to relocation assistance.

Problems of Financing

It should be pointed out briefly that practical problems in financing may be encountered. Take the following hypothetical case: An individual to be displaced is paid fair market value for his property by the State in the amount of $10,000. There is a trust deed or mortgage on the property, and he realizes $2,000 from the sale thereof to the State. In order to purchase a decent, safe, and sanitary dwelling he must pay $15,000. The lending institution which he approaches will loan him up to 60% on the purchase of the new dwelling, or $9,000. He thus must make a down payment in the amount of $6,000, and he has no funds other than the $2,000 realized from the sale of the property to the State. A second trust deed or mortgage will not make up the difference. Under the terms of Section 506 of Chapter 5 of the Federal Act the $5,000 additive will be paid as reimbursement after he has purchased and occupied the dwelling. The difference between $6,000 and $2,000, or $4,000, would in such instances have to be advanced either by the State, or by the financial community on the basis of a security arrangement not spelled out or even referred to in the Federal Act. It is patent that constitutional problems may be encountered if the money is to be advanced by the States, and practical problems as to sound and sufficient collateral encountered if the money is to be advanced by commercial lending institutions.

An effort to meet this problem has been made in the previously mentioned provisions of IM 80-1-68, No. 9-b, (5) which in material part reads as follows:

> In cases where an owner-occupant qualifies for the payment --- except that he has not yet purchased or occupied a suitable replacement dwelling, the State agency, after inspecting the proposed replacement dwelling and finding that it meets the standards --- for decent, safe, and sanitary dwellings, shall state to any interested party, financial institution, or lending agency, that the owner-occupant will be eligible for the payment of a specific sum under this paragraph provided he purchases and occupies the inspected dwelling by a specified date, which shall be one year from the date on which the owner was required to move from the dwelling taken for the highway project.

Whether such certification by the State will be generally accepted by commercial lending institutions as security for a loan is a matter as yet unknown.

Attention is further invited to the provisions of Section 510 of Chapter 5 of the Federal Act which authorize the Secretary of Transportation to promulgate rules and regulations providing, inter alia, that "a displaced person who makes proper application for a payment authorized --- by this chapter shall be paid promptly after a move or, in hardship cases, be paid in advance." (Underscoring supplied.) At the date of this writing no rules or regulations have been promulgated by the Secretary which would clearly authorize an advance payment in the hypothetical case previously described.

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[4]Included among cases other than those treated above which deal with the constitutionality of statutes authorizing reimbursement of utilities for relocation expenses are: State Highway Dept. v. Delaware Power and Light Co., 39 Del. Ch. 467, 167 A.2d 27 (1961); State v. Idaho Power Co., 81 Ida. 487, 346 P.2d 596 (1959); Edge v. Brice, 253 Ia. 110, 113 N.W.2d 755 (1962); Jones v. Burns, 138 Mont. 268, 357 P.2d 22 (1960); Northwestern Bell Tel. Co. v. Wentz, 103 N.W.2d 245 (N.D. 1960); State v. City of Austin, 160 Tex. 348, 331 S.W.2d 737 (1960); State Road Comm'n. of Utah v. Utah Power and Light Co., 10 Utah 2d 333, 353 P.2d 171 (1960); Washington State Highway Comm'n v. Pacific N.W. Bell Tel. Co., 59 Wash. 2d 219, 367 P.2d 605 (1961). See also HRB Special Report 91, Relocation of Public Utilities, 1955-1966.

State Statutes Enacted to Comply with Chapter 5 of the 1968 Federal-Aid Highway Act

As of January 1, 1969, California, Pennsylvania, New Jersey, and Oregon have enacted legislation in compliance with Chapter 5 of the 1968 Federal-Aid Highway Act. In addition, Iowa, Indiana, Massachusetts, Missouri, and North Dakota have indicated that they are able to comply with the provisions of Chapter 5 under existing legislation.

The statutes enacted by California, Pennsylvania, and New Jersey closely follow the provisions contained in Chapter 5 of the 1968 Act with regard to occupancy, period of ownership, and amount of compensation. The Oregon Act (Oregon Revised Statutes 366.324), on the other hand, is simply a broad delegation of authority to the Oregon State Highway Department to match available Federal funds to the extent provided by Federal law to provide direct financial assistance to persons displaced by highway projects in instances and on the conditions set forth by Federal law and regulations. The Oregon statute is advantageous in that it need not be amended when changes are made in the Federal Act, but the validity of such broad delegation of authority may be open to question in some States.

Interim Measures That States May Use to Comply with Chapter Five

If a State is presently unable to legally comply with Chapter 5 of the 1968 Federal-Aid Highway Act, the FHWA has suggested the following two interim measures which a State might use in order to participate in Federal relocation payments under the 1968 Act:

1. Have the States use a current billing basis in connection with the relocation program, and have the States enter on their books a bookkeeping liability contingent on Federal-aid reimbursement.

2. Advance funds to the States under Section 124 (Trust funds in advance), on either a revolving fund or replenishable fund, whichever is deemed to be more desirable.

Suggested Legislation

Attached is a Proposed Act, which hopefully will prove helpful in drafting legislation to comply with Chapter 5 of the 1968 Federal-Aid Highway Act.[5] This Proposed Act closely parallels said Chapter 5 and statutes enacted to comply with said Chapter 5 by California (Assembly Bill No. 12, Chap. 3, Laws of the 1968 Regular Session amending Sections 15952 and 15956 of the Government Code by adding Article 3.5 to Chapter 1, Division 1 of the Streets and Highways Code, and repealing Sections 103.8, 103.9, 135.1, and 135.2 of the Streets and Highways Code), Pennsylvania (House Bill No. 2653, 1968 Session Laws, amending P.L. 1242 by adding Sections 304.1 - 304.7 to Title 36, Highways and Bridges Code), and New Jersey (Assembly Bill No. 955, Chap. 393 of the 1968 New Jersey Session Laws, repealing P.L. 1962, Chapter 221, and amending Title 27, Highways Code, of the Revised Statutes), and it lists the variations between these State Acts. (The above citations are incomplete because at the time of writing the 1968 Code Supplements for these States have not been published.)

It goes without saying that the suggested legislation which follows herein is presented as a guide, and that it should be modified to meet local conditions where required. However, it is to be emphasized that, generally speaking, the provisions of the suggested legislation reflect mandatory requirements of the Federal-Aid Highway Act of 1968, and that effective compliance must be had with such requirements, if the possibility of the imposition of the sanctions provided for in the Federal Act is to be avoided.

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[5] It should be noted that many bills have been introduced in Congress which provide for uniform relocation assistance in all Federally-assisted projects. (See, Hearings Before the House Committee on Public Works, Uniform Relocation Assistance and Land Acquisition Policy, 90th Cong., 2d Sess. [Sept. 11, 12, 17, 18, 19, and 24, 1968], also see, Muskie Bill, S. 698, 90th Cong., 1st Sess., and Muskie Bill, S. 1, 91st Cong., 1st Sess.). It seems likely that Congress will pass a Federal Uniform Relocation Assistance Act in 1969. In anticipation of such an Act, a State Legislature possibly should consider enacting a relocation act which provides relocation assistance for any displacement caused by the exercise of a State's eminent domain power.

PROPOSED ACT

SECTION 1 — Declaration of Legislative Purpose

WHEREAS, The Federal-Aid Highway Act of 1968 establishes a new program of highway relocation assistance; and

WHEREAS, The declared purpose of this program is to insure that a few individuals do not suffer disproportionate injuries as a result of a displacement caused by a Federal highway program; and

WHEREAS, Continuing eligibility for Federal-aid highway funds is made contingent upon compliance with the terms and provisions of the Federal-Aid Highway Act of 1968; and

WHEREAS, The Legislature hereby finds and declares that it is in the public interest that persons displaced by the construction of highways, whether Federally financed or not, be fairly compensated for the property acquired and inconvenience suffered as the result of programs designed for the benefit of the public as a whole; and

WHEREAS, The Legislature hereby further finds and declares that relocation assistance and assistance in the acquisition of replacement housing are proper costs of the construction of highways; now therefore

BE IT ENACTED ---

The foregoing Declaration of Legislative Purpose follows in part the New Jersey Act and in part the Federal Act. The last sentence has been added to provide a legislative finding that the payments provided for in the Act constitute a proper cost of construction, which finding might prove of some value in the event of a court test, particularly in those States having an anti-diversion clause in their State constitutions. The Declaration recites that the Act is applicable to all State highways, whether on the Federal system or not, in order to avoid the possible equal protection question. It is to be noted that the coverage of the New Jersey, Pennsylvania, and California Acts is not restricted to Federal-aid highways.

SECTION 2 — Definitions

When used in this Act:

"Person" shall mean (a) any individual, partnership, corporation or association which is the owner of a business; (b) any owner, part owner, tenant, or sharecropper operating a farm; (c) an individual who is the head of a family; or (d) an individual not a member of a family.

"Family" shall mean two or more individuals living together in the same dwelling unit who are related to each other by blood, marriage, adoption, or legal guardianship.

"Displaced person" shall mean any person who moves from real property on or after the effective date of this Act as a result of the acquisition or reasonable expectation of acquisition of such real property, which is subsequently acquired, in whole or in part, for highway purposes or as the result of the acquisition for highway purposes of other real property on which such person conducts a business or farm operation.

"Business" shall mean any lawful activity conducted primarily (a) for the purchase and resale, manufacture, processing, or marketing of products, commodities or any other personal property; (b) for the sale of services to the public; or (c) by a nonprofit organization.

"Farm operation" shall mean any activity conducted solely or primarily for the production of one or more agricultural products or commodities for sale and home use, and customarily producing such products or commodities in sufficient quantity to be capable of contributing materially to the operator's support.

The definitions as set forth are similar to those listed in Sec. 511 of Chapter 5 of the 1968 Federal-Aid Highway Act. California, Pennsylvania, and New Jersey have adopted similar definitions in their Acts. Under "Displaced Persons," in the New Jersey Act, the term "transportation project" is substituted in place of "highway purposes." The New Jersey Act defines "transportation project" as "any undertaking of the department for which the acquisition of real property is required." This insures that the New Jersey Relocation Act applies to all transportation projects and not just Federal-aid highway projects.

SECTION 3 Administration of Relocation Assistance Program

In order to prevent unnecessary expenses and duplication of functions, the State Highway Department may make relocation payments or provide relocation assistance or otherwise carry out the functions required under this Act by utilizing the facilities, personnel, and services of any other Federal, State or local governmental agency having an established organization for conducting relocation assistance programs.

This provision is similar to Sec. 503 of Chapter 5 of the 1968 Federal-Aid Highway Act. The Pennsylvania and New Jersey Acts have provisions similar to the above. (See N. J., Sec. 2, Pa. Sec. 304.6).

SECTION 4 Relocation Services

The State Highway Department shall provide a relocation advisory assistance program which shall include such measures, facilities, or services as may be necessary or appropriate in order:

(1) To determine the needs, if any, of displaced families, individuals, business concerns, and farm operators for relocation assistance;

(2) To assure that, within a reasonable period of time, prior to displacement there will be available, to the extent that can be reasonably accomplished, in areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families and individuals displaced, housing meeting the standards established by the Director of the State Highway Department for decent, safe, and sanitary dwellings, equal in number to the number of, and available to, such displaced families and individuals and reasonably accessible to their places of employment;

(3) To assist owners of displaced businesses and displaced farm operators in obtaining and becoming established in suitable locations;

(4) To supply information concerning the Federal Housing Administration home acquisition program under section 221 (d) (2) of the National Housing Act, the small business disaster loan program under section 7 (b) (3) of the Small Business Act, and other programs of this State or the Federal government.

These above provisions are almost identical to Sec. 508 (a) 1, 2, 3 and 4 of Chapter 5 of the 1968 Federal-Aid Highway Act. The New Jersey Act has provisions similar to these (see N. J. Sec. 8 (1) (2) and (3)). The Pennsylvania Act does not provide for advisory assistance but this can be accomplished under the rule-making power of the Pennsylvania Secretary of Highways. The California, New Jersey, and Pennsylvania Acts do not have provisions similar to subsection (4) above, which is included in the Proposed Act because it is required by the Federal Act.

The California Act does not describe in detail the kind of advisory assistance that must be provided. It simply states that the Highway Department is authorized to give relocation advisory assistance to any individual, family, business or farm operations displaced because of the acquisition of real property for any project on the State highway system or Federal-aid systems. In addition, the California Act authorizes the Highway Department to establish an advisory assistance office to assist in obtaining facilities for displaced individuals, families, and businesses (see: Calif. Assembly Bill No. 12, Sec. 156.5 (a) (b)).

It should be noted that both California and Maryland enacted relocation assistance laws prior to the passage of the 1968 Federal-Aid Highway Act. The Maryland law (Ann. Code of Md., Art. 33 A, Eminent Domain, Sec. 6A, 1968 Cumulative Supp.) contains provisions somewhat similar to the replacement housing provisions of the 1968 Act except that a displaced homeowner need not purchase a new home in order to qualify for an additive of up to $5,000. The Maryland law is designed to compensate the displaced owner for the equivalent of replacement housing.

The California law (Cal. Streets and Highways Code Sec. 135.3, 135.4, 135.5, 135.6 and 135.7; Cal. Health and Safety Code Sec. 37110.5, 1969 Pocket Supp.) provides that it is the responsibility of the State Department of Public Works to provide relocation assistance to persons displaced by highway projects. Relocation assistance under the above code sections encompasses arranging for relocation housing or for the construction of such housing if necessary. The California law is more comprehensive than the Maryland law in that it provides for the actual procurement or construction of replacement housing, whereas the Maryland law simply compensates a displaced homeowner for equivalent housing.

SECTION 5 Relocation Payments

A. Payments for Actual Expenses: As part of the cost of construction the State Highway Department may compensate a displaced person for his actual and reasonable expenses in moving himself, his family, his business, or his farm operation, including personal property.

B. Optional Payments (Dwellings): Any displaced person who moves from a dwelling who elects to accept the payments authorized by this subsection in lieu of the payments authorized by subsection (A) of this section may receive:

1. A moving expense allowance, determined according to a schedule established by the Director of the State Highway Department, not to exceed two hundred dollars ($200);

2. A dislocation allowance in the amount of one hundred dollars ($100).

C. Optional Payments (Business and Farm Operations): Any displaced person who moves or discontinues his business or farm operations who elects to accept the payment authorized by this section in lieu of the payment authorized by subsection (A) of this section, may receive a fixed relocation payment in an amount equal to the average annual net earnings of the business or farm operation, or five thousand dollars ($5,000), whichever is the lesser. In the case of a business, no payment shall be made under this subsection unless the State Highway Department is satisfied that the business (a) cannot be relocated without a substantial loss of its existing patronage, and (b) is not part of a commercial enterprise having at least one other establishment, not being acquired by the State or by the United States, which is engaged in the same or similar business. For purposes of this subsection, the term "average annual net earnings" means one-half of any net earnings of the business or farm operation, before Federal, State, and local income taxes, during the two (2) taxable years immediately preceding the taxable year in which such business or farm operation moves from the real property acquired for such project, and includes any compensation paid by the business or farm operation to the owner, his spouse, or his dependents during such two (2) year period. To be eligible for the payment authorized by this subsection, the business or farm operation must make its State income tax returns available and its financial statements and accounting records available for audit for confidential use to determine the payment authorized by this subsection.

This section is almost identical to Sec. 505 (a) (b) and (c) of Chapter 5 of the 1968 Federal-Aid Highway Act. The final sentence in subsection C (b) has been taken from the California Act. (See Sec. 157 (c). The Pennsylvania and New Jersey Acts do not contain a similar provision. Inclusion in a statute of language similar to that taken from the California Act may prove necessary and helpful for the purpose of establishing "average annual net earnings."

The Pennsylvania Act imposes a limitation on moving expenses. It also provides that "in no event shall such expenses exceed the market value of the property moved ---." It should be noted that Sec. 505 (a) of Chapter 5 of the 1968 Federal-Aid Highway Act states that a displaced person, family, business or farm operation may recover actual "reasonable" moving expenses. The Federal Act does not define "reasonable" moving expenses. The limitation imposed by the Pennsylvania Act has not been included in the Proposed Act because it is felt that there is at least some possibility such limitation might jeopardize compliance with the Federal Act.

SECTION 6 Replacement Housing

(A) In addition to amounts otherwise authorized by this Act, as part of the cost of construction the State Highway Department shall make a payment to the owner of real property acquired for a project which is improved by a single-, two-, or three-family dwelling actually owned and occupied by the owner for not less than one (1) year prior to the initiation of negotiations for the acquisition of such property. Such payment, not to exceed five thousand dollars ($5,000), shall be the amount, if any, which when added to the acquisition payment, equals the average price required for a comparable dwelling determined, in accordance with standards established by the Director of the State Highway Department to be a decent, safe, and sanitary dwelling adequate to accommodate the displaced owner, reasonably accessible to public services and places of employment, and available on the private market. Such payment shall be made only to a displaced owner who purchases and occupies a dwelling within one year subsequent to the date on which he is required to move from the dwelling acquired for the project.

(B) In addition to amounts otherwise authorized by this Act, the State Highway Department shall make a payment to any individual or family displaced from any dwelling not eligible to receive a payment under subsection (A) of this section which dwelling was actually and lawfully occupied by such individual or family for not less than ninety (90) days prior to the initiation of negotiations for acquisition of such property. Such payment, not to exceed fifteen hundred dollars ($1,500) shall be the amount which is necessary to enable such person to lease or rent for a period not to exceed two (2) years, or to make the down payment on the purchase of a decent, safe, and sanitary dwelling of standards adequate to accommodate such individual or family in areas not generally less desirable in regard to public utilities and public and commercial facilities.

The above provisions are similar to Sec. 506 (a) and (b) of Chapter 5 of the 1968 Federal-Aid Highway Act. The California, Pennsylvania, and New Jersey Acts contain provisions similar to those above. The California Act substitutes the words "prior to the first written offer" in place of the words "prior to the initiation of negotiations" as used in the Federal Act. The effect is the same, however, since in California the initiation of negotiations is accomplished by a written offer.

SECTION 7 — Expenses Incidental To Transfer of Property

(A) In addition to amounts otherwise authorized by this Act, the State Highway Department shall reimburse the owner of real property acquired for a project for reasonable and necessary expenses incurred for (1) recording fees, transfer taxes, and similar expenses incidental to conveying such property; (2) penalty costs for prepayment of any mortgage entered into in good faith encumbering such real property if such mortgage is on record or has been filed for record as provided by law on the date of approval by the State Highway Department of the location of such project; and (3) the pro rata portion of real property taxes paid which are allocable to a period subsequent to the date of vesting of title in the State, or the effective date of possession of such real property by the State Highway Department, whichever is earlier.

(B) No payment received under this Act shall be considered as income for purposes of the State Income Tax Law; nor shall such payments be considered as income or resources to any recipient of public assistance and such payment shall not be deducted from the amount of aid to which the recipient would otherwise be entitled to under the State Welfare Act.

Section 7 (A) is similar to Sec. 507 (a) of Chapter 5 of the 1968 Federal-Aid Highway Act. The New Jersey and Pennsylvania Acts have similar provisions. The California Act, on the other hand, does not have a provision similar to subsection (A) but these incidental expenses can be granted under the rule-making power of the California Secretary of Highways. It should be noted that Section 1246.2 of the California Code of Civil Procedure provides that when property is acquired for a public use the amount payable to the mortgagee, under the terms of the mortgage, shall not include any prepayment penalty costs. Thus, the problem of penalty expenses for prepayment of a mortgage are covered by the California Code and need not be set out in subsequent rules which are adopted by the Secretary of Highways.

The California Act has a provision similar to subsection (B), but the Pennsylvania and New Jersey Acts do not. Sec. 507 (b) of Chapter 5 of the 1968 Federal-Aid Highway Act provides that relocation payments will not be considered income for Federal tax purposes, or for determining the eligibility or extent of eligibility of any person for assistance under the Social Security Act or any other Federal law. The purpose of Sec. 507 (b) is to insure that relocation payments will not be diminished by Federal taxes and that the recipient of relocation payments will not be deprived of any benefits for which he would otherwise be eligible under a Federal program. Likewise, it is recommended that a State provide that relocation payments are not to be considered as income for State tax purposes or for the purpose of determining eligibility or the extent of eligibility for benefits under a State welfare or assistance program. This will help to assure that persons receiving public assistance will actually receive the full amount of payments as intended by the Federal Act.

SECTION 8 — Delegation of Authority to Adopt Rules and Regulations

The Director of the State Highway Department is authorized to adopt such rules and regulations as he deems necessary and appropriate to carry out the provisions of this Act. The Director of the State Highway Department is authorized and empowered to adopt all or any part of applicable Federal rules and regulations which are necessary or desirable to implement this Act. Such rules and regulations shall include, but not be limited to, provisions relating to:

(A) Payments authorized by this Act to assure that such payments shall be fair and reasonable and as uniform as possible.

(B) Prompt payment after a move to displaced persons who make proper application and are entitled to payment, or, in hardship cases, payment in advance.

(C) Moving expense allowances as provided for in Section 5, subsections A and B of this Act.

(D) Standards for decent, safe, and sanitary dwellings.

(E) Eligibility of displaced persons for relocation assistance payments, the procedure for such persons to claim such payments, and the amounts thereof.

(F) Procedure for an aggrieved displaced person to have his determination of eligibility or amount of payment reviewed by the Director of the State Highway Department.

These above provisions are similar to Section 159 of the California Act and Section 12 of the New Jersey Act. In turn, Section 12 of the New Jersey Act is similar to Section 510 (a) (1) (2) and (3) of the Federal Act. The Pennsylvania Act simply provides that it is the duty of the Secretary of Highways to supervise the administration and enforcement of the provisions of the Act and to adopt rules and regulations to implement the Act. (See: Section 304.7). Thus, the California and New Jersey Acts specify the subject matter of rules and regulations to be adopted, but the Pennsylvania Act does not.

Inclusion of a provision similar to subsection (F) is of special importance because Section 510 (a) (3) of the Federal Act specifically required a review procedure. In addition, No. 11-b and c of IM 80-1-68 provide that the head of a State Highway Department shall establish procedures for reviewing appeals and submit these review procedures to the Division Engineer (Bureau of Public Roads) for his approval.

SECTION 9 — Eminent Domain

Nothing contained in this Act shall be construed as creating in any condemnation proceedings brought under the power of eminent domain, any element of damages not in existence on the date of enactment of this Act.

This provision is identical to Section 159.5 of the California Act. The Pennsylvania and New Jersey Acts have similar provisions (see: Section 304.5, Pennsylvania; Section 6 (a), New Jersey).

SECTION 10 — Separability

If any provision of this Act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect any other provision or application of this Act which can be given effect without such invalid provision or application, and to this end the provisions of this Act shall be severable.

SECTION 11 — Effective Date

This Act shall take effect immediately on passage.

BIBLIOGRAPHY

Table of Cases

Monongahela Nav. Co. v. United States, 148 U.S. 312, 37 L.Ed. 463, 13 S.Ct. 622 (1893).

Mitchell v. United States, 267 U.S. 341, 69 L.Ed. 644, 45 S.Ct. 293 (1925).

United States ex rel. T.V.A. v. Powelson, 319 U.S. 266, 87 L.Ed. 1390, 63 S.Ct. 1047 (1943).

United States v. Petty Motor Co. 327 U.S. 372, 90 L.Ed. 729, 66 S.Ct. 596 (1956).

United States v. General Motors Corp. 323 U.S. 373, 89 L.Ed. 311, 65 S.Ct. 357 (1945).

Kimball Laundry Co. v. United States, 338 U.S. 1, 93 L.Ed. 1765, 69 S.Ct. 1434 (1949).

Joslin Mfg. Co. v. Providence, 262 U.S. 668, 67 L.Ed. 1167, 43 S.Ct. 684 (1923).

Minneapolis Gas Co. v. Zimmerman, 253 Minn. 164, 91 N.W.2d 642 (1958).

Opinion of the Justices, 101 N.H. 527, 132 A.2d 613 (1957).

Opinion of the Justices, 152 Me. 449, 132 A.2d 440 (1957).

State Highway Comm'n of New Mexico v. Southern Union Gas Co., 65 N.M. 84, 332 P.2d 1007 (1958).

State v. Southern Bell Tel. and Tel. Co., 204 Tenn. 207, 319 S.W.2d 90 (1958).

Department of Highways v. Pennsylvania Pub. Util. Comm'n, 185 Pa. Super. 1, 136 A.2d 473 (1957).

State Highway Department v. Delaware Power and Light Co., 39 Del. Ch. 467, 167 A.2d 27 (1961).

State v. Idaho Power Co., 81 Ida. 487, 346 P.2d 596 (1959).

Edge v. Brice, 253 Ia. 710, 113 N.W.2d 755 (1962).

Jones v. Burns, 138 Mont. 268, 357 P.2d 22 (1960).

State v. Lavender, 69 N.M. 220, 365 P.2d 652 (1961).

Northwestern Bell Tel. Co. v. Wentz, 103 N.W.2d 245 (N.D. 1960).

State v. City of Austin, 160 Tex. 348, 331 S.W.2d 737 (1960).

State Road Comm'n of Utah v. Utah Power and Light Co., 10 Utah 2d 333, 353 P.2d 171 (1960).

Washington State Highway Comm'n v. Pacific N.W. Bell Tel. Co., 59 Wash. 2d 219, 367 P.2d 605 (1961).

Law Review Articles

Langenheim, Constitutionality of State Payment to Relocate Utilities, 38 Neb. L. Rev. 553 (1959).

Miller, Federal and State Condemnation Proceedings -- Procedure and Statutory Background, 14 Vand. L. Rev. 1085 (1961).

Comment, Eminent Domain - Damages - Cost of Moving Personal Property Rejected as a Separate Element of Damages, 49 Iowa L. Rev. 606 (1964).

Comment, State Constitutional Law - Public Utilities - Constitutionality of State Statutes Reimbursing Utilities for the Relocation of Equipment in Connection with Construction of Federal-Aid Highways, 35 N.Y.U.L. Rev. 302 (1960).

Note, Public Utility Relocation Costs Relative to the Federal-Aid Highway Act of 1956, 60 W.Va. L. Rev. 358 (1956).

Recent Decisions, State Constitutional Law - Public Utilities - Statute Reimbursing Utilities for Relocation Expenses Held not Violative of Private Donation Prohibitions, 17 Rutgers L. Rev. 233 (1962).

Miscellaneous

Relocation of Public Utilities Due to Highway Improvement - An Analysis of Legal Aspects, Highway Research Board Special Report No. 21 (1955).

Relocation of Public Utilities: 1956 - 1966, Highway Research Board Special Report No. 91 (1966).

Hearings Before the House Committee on Public Works, Uniform Relocation Assistance and Land Acquisition Policy, 90th Cong. 2d Sess. (Sept. 11, 12, 17, 18, 19, and 24, 1968).

House Committee on Public Works, Study of Compensation and Assistance for Persons Affected by Real Property Acquisition in Federal and Federally Assisted Programs, 88th Cong., 2d Sess. 11, 14, (Commiteee Print No. 31, Dec. 22, 1964).

Staff of Dept. of Transportation, 90th Cong., 1st Sess., Highway Relocation Assistance Study, (Committee Print No. 9, July 1967).

Dept. of Transportation, Instructional Memorandum 80-1-68 (Sept. 5, 1968).

APPLICATION

The foregoing paper should prove helpful to State Highway officials and their Legal Counsels in drafting legislation in compliance with Chapter 5 of the 1968 Federal-Aid Highway Act. The discussions of constitutional and other legal problems should be of special interest to the Counsels in their reviews and analyses of their States' statutes.

The Proposed Act that has been prepared as suggested legislation is presented as a guide and should be modified to meet local conditions where required. However, the provisions of the suggested legislation reflect mandatory requirements of the Federal-Aid Highway Act of 1968 and, by whatever form taken, effective compliance must be had to avoid the possibility of the imposition of the sanctions provided for in the Act.