

DEPARTMENT OF ECONOMICS, FINANCE, AND ADMINISTRATION

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HIGHWAY DEVELOPMENT RIGHTS

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SYNOPSIS

The acquisition of highway development rights is the appropriation by the State or its subdivisions of the right of private property owners to improve road margins. The purpose is to prevent improvements on abutting property which would handicap present facilities or future expansion of the highway. Broadly conceived, this concept provides for the acquisition of a private owner's right to convert agricultural or other undeveloped land to residential, commercial, or industrial uses. It is here proposed as a simple, economic, and effective method of protecting main highways so that they may serve more effectively the purposes for which they are designed. The evils of unregulated growth along our main thoroughfares constrain us to consider carefully any instrument which shows promise of banishing the human and economic casualties of our present imperfect transport system.

A model statute is presented as a guide to effective language for State enactment. The general plan of the law would permit the highway authorities of the State, counties, cities, towns and villages to designate, adjacent to public streets and highways, easement areas of 100-, 200-, 300-foot or of any other width or dimensions deemed appropriate.

The immediate intended effects of such designation of easement areas for the subsequent acquisition of highway development rights would be to arrest all roadside development detrimental to or inconsistent with the present function and future expansion of the road facility.

Thereafter, the highway authorities might acquire highway developments, as specifically defined by the statute, by gift, devise, purchase, or condemnation in the same manner as the State and its local units are now or hereafter may be authorized by law to acquire property or property rights for street and highway purposes.

After the acquisition of highway development rights in designated easement areas adjacent to a public road facility, property owners may continue to cultivate these marginal strips and otherwise continue to utilize them in any fashion not inconsistent with the protection, preservation, and development of the street or highway as an effective traffic facility. Compensation for highway development rights would be made only for actual, demonstrable injury to property.

Some of the finest highway improvements in the United States have become functionally obsolete long before the physical facilities have deteriorated. Unregulated growth along their margins has impaired facilities representing investments of millions of dollars of public funds. Portions of our transportation system are therefore rendering an inferior service today.

To promote better road transportation, various methods of regulating land use development adjacent to streets and highways have been evolved in this country. The major instruments of authority include control of

street and highway access, marginal land acquisition, land-use controls of various sorts, and the acquisition of highway development rights all of which may be supplemented by a liberal initial right-of-way acquisition policy. Minor devices, such as deed restrictions, punitive taxation or licensing, and voluntary expedients, are of little practical significance.

Because of the unique aspects of the concept of highway development rights, it is the purpose of this discussion to develop its outstanding legal and economic characteristics and to appraise its potentialities in greater detail than has been possible heretofore. The device

has been recently recommended by the National Interregional Highway Committee¹ and the Public Roads Administration as an alternative to the outright acquisition of road-bordering lands.

What it is.—The acquisition of highway development rights is the appropriation by the State or its subdivisions of a specific right of private owners abutting new or existing highway facilities—their right to improve road margins in a manner inconsistent with present or future traffic requirements. Broadly conceived, it is the appropriation by the State or by its subdivisions of the right to convert agricultural or other undeveloped land to residential, commercial or industrial uses. Owners of land abutting on roads where highway development rights have been acquired would exercise all the privileges of ownership in road margins of 100-, 200-, or 300-ft. depths, as the case might be, except the right of development. That is, they would be divested of the right to use such strips in any manner inconsistent with the purposes for which the highway was designed. In terms of existing concepts, this amounts to the creation of a new marketable interest in property, and its valuation and acquisition by the State.²

Acquisition of highway development rights along the margins of our main roads is proposed as a simple, economic and effective method of protecting our highways and enabling them to serve the purposes for which they are designed.

In establishing a new facility, a strip of 100 or 200 feet or of any other desirable width could be designated on each side as a development strip, and highway development rights in these margins acquired by the State or local unit. By such acquisition the owners would have transferred to the State their right to develop these marginal strips as they see fit. But the owners could cultivate the strips and

¹See *Interregional Highways*, H. Doc. No. 379, 78th Congress, 2d Session.

²A much broader conception of the acquisition of development rights is currently being considered in Great Britain in connection with proposed postwar development schemes. See the so-called Uthwatt Report, Final Report of the Expert Committee on Compensation and Betterment, Command Paper No. 6386, September 10, 1942.

continue to utilize them in any fashion not inconsistent with the protection and preservation of the highway as an efficient traffic facility. The State would issue rules and regulation governing the development of the marginal strips and the erection of structures on them.

The immediate effect of the device would be to arrest all roadside development detrimental to or inconsistent with the function and future expansion of the highway.

Legal features.—Highway development rights, as so conceived, may be acquired and regulated either under the police power or the power of eminent domain. Presumably these rights are reasonably related to public health, safety, and welfare, as they must be to qualify under the police power. In this event, no compensation would be necessary to designate, acquire or exercise them. But a liberal court reflecting a highly enlightened public opinion would be essential to sustain regulation under the police power.

A good example of existing legislation providing for such use of the police power is to be found in the statutes of Pennsylvania.³ The pertinent sections of the law are as follows:

“The Secretary of Highways, with the approval of the Governor, may designate the future location and width of any proposed highway, and continue to maintain the present highway until such time as the amount of traffic warrants the construction of the new highway designated and until such new highway has been completed and opened to traffic.” (Sec. 521)

“Whenever the Secretary of Highways shall establish the width and lines of any such highway he shall cause a description and plan thereof to be made, showing the center line of said highway and the established width thereof Thereupon such description, plan, and acknowledgment shall be recorded in the office of the recorder of deeds of the proper county (Sec. 522)

“No owner or occupier of lands, building, or improvements shall erect any building or make any improvements within the limits of any State highway the width and lines of which have been established and recorded . . . and if any such erection or improvement shall be

³Purdon's Pennsylvania Statutes Annotated, 1942 (Perm. Ed.), title 36, ch. 1, Secs 521-524. See also Sec. 61

made no allowance shall be had therefore by the assessment of damages. (Sec. 523)

"Any damages sustained by the taking of private property under the provisions of this act. . . . shall be ascertained and paid in the same manner as provided by existing laws for the payment of damages due to a change of width or of existing lines and locations of State highways." (Sec. 524)

This type of set-back control probably needs to be rather narrowly construed, not only because it is conceived under the police power, but because, by its very terms, the law seems to limit public control to present or reasonably-anticipated right-of-way for highway purposes. It probably is not sufficiently comprehensive to sanction control of road-bordering lands as such.

The proposal of acquiring highway development rights is more likely to succeed, therefore, if exercised under the power of eminent domain, with compensation. Simple State enabling legislation would be necessary. That an acquisition was needed for a public use would also have to be demonstrated. This could undoubtedly be sustained upon an adequate presentation of the facts.

A prototype of such legislation exists in a 1941 Maryland statute⁴ as follows:

"The State Roads Commission may acquire, by gift, purchase, condemnation or otherwise, real property along or near any State highway, parkway or free way, or any interest in such property, in order to protect the highway, parkway or freeway, or scenery along or near it, or to provide parking areas along the highway, parkway or freeway and for similar purposes. (Sec. 4A (a))

"Among the interests in land which may be so acquired are agreements or easements restricting, or subjecting to regulation by the Commission, any right of the owner or other persons—

- (1) to erect buildings or other structures;
- (2) to construct any private drive or road;
- (3) to remove or destroy shrubbery or trees;
- (4) to place thereon trash or unsightly or offensive material,
- (5) to display thereon signs, billboards or advertisements. (Sec. 4A (b))

"Where any interest in real property is acquired under this section, the deed, agreement, judgment or other instrument shall clearly set forth the specific restrictions or

other interests purchased, condemned or otherwise acquired and any such restrictions shall run with the land to which they apply and be binding on all subsequent holders, except as the deed, agreement, judgment, or decree or other instrument otherwise expressly provides." (Sec. 4A (c))

A moment's study of this Maryland enactment reveals that the aggregate of the five interest or easements that may be acquired, together with a few minor interests perhaps, constitute what has been called highway development rights.

Legal consequences of proposal.—The acquisition of highway development rights in road margins by the State will not disturb the title or possession of any person interested in the land. The owner's powers of selling, mortgaging, leasing, or otherwise disposing of his property remain undisturbed. Any interests affecting the land will continue to attach to the property shorn of highway development rights in the designated road margins.

Any compensation paid by reason of the imposition of the prohibition against development in the easement areas will be paid to persons interested in the property according to their rights and interests.

Compensation aspects—The cost to the State or to its local units of acquiring highway development rights will determine to a large extent whether the device will be successful. It is presumed that compensation for such rights would be nominal in most instances, because the payment would be made only for actual, demonstrable injury, and because rights would be acquired usually at the time when land is being taken for immediate highway improvement, often on new location in undeveloped areas. If the margins thus taken under control are later required for expansion of the road facility, as must inevitably be the case in many instances, the acquisition costs will be a minimum because of the arrested development of the lands affected.

Nominal though the compensation be, enactment of a State statute sanctioning the acquisition of highway development rights, as here conceived, will result in the creation of a new marketable interest in property and its valuation by the State. A number of general and specific rules concerning the valuation and damaging of property have been evolved through the years by expert appraisers. Some

⁴Laws of Maryland, 1941, ch 486

of these rules have survived judicial review and are now deemed to be legitimate measures of damages in arriving at a just compensation for injury sustained. No such aids now exist for the valuation of highway development rights and appropriate indicia of value will need to be evolved in the years to come, guided by such public policy as seems just and reasonable.

Highway development rights are probably best characterized as easements representing only fractional portions of a fee simple title in real property. The total value of these easements is made up of two basic elements: (1) The value of the rights in the easement area, that is in the 100-, 200-, or 300-ft. strip, as the case may be; and (2) in some instances, damages to the remainder areas resulting from the granting of the highway development rights in the easement area; this latter element is sometimes referred to as consequential or severance damages.

A generally accepted theory of property and damage valuation is the "before-and-after" doctrine, commonly used in the partial taking of the fee. Under this rule of appraisal, the difference between the estimates of the market value of the entire property before and after the granting of the highway development rights would constitute the value of these easements. The precise value of a parcel minus highway development rights in a narrow margin thereof would be subject to expert appraisal and negotiations between the parties.

For example, let us consider a parcel of agricultural land that is worth \$50 an acre for farm purposes. However, its proximity to newly developed residential areas has rendered it presently suitable for residential purposes, with a present value of \$250 an acre. If it is proposed that highway development rights be acquired in such lands, the extent of the damage or the value of the rights would, in its very nature, amount to at least \$200 an acre, because land potentially ripe for residential development would cease to have value as such.⁶

Marginal land acquisition alternative—Negotiations with owners for the acquisition of

⁶This value of \$200 an acre for highway development rights is not to be construed as the author's estimate of what such rights are likely to cost generally.

highway development rights in certain instances may reveal that it would be more economic in the long run to acquire the full fee simple title to marginal strips of land, rather than limited easement rights, subject to the future purchase of the remaining interests. If for example, purchase of highway development rights would cost \$95 an acre and the entire legal interest in the property could be acquired at \$100 an acre, it would seem sound policy to make the small additional outlay, for reasons apparent.

Yet broad sanction for the acquisition of marginal lands for highway purposes is lacking in many States. To date, only ten States have enacted appropriate constitutional amendments.⁶ Other States, without the benefit of constitutional provision, have enacted laws permitting marginal land acquisition.⁷ Still other jurisdictions have incorporated the device in their controlled-access highway legislation.⁸

Since a legal sanction for the potential use of marginal land acquisition in itself may exert a compelling influence upon the acquisition of highway development rights at reasonable values and otherwise contribute to its effective exercise, it would seem highly desirable to make adequate legislative provision for marginal land acquisition as well as for highway development rights, simultaneously.

Substantial repair of structures—If it is deemed desirable, the device of highway development rights could be expanded to include the substantial repair of improvements in the easement area. Whenever it becomes necessary or desirable, for any reason, for an owner to substantially repair a building or structure located in the easement area, the situation may be made the occasion, after agreement of the highway authorities and the owner, for the removal altogether of such building or structure from the easement area to an appropriate location on the remainder lands. Compensation for actual, demonstrable injury resulting from such change of

⁶California, Massachusetts, Michigan, Missouri, New York, Ohio, Pennsylvania, Rhode Island, Virginia, and Wisconsin.

⁷Delaware, Illinois, Indiana, Maryland, Nebraska, Oregon, Virginia, and others.

⁸See Florida, Louisiana, Michigan, New Hampshire and others.

location would be made by the highway authorities. It is contemplated that ordinary maintenance of all existing improvements would not be affected by the exercise or acquisition of highway development rights.

A model bill for a highway development rights law—Because the acquisition and exercise of highway development rights is a relatively new proposal, a preliminary draft of a model statute is presented herewith. It is suggestive of appropriate language for State enactment.

A Model Bill For A Highway Development Rights Law

AN ACT TO PROVIDE FOR THE PLANNING, DESIGNATION, FINANCING, ACQUISITION, ALTERATION, USE, REGULATION AND EXERCISE OF HIGHWAY DEVELOPMENT RIGHTS; AND FOR OTHER PURPOSES

Sec. 1. Declaration of policy. The legislature hereby finds, determines, and declares that this act is necessary for the preservation of the public peace, health and safety, and for the promotion of the general welfare. Acquisition of highway development rights is not intended to have a contracting influence on right-of-way widths.

Sec. 2. Definition of highway development rights. For purposes of this act, highway development rights are defined as an aggregation of easements in perpetuity concerning the improvement of lands and property immediately adjacent to existing or proposed public streets and highways. Broadly conceived, these easements include the right of the owners of abutting lands and property to improve road margins in a manner inconsistent with present or future traffic requirements; the right to convert agricultural or other undeveloped land to residential, commercial, or industrial uses; the right to construct or substantially alter buildings or other structures or make additions thereto; the right to construct private drives, roads or entrances from the highway; the right to destroy or remove or alter shrubbery or trees or other features of the landscape; the right to use such lands for any purpose detrimental to highway drainage and erosion control; the right to display advertising signs, billboards, or other such related matter; the right to place trash or unsightly or offensive material on such lands; and all other rights which would detract from the ability of the public highway authorities to adapt the highway facility to its intended

function. The strip or margin abutting and adjacent to the public street or highway wherein such rights are acquired and exercised is designated as the easement area. For purposes of this act, public streets or highways are deemed to include all public streets and highways, parkways, freeways, service or frontage roads, expressways, and all other public roads.

Sec. 3. Authority to acquire and exercise highway development rights. The highway authorities of the State, counties, cities, towns and villages, acting alone or in cooperation with each other, or with any Federal, State, or local agency, are hereby authorized to plan, designate, finance, acquire, alter, use, regulate and exercise highway development rights for public use in easement areas adjacent to public streets and highways, wherever and to the extent that such authorities are of the opinion that traffic conditions, present or future, will justify the same.

Sec. 4. Designation of easement areas and highway development rights. The highway authorities of the State, counties, cities, towns, and villages are authorized to designate, adjacent to public streets and highways, easement areas of 100-, 200-, 300-foot or of any other width or dimensions deemed appropriate by such authorities (beginning at the outer boundaries of the right-of-way), with respect to any street or highway or portion thereof. The highway authorities may designate easement areas for the acquisition of highway development rights along new or proposed street or highway facilities or along existing streets or highways, as the public interest warrants. Such highway authorities shall establish the width and dimensions of easement areas and shall cause a plan and description thereof to be made, which, with a proper acknowledgement, shall be recorded in the office of the recorder or register of deeds in the county in which the affected street or highway is located. Notice of such designation shall be given the owner in the customary manner. The immediate intended effects of such designation of easement areas for the subsequent acquisition of highway development rights therein is to arrest all roadside development detrimental to or inconsistent with the present function and future expansion of the road facility.

Sec. 5. Acquisition of highway development rights. The highway authorities of the State, counties, cities, towns and villages, may acquire highway development rights in private or public property, by gift, devise, purchase, or condemnation in the same manner as the State and its local units are now or hereafter