REPORT OF DIVISION I
ON
DESIGN, RIGHT-OF-WAY AND BORDER CONTROL

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The Project Committee on Right-of-Way and Border Control sponsored the following special paper for presentation at the 1942 annual meeting. Because of the importance of the subject of land acquisition at this time, the Committee recommended that this paper be submitted to the Right-of-Way Committee of the American Association of State Highway Officials.

"PUBLIC LAND ACQUISITION FOR HIGHWAY PURPOSES"

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There are many focal points of weakness in the present public land acquisition machinery for highway purposes in the United States. While the laws and procedure in some States are models of excellence, policies and practices in most States can be improved materially. The construction of new facilities and the modernization of existing highways are being delayed, sometimes indefinitely, because of prohibitive land acquisition costs. The diversity of land acquisition methods, most of them time-consuming and expensive, is a primary obstacle. Many States still permit the burden of acquisition and financing of State highway rights-of-way to rest with local units of government despite ineffective administration and financial incapacity. Tolerance of these practices has impeded the early realization of the benefits of needed public improvements. Tedious delays increase costs already burdensome, while untrained personnel are helpless to meet the challenge of new requirements. Unfortunately the law and the courts move very slowly indeed to the dynamic requirements of present-day highway transport.

In a word, public authorities in many of the States cannot obtain land for highway facilities when they need it most; when they do finally acquire such lands, it is found they do not have enough, and that too much has been paid for what they do have. As a result, the functional obsolescence now characteristic of land acquisition policy threatens to warp the growth of a highway system which might otherwise enjoy a wholesome development. Properly planned and implemented with efficient land acquisition machinery, a highway facility can supply a needed transportation medium, sharply increase adjacent land values, reduce commuting time to urban centers, and result in a lower cost for a better transportation service. Improperly planned and hindered by a multiplicity of legal, financial, and administrative obstacles, a highway becomes a magnet for slum development, billboards, roadside stands of all sorts, decadent land values, and traffic congestion with its attendant human and economic toll; at the same time, it results in a higher cost for a poorer transportation service.

While one cannot condone the continued existence and use of outmoded land acquisition practices, it is easy to understand how this aggravated condition came to exist. Along with the transfer of local highways to the State highway departments, the States fell heir to the already ancient laws dealing with right-of-way acquisition.[1] The State laws and practices of appropriation of lands for public purposes represent the accumulations of over a century, and except in isolated instances, little revision or simplification has been attempted. The result is that we have attempted to build a highway system for the modern, streamlined, high-speed motor vehicle with land acquisition laws and devices of the horse and buggy days. There is much wisdom in periodic revision of the rules of policy and procedure, lest the substance be engulfed in a maze of arbitrary and confusing laws.

The problem is not so much one of devising an entirely new technique as it is of revising the existing mechanism and reassembling the parts to do a given job more effectively. There is no "best" method of right-of-way acquisition. Practice will vary with needs and circumstances. But if land acquisition policy is to be efficient in implementing the creation and modernization of our highway system, it must facilitate land assembly at the minimum total cost with the maximum of speed consistent with the preservation of the rights of private property. To this end, the following recommendations are suggested:

(1) A single method of acquiring land. One of the chief weaknesses of present right-of-way acquisition practice is the variety of methods, voluntary and compulsory, of acquiring land. Investigation reveals that there are 320 methods of condemnation in fifty-five jurisdictions. Separate methods are provided for the various policical subdivisions of a given State, different methods for the numerous agencies within each such unit, and still others for various public uses. A single, efficient method, preferably what has been referred to as the administrative type, of acquiring lands for highway facilities or for all public purposes can effectively be substituted for the many present cumbersome procedures. There is nothing inherent in the nature of the units exercising the power of eminent domain nor in the public uses for which lands are acquired that requires individual treatment.

(2) Right of survey entry. To make possible the efficient translation of a projected public improvement into the finished product, it is necessary that public authorities have the right to enter private property for the purpose of making whatever locations and surveys are essential, without becoming liable for the consequences of a legal trespass. While the courts in some States have construed this right to be implied from the express grant of authority to make provision for designated public improvements, it is highly desirable to have this right expressly indicated in the statutes, with such safeguards as are deemed necessary to adequately protect the property owner.

(3) Right of immediate entry and possession. Much of the delay and its accompanying expense which is found to exist in the land acquisition process is attributable to the absence of a legal right to enter and take possession of

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[1] See L. E. Boykin, "Expropriated Rights of Way," American Highways, April, 1941, Vol. XX, No. 2, p. 3.

the desired premises after certain preliminary negotiations have been completed. If the condemnor cannot enter into possession or commence construction of the improvement promptly, or until compensation has been determined pursuant to law and paid the owner, hardship will result on both the condemnor, because he cannot proceed with the improvement, and on the public because it is deprived of its use. In most States, the condemnor cannot enter into possession or commence construction of the improvement until compensation has been determined. The right of immediate entry and possession to lands, after certain preliminaries have been complied with, pending the settlement of negotiations is necessary to expedite the timely construction of highways and should be granted by law, with safeguards adequate to protect the property owner.

(4) A centralized State land acquisition agency. Investigation in a number of States reveals that one of the most promising steps toward the immediate solution of the right-of-way problem is the establishment of an efficient, centralized land acquisition department in each State. In practically all States, the local units of government continue to acquire the rights-of-way for a highway system which has rendered their right-of-way activities obsolete. A centralized land acquisition division should be created in every State highway department, equipped with adequate records and staffed with trained personnel selected by the merit system. A consistent policy should prevail, utilizing prenegotiation appraisals, options, standard values, research, summary court procedure, and all the other techniques which experience has demonstrated results in greater returns per unit of expenditure.

(5) Title searches and examinations. The magnitude of the present expenditures and time consumed for title searching and title examination utilized in the transfer of property acquired for highway facilities (as well as for other public purposes) warrants a careful consideration of the merits of the effective and widespread utilization of the Torrens system of land registration in the various States. The Torrens system, originated in 1857 by Sir Robert Torrens in South Australia, registers all deeds and documents affecting property, indicating in a single certificate who the owner is and what encumbrances exist on a given piece of property. This contributes to the easy marketability of title and greatly diminishes the delays and expense of title abstract extensions and title searches incident to ministerial or judicial transfers of land.

(6) The administrative method of land acquisition. The land acquisition machinery designated in the various State laws may be classified as either judicial or administrative. The latter is the more recent and indicates the more summary procedure. Under the judicial method of public land acquisition, after necessary preliminaries have been complied with, the condemnor seeks to purchase the property through negotiation; if the power of eminent domain must be resorted to, the condemnor invokes the formal legal machinery by service of a petition upon the condemnee-owner, the court after hearing the evidence determines with or without a jury what the just compensation for the property shall be, and title passes after the award has been paid the owner. Under the administrative

type, after certain preliminaries, the condemnor files a plat and description of the property and, after notice to the owner of such action, the appropriation is complete and title to the property vests in the State; if formal offers of the condemnor are rejected, the owner must file a claim for the value of his property taken or damaged with the State Court of Claims which makes an award after hearing all the evidence. Since the judicial condemnation mechanism, used in most of the States today, is cumbersome and costly, revision of forcible acquisition could well be modeled after the summary and effective administrative Court-of-Claims procedure exemplified by the New York Grade Crossing Elimination Act.

(7) Court preferences of condemnation cases. A combination of circumstances makes it highly desirable for condemnation suits to be preferred on the civil court calendar. At the time most of our condemnation laws were enacted, decades ago, eminent domain was seldom resorted to, public improvements were few in number, and amounts involved were negligible. Today, however, the situation is much changed. Public improvements are many and are sorely needed; eminent domain is invoked relatively often; awards frequently amount to thousands of dollars in an individual case; and court dockets are congested. In this setting, condemnation cases have been given minor consideration and every dilatory tactic known to the legal profession has been permitted. Present land acquisition laws might well be revised to the end that all court acquisition proceedings be given a genuine preference over all other civil actions in setting of times for hearing and trial, so that all such actions may be quickly heard and determined. At the same time, means could be devised to make such a preference effective in practice.

(8) Group condemnation and abandonment. In the interests of economy and dispatch, group condemnation should be sanctioned by law and used effectively in the acquisition of lands for highway facilities. Group condemnation is the prosecution of eminent domain proceedings against a number of separate parcels or owners in a single suit. Moreover, it is essential to the public interest that when the need arises, the condemnor of lands be permitted to abandon condemnation proceedings except where the property is deemed already to have been taken.

(9) Friendly court proceedings. It is desirable to sanction friendly, non-contested, summary court proceedings in unusual cases and to cure defective titles to property which is acquired for public purposes.

(10) Offset of special benefits. Special benefits to property arising out of public improvements ought to be permitted in all States to be offset at least as against consequential damages. While such special benefits are permitted by some State statutes to be so offset, in actual practice benefits of any kind are rarely taken into account in the determination of just compensation. The sound public policy which is thus written into the law ought to be reflected in its application in practice.

(11) Financing land acquisition. Since the obvious financial incapacity of local units and some States is becoming more and more of an obstacle in the provision of adequate highway facilities, the States and the Federal government may find it necessary to finance the acquisition of land for projects in which

they participate. The Federal Works Administrator has been authorized by the Defense Highway Act of 1941 where necessary to acquire lands for flight strips, access roads, the strategic network and off-street parking facilities, and the costs of such acquisitions are made payable out of the appropriations authorized for the several classes of projects. Consistent with its established policy, the Public Roads Administration, in accordance with an alternate provision of the Act, has channelized the land acquisition activities as much as possible through existing State and local agencies, except where it has been determined that such agencies cannot act with sufficient promptness; in these latter cases, acquisition is facilitated through Federal machinery.

As a technique to facilitate a full realization of the benefits of a modern motorway system, marginal land acquisition has many possibilities, most of them untried and perhaps unknown generally. The more important advantages of the device include: (1) Elimination or reduction of consequential damages; (2) solution of the remnant problem; (3) reduction of traffic hazards; (4) elimination of prohibitive right-of-way costs incident to future highway development; (5) an aid in the establishment of freeways; (6) protection of the highway investment; (7) preservation of the highway appearance; (8) protection of property values; and (9) an aid in the establishment of a land use pattern. It is not alleged, however, that marginal land acquisition is a magic formula, for it has decided limitations and any widespread utilization of the device must be accompanied by adequate safeguards against the unwarranted invasion of the rights of private property and abuse of public funds. But in the light of current difficulties in the acquisition of adequate rights-of-way for highway facilities, this technique along with others merits consideration.

(13) Land use controls. Where other devices such as marginal land acquisition are not utilized, land use controls, i.e., zoning and platting and subdivision regulation, may well be reflected in a more efficient highway transportation system. While motorways are often built to bypass small centers and built-up areas to promote through transport efficiency, the passing of a few years witnesses extensive ribbon development along the roadway in the form of gasoline stations, restaurants, stands, and related enterprises, destroying to a large extent the efficiency for which the motorway was originally designed. Unregulated subdivision of adjacent lands invites more people, more vehicles, more business, and the functional obsolescence of the highway becomes complete. Business and social development is to be encouraged most assuredly, but the pattern of which such development is to follow should be carefully prescribed in the interests of a better transportation system and for the general welfare. This can be accomplished in part at least through the enactment of simple, but effective zoning, platting, and subdivision regulations.

(14) Limited-access highways. Despite the apparent usefulness of the limited-access highway, its potentialities are still largely unexplored today. Early and widespread utilization of this type of motorway will pay untold dividends in safer and more efficient travel.

These, then, are some of the difficulties inherent in our present-day land acquisition machinery which have tended to obstruct the provision of ade-

quate highway facilities. This paper has sought to reveal the urgent need for revision and simplification of policies and practices dealing with right-of-way acquisition consistent with the preservation of basic property rights so that maximum benefit may be realized from the application of modern highway engineering technique.

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A New Approach to Highway Border Control

The Project Committee on Right-of-Way and Border Control is concerned with "what the eye sees" from the highway. The question of selling the right to be seen from the public highway, including limited access highways (freeways and parkways) is important to the control of highway borders. The application, therefore, of the elementary principle of the law of easements used in the decision of the Vermont Supreme Court in upholding the constitutionality of the billboard law of the Green Mountain State is a fundamental and new approach to the control of outdoor advertising supplementing earlier Supreme Court decisions in Massachusetts and in other States.[1]

In declaring that "there is no inherent right to use the highways for commercial purposes," the court points out that the billboard is essentially a use not of private property but of the public thoroughfare, similar to the use of the highway by bus and trolley lines, for which uses permission may be granted or withheld by the State. Under this decision, the private property owner has no inherent right to lease his highway property for commercial advertising unless such advertising applies solely to business on the property.

That the property owner has certain inherent rights in the adjoining street or highway, such as ingress, egress, light and air, has long been recognized by the courts. These rights are known as easements and are governed by the law of easements. The right to be seen from the highway (the factor which gives the billboard its value) is likewise an easement appurtenant to the land abutting upon the highway. But, according to established law, all such easements exist solely for the benefit of the property itself.

The "right-to-be-seen," or visibility easement, entitles the property owner to maintain highway advertising only if it pertains to the property itself, its sale, its rental, or business conducted thereon. It does not include commercial advertising foreign to such business.

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[1] - See: Release of February 26, 1943 by the National Roadside Council covering unanimous decision made on January 5, 1943 by the Vermont Supreme Court. Also, the American City magazine - February 1943 and September 1942, issues.

Under this court ruling, the property owner may lease space to billboards so long as there is no law forbidding it. But if the State enacts a law restricting or even forbidding highway advertising, neither the property owner nor the billboard owner can legally claim that he is deprived of any constitutional rights.

This recent court decision deals with the intangible rights of billboard control under the law of easements. To augment the general application of this legal principle, a definitely positive and tangible legislative approach to highway border control is also needed to enable acquisition of wide rights-of-way with limited access and other control legislation, including advertising and billboard controls. To meet this need, an analysis of State legislation for limited access highways has been prepared by Public Roads Administration as part of a broadly conceived study on all phases of highway access control./1

Model Bill for Limited Access Highway Legislation

In advance planning for post-war traffic facilities there is obvious need for a comprehensive limited access highway law which may serve as a model in order to clarify ambiguities latent in present freeway legislation in 12 States and at the same time make provision for the broadest and most efficient application of a principle which the expert and the layman alike endorse./2 Similar legislation is now pending in at least seven State legislatures.

The designation of the limited access highway is far from uniform in the laws of the 12 States. The special type of highway is designated as a "freeway" in 5 States. The terms "limited access highway," "freeway or limited access highway," and "freeway or parkway" are used in each of two States, respectively, while the one remaining State uses the term "limited access highway" as signifying either a "parkway or motorway." Another State has recently designated a new series of expressways as "thruways." There is wide variation also in the statutory definitions of these terms.

This study reveals many undesirable differences and restrictions in regard to this relatively new type of highway facility. The public interest makes it highly desirable that the framing of limited access highway laws be reasonably uniform and consistent with the functions the special facility is de-

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/1 - See Commissioner of Public Roads General Administrative Memorandum No. 214, dated March 19, 1943, on subject of Model limited access highway legislation. The important features of State limited access highway legislation as of January 1943 are summarized in table 1 of the 7-page analysis of this subject.

/2 - Limited access highway legislation was passed in New Hampshire, February, 1943 and in Florida, June, 1943, making a total of 14 States with these provisions.

signed to fulfill. The purpose of the model limited access highway bill proposed in this study is to provide a basis for statutory enactment in States which have not as yet made provision for limited access facilities. This model bill is in reality a composite of the best portions of existing State laws and every thought and clause in it may be found in the laws of one or more of the 14 States having limited access legislation. It should serve as a check-list of essentials to be included in the statutes from the very start so that the need for periodic amendments to the law may be kept at a minimum.

A review of the reports of Committee activities over the past decade reveals that this fundamental approach has been emphasized as an essential element in the complete roadside. This is the link between land-use and highway functions. Legislation of both the preventive and the corrective type is vital to the sound development of post-war highway construction. This was emphasized by the Commissioner of Public Roads in his General Administrative Memorandum No. 214, dated March 19, 1943, as quoted below:

"Limited access highways of the type that may be expected to assume an important position in post-war construction programs will be effective in serving their intended purposes only to the extent that adequate safeguards are provided against encroachment of undesirable activities or functions and improper access * * * * * * * * the most desirable features (of the limited access laws in effect at the beginning of 1943) have been consolidated into a model bill which it is believed embodies the elements necessary to assist in the establishment and to insure the proper utilization of limited access facilities * * * * * * * it should be carefully reviewed by all interested highway officials in order that it may serve as a basis for legislation of this character that may be introduced in the future."

The "Ogee" or Rounded "S"-type of Slope Grading

As pointed out in the previous report of the Committee, 1/ highway engineers, more than ever before in their search for ways and means to make the highway dollar go farther under changed conditions due to the war, need to make sympathetic adjustments in center-line location and cross-section design to fit the controls fixed by topography. This is necessary if highway construction is to take full advantage of the possibilities of improved cross-section design as a means of lowering maintenance costs.

Progress in highway cross-section development has been evolutionary by a series of steps in the roadside improvement programs. Beginning with the rounding of the tops of cut slopes a decade ago, it was not long before this initial step became the accepted practice of slope flattening and rounding. Transitioning or warping of ends of cuts and fills is another forward step in highway practice. To continue this course of development the "Ogee" or "S" form of rounded slope is presented for use in critical topographic situations. The following analysis by a member of the project committee on roadside design explains how the face of the cut slope may be set back or "offset" to permit flattening of the lower part of the slope where the problem of drainage and erosion is most critical.

1/ - See page 6 of the 1941 Annual Report on Roadside Development.