

Session Five

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ADMINISTRATION AND MANAGEMENT

HOPE S. WILEY, Presiding

Highway Programing Law

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It is perhaps characteristic of much of the highway subject matter most of us have to deal with, that it is all so interrelated in its component parts. Such, too, has been our experience in trying to excavate and evaluate the law dealing with highway programing. We begin by trying to isolate those provisions in the statutes that deal directly with the matter and soon we find that we have gone way beyond those provisions and have gone into many other kinds of things, but only because they concern the matter of highway programing, directly or indirectly.

This analysis of the legal basis for highway programing is based upon a study of the law that is now in progress under the auspices of the Highway Laws Committee of the Highway Research Board. Miss Helen J. Schwartz, of the District of Columbia Bar, is doing the work on this phase of the Highway Laws Project. There are also some other sources of information to which I have had access. Because we have not yet completed the assembly and analysis of statutes and case materials, this cannot be deemed to be an exhaustive treatment of the legal aspects of programing. But a good bit of the ground is believed to have been covered; accordingly, it should be revealing of the general state of the law on the subject and its deficiencies, if any.

The law relating to highway programing may be said to be a composite of elements relating to long-range planning, annual programs of needs, the cumulation of certain kinds of data for budget and finance purposes, the sufficiency rating mechanism, intergovernmental cooperation, highway system classification, the acquisition of lands for future highway needs, and perhaps some others.

LONG-RANGE HIGHWAY PROGRAMS

Only a handful of States have statutes relating, even generally, to long-range highway programs. Thus far, we could find only twelve such States. The nature of these provisions is detailed in Table 1. All but four of these involve the State highway activity; one (Connecticut) is limited to towns in its application; another one involves the State Department of Commerce (Massachusetts); the remaining two are limited to counties (Texas and Washington).

The variations even in these few statutory provisions are many. For example, the Arkansas law authorized the State Highway Commission generally to establish a program of current and long-range planning for the State Highway system.¹ More detailed provisions are found in Illinois, Indiana, and Iowa, making it the duty of the highway commission specifically to prepare, adopt, and publish a long-range program containing statements of intended construction and other related works, an estimate of revenues which will become available, and such other information as will enable the public to

¹/ Arkansas Statutes 1947, 76-201.5.

have the most complete understanding of the needs of the highway system.²

Incidentally, these laws also provide that the sufficiency rating principle be applied insofar as is practicable, in determining the projects to be included in the long-range program. The enactments also specify that there be a periodic reinspection of the system of highways, in order to better revise the estimates of future needs to conform to the actual physical and service condition of the highways.

ANNUAL PROGRAMS

Highway officials are sometimes directed, either as part of a long-range program, or independently thereof, to publish a program of highway improvements to be accomplished within the following year, as in Illinois,³ or within the following two years, as in Indiana and Michigan, for example.⁴ At least seventeen States are known to have general provisions relating to annual programs, and these are outlined in Table 2.

Annual programs are required by statute in some States which do not have long-range programming requirements. For example, in North Dakota the chief engineer is required by law to submit annually to the highway commissioner, a statement showing what improvements, structures, and construction work have been requested and proposed and may be undertaken by the department. This statement is to contain the estimated quantities and the estimated unit cost of each class and type, together with the totals for each project or improvement, and the totals for all such projects or improvements, and the average quantities and unit costs for all such projects or improvements. From this, the highway commissioner is to adopt a construction program, determining what projects and improvements are to be undertaken during the ensuing construction season, and their order of priority.⁵

Some of these provisions relate to highway departments at the local level, as in Colorado, Connecticut, Indiana, Iowa, Minnesota, Mississippi, Nebraska, New Jersey, North Dakota, and Tennessee. For example, the Nebraska law requires that the county highway superintendent submit to the county board, the annual county road program which proposes a schedule of construction, repair, maintenance, and supervision of county roads and bridges, including Federal-aid secondary road projects, as well as a list of equipment and material purchases to be made by the county within the limits of the estimated county funds, for the ensuing year. It then becomes the duty of the county board to give notice by publication, of the date of a public hearing on the proposed program. Thereafter, the county board adopts an annual highway program which includes a schedule of construction, repair, and maintenance projects, and their order of priority.⁶

Highway programs are sometimes required as a part of the annual budget. For example, the budget report of the California Department of Public Works must include a section showing all proposed expenditures and obligations to be incurred, in each county group, for major construction and improvement, segregating the route of each highway to be constructed or improved, the county in which it is located, the number of miles involved, and a description of the type of work to be done.⁷ In Colorado, the general highway budget summary is to be supported by explanatory schedules or statements classifying the expenditures by organizational units, objects, and funds.⁸ In Florida, the budget is to be accompanied by a program of work to be undertaken during the ensuing budget year.⁹ An interesting provision of the Florida statute is that the program of work may list projects, the sum total of the estimated cost of which may exceed the amount budgeted by 50 percent, in order to provide alternate projects in case any particular project listed in the approved program cannot be undertaken. The purpose of this

2/ Smith-Hurd Ill. Ann. Stats., ch. 121, 4-301; Burns' Ind. Stats. Ann., 36-2943; Code of Iowa 1958, 307.5 as amended by 1959 laws, H.F. 463.

3/ Smith-Hurd Ill. Ann. Stats., ch. 121, 4-301.

4/ Burns' Ind. Stats. Ann., 36-2943; Mich. Stats. Ann. 9.1097(14).

5/ N.D. Rev. Code of 1943, 24-0303.

6/ Rev. Stats. of Neb. 1943, 39-1503, 39-1508.

7/ Deering's Cal. Codes, Sts. & Hwys. Code, 143.1.

8/ Colo. Rev. Stats. 1953, 120-2-11.

9/ Fla. Stats. 1957, 334.21(3).

TABLE 1
STATE STATUTORY PROVISIONS RELATING TO LONG-RANGE HIGHWAY PROGRAMS, 1960

State	Authority Responsible	Type of Program	Number of Years
Alaska	Department of Public Works shall establish	Continuing, long-range program for highway construction and maintenance	Not less than five years, projected annually
Arkansas	State Highway Commission authorized to establish	Program of current and long-range planning for State highway system	
Connecticut	Any town at its annual meeting may provide for	Repair of its highways	Periods not exceeding five years
Georgia	Division of Planning (or other division designated by State Highway Board) with other engineering and design divisions of the Department, and the U. S. Bureau of Public Roads in matters involving Federal funds, shall prepare	Long-range biennial programs of improvements under Federal-aid urban, Federal-aid secondary classifications	Flexible programs as basis of biennial programs of improvement work. Board to arrange that the surveys and drawings and the appropriate specifications shall be made available from among the projects in such scope, amount, and classes as would provide at least a full year of work under the fund allocation available
Illinois	Department of Public Works and Buildings shall prepare, formally adopt, and publish	Long-range plan of its future activities for State highway system	
Indiana	State Highway Department shall prepare, formally adopt, and publish	Long-range program of its future activities with regard to highway construction	Biennial plan annually adopted from long-range plan
	Board of Commissioners of county	Construction plan for county highway system	Four-year program prepared at two-year intervals
Iowa	State Highway Commission shall adopt and cause to be published	Long-range program for primary road system	At least five years, brought up to date and republished at least once a year
Massachusetts	Division of Planning of Department of Commerce to assist in	Preparation and execution of long-range capital budgeting and programming of public works projects	
Michigan	Each County Road Commission and incorporated city and village shall submit to State Highway Commission for approval State Highway Commissioner includes in his biennial report to the Governor and legislature a summary of	Biennial highway and street programs, based on long-range plans, with standards and specifications for projects included Program of improvements scheduled for the next biennium by the State Highway Department, County Road Commissions, and incorporated cities and villages	
New Hampshire	Department of Public Works and Highways is authorized to	Cooperate with Department of Administration and Control in long-range capital planning	
Texas	Commissioners' court in certain counties adopt	"Master Plan" - survey by county engineer with view to determining needs for new highways	
Washington	County road engineer to file with Board of County Commissioners (within six months of June 1949) and board to adopt	Long-range county road program	For period of not less than 10 years

provision is to make the program of work of the highway department flexible by providing alternate projects for road construction and maintenance, without, at the same time, including an amount in the budget which is greater than the resources available for that purpose.¹⁰

OBTAINING DATA NECESSARY FOR PROGRAMING

A few States have in their statutes formally authorized the highway department to make studies or surveys of highway needs, in order to provide an objective basis for programing. Thus, the Michigan highway commissioner is authorized to make continuing studies of highway conditions and deficiencies, at regular intervals, in order to re-evaluate highway needs, and to thereby keep current the results of previous studies and reports.¹¹ The Michigan enactment further provides that all county road commissions and incorporated cities report annually to the State highway commissioner, the mileage and condition of each road system under their jurisdiction.¹²

¹⁰/ Fla. Stats. 1957, 334.21(5).

¹¹/ Mich. Stats. Ann., 9.1097(9a).

¹²/ Mich. Stats. Ann., 9.1097(14).

TABLE 2

STATE STATUTORY PROVISIONS RELATING TO ANNUAL HIGHWAY PROGRAMS, 1980

State	Authority Responsible	Program Description	Determination of Priorities
Alaska	Department of Public Works adopts	Annual construction program which is included in detail in the long-range program submitted by Governor to legislature annually	Annual construction program establishes project priorities (may be amended as circumstances warrant)
Colorado	State Highway Commission to determine	Priorities for construction on State highway system annually	In establishing priorities Commission shall make use of sufficiency rating
	Boards of County Commissioners to submit to State Highway Commission	Priorities for construction of roads, streets, and highways annually	May use sufficiency rating
Connecticut	Selectmen may	Provides for repair of highways for one year if town fails, at its annual meeting, to make long-range provisions	
Florida	State Highway Board pursuant to tentative budget and work program prepared by Executive Director of State Road Department	Program of work setting forth all construction and maintenance projects for ensuing year under the budget	Board shall use results of sufficiency rating
Illinois	Department of Public Works and Buildings	Annually adopted from its long-range plan, and publish plan of construction for the next calendar year	Projects listed in order of urgency (deviations from adopted programs permitted in cases of emergency)
Indiana	Board of County Commissioners of County	Annual plan for maintenance and repair of county highway system to contain program, nature of work to be done, and estimate cost	Construction plan sets forth section of system to be constructed, year in which to be done, type of construction, and estimated cost
Iowa	State Highway Commission to publish	Annual program for next calendar year (as part of long-range program)	Lists definite projects in order of urgency, to include a reasonable year's work with estimated funds
	Board of Supervisors, subject to approval of State Highway Commission shall adopt	Comprehensive program for calendar year based upon construction funds estimated to be available	Board may have county engineer make written report designating in their order of importance the roads which, in his judgment are most urgently in need of construction
Maine	Head of Department to submit to Department of Finance and Administration	Work program for ensuing fiscal year, including all appropriations available and requesting allotments (Governor and Council review and may revise requested allotments before approval)	
Maryland	State Roads Commission shall, upon request, furnish Board of County Commissioners	Plan showing how county system may best improved as a commitment to the State system, and suggest an annual program based on county funds available for construction	
Minnesota	Town Board shall render to annual Town meeting	Statement of improvements needed on roads, cartways, and bridges for the ensuing year, with estimate of cost	
Mississippi	County engineer must file	An annual program with the division of State-aid road construction in order for county to be entitled to State-aid, to be approved by State aid engineer	
Michigan	Township commissioner of highways to render to township board annually	An account in writing stating the permanent road and bridge improvements which should be made during the next ensuing year	
	Board of County Commissioners, on basis of county highway engineer's surveys	Annually determine tax, specifying roads upon which it is to be expended	
Nebraska	County Board to adopt	County highway annual program Schedule of construction, repair, and maintenance projects	Includes order of priority of projects
New Jersey	Counties and municipalities file with Commissioner for his approval	Annual work programs governing expenditures of State-aid funds	
North Dakota	State Highway Commissioner shall	Review the annual programs for each of the major systems to insure coordination of planning	
	County and City Authorities shall initiate	Programs for the road systems of their respective counties, to be approved by the Commissioner	
	State Highway Commissioner	Adopt a construction program for department for ensuing construction season, to contain projects and improvements and their order of priority	Priority given first to improvement of primary system insofar as is practicable
Tennessee	County Road Authorities shall submit to Department of Highways and Public Works	Annual program of improvements to be carried out under rural roads system charter to the status	
Wisconsin	State Highway Commission	Annually determines improvements to be made during succeeding year and notifies county clerks as to improvements in their respective counties	
	State Highway Commission	Prepares a future construction program, when it agrees with county on project under the State trunk highway allotment	

Employing a little different approach, the Georgia law authorizes the State highway board to employ inspectors whose duties shall include that of going into the several counties to inspect, measure, and gather information necessary for the compilation of such information as is deemed by the board to be necessary to facilitate sound long-range planning of highway construction and maintenance.¹³

With still another variation in it, the Arkansas enactment dealing with revenue distribution declares it to be the State's policy to stabilize the use of certain of its highway revenues, by providing for their distribution among the State, counties, and municipalities according to the relative ratio of use of State highways, county roads, and municipal streets. The highway department, accordingly, is directed to make a study of the use of these highways every four years, and to file a report of its findings with the Governor and the General Assembly, so that such changes may be made in the then-existing law as are deemed necessary to conform with the State's declared policy.¹⁴

PROJECT PRIORITIES AND SUFFICIENCY RATINGS

A few States have legal provisions concerning the factors which shall determine the order of priority of highway projects in the program. Some even go so far as to direct the use of the sufficiency rating device in this connection.

The variations are legion. Such provisions range from the Arkansas directive that, insofar as practicable, priority shall be given first to the improvement of the primary State highway system,¹⁵ to one providing that the order of selection of county roads, in establishing the road construction program within the respective counties, shall be: first, those county roads presently used for school bus routes, mail routes, and milk routes; second, those used for two of the aforementioned purposes; third, those used for any one of the aforementioned purposes; fourth, those which may be used if improved or restored, for any one of the aforementioned purposes; and finally, any other county road if consideration is given to the number of farms or service units served by such road and the amount of traffic on it.¹⁶ Although one may applaud the general notion of having criteria written into the law, we may well ask ourselves at this point whether those indicated, in whole or in part, represent an adequate approach to a scientific determination of priorities, even if some predetermined policy objectives should prevail. It may well be that, in addition to or in place of those specified, other standards or criteria need to be considered and written into the law.

It is perhaps pertinent, in this connection, to consider an Iowa statute. It provides that in planning and adopting the county secondary road program, the board of supervisors and the county engineer in each county are directed to give due and careful consideration to the following: (1) the location of primary roads, and of roads improved as county roads; (2) market centers and main roads leading thereto; and (3) rural mail and school bus routes. The stated intent of this provision of Iowa law is that when the program is finally executed, it will afford the highest possible systematic, intra-county and inter-county connections of roads of the county.¹⁷ After consultation with the county engineer, the highway board provisionally is directed to select those roads which they consider advisable to be included in the program, and directs the engineer to make a reconnaissance survey and estimate of all these roads or of such segments of them as, in view of the public necessity and convenience, present the most urgent need for early consideration. Additionally, when ordered by the highway board, the engineer is to submit a written report designating, in their order of importance, the roads which, in his judgment, are most urgently in need of improvement. The board may order additional reconnaissance surveys and estimates when it deems them necessary or advisable.¹⁸

At least seven States have statutory provisions relating to sufficiency ratings. The

^{13/} Code of Ga. Ann., 95-1612.

^{14/} Ark. Stats. 1947, 76-309.1.

^{15/} N.D. Rev. Code of 1943, 24-0303.

^{16/} Mo. Rev. Stats. 1949, 231.460.

^{17/} Code of Iowa 1958, 309.25.

^{18/} Code of Iowa 1958, 309.26 to 309.30.

factors specified in the law of each of these States are summarized in Table 3. These seem to group themselves into those relating to safety and service characteristics, physical condition, and other elements.

TABLE 3
STATUTORY FACTORS TO BE USED IN ESTABLISHING HIGHWAY
SUFFICIENCY RATINGS, 1960

State	Safety and Service Characteristics	Physical Condition	Other Factors
Colorado	Traffic volume; composition of traffic	Width of roadbed; pavement type	Other construction factors as deemed necessary
Florida	X ¹	Structural adequacy ¹	
Illinois	X	X	
Indiana	X	X	Purdue University studies, data, and information
Iowa	X	X	
Louisiana			Most urgent needs ²
Nebraska	X	Surface condition	Economic factors

1/ The determination of rating accorded these factors shall take into consideration the volume of traffic using the roads, and the minimum engineering standards required to safely accommodate such volume of traffic; age of roads; width of pavement and shoulders; number and degree of curves, both horizontal and vertical; ridability; and maintenance economy.

2/ In fixing priorities, board shall consider condition of roads and relative urgency of improvements considering in their order of general needs, traffic volume, accident records, technical difficulties in the preparation of plans and procurement of rights of way as well as unforeseeable emergencies such as floods. Department is directed to have prepared, at intervals not to exceed two years, a sufficiency rating of its highways to aid in establishing priority on the basis of most urgent needs.

Let us consider a few specific laws. The Colorado Statute directs the State highway department to promulgate and adopt rules and regulations for a practical system of rating roads, streets, and highways, based upon sufficiency rating studies, for the systems under its jurisdictions. In establishing construction priorities, the State highway commission is to make use of a sufficiency rating which takes into consideration traffic volume, composition of traffic, width of roadbed, pavement type, and such other construction factors as the commission deems necessary, in order to adequately compare existing highway facilities with the known desirable standards for highways.¹⁹

In the Florida law, the sufficiency rating is defined as the objective rating of a road or section of a road for the purpose of determining its capability to serve properly the actual or anticipated volume of traffic using the road.²⁰ The Florida State road board

^{19/} Colo. Rev. Stats. 1953, 120-13-36.

^{20/} Fla. Stats. 1957, 334.03.

is authorized and required, under the law, to adopt a system of sufficiency ratings of roads in the State highway system. It is to include, but is not limited to, the consideration of three factors—structural adequacy, safety, and service. The statute further provides that the determination of rating according to these factors is to take into consideration the volume of traffic using the roads, and the minimum engineering standards required to safely accommodate such volume of traffic; the age of roads; width of pavement and shoulders; number and degree of curves, both horizontal and vertical; rideability; and maintenance economy. In addition to these required factors and considerations, the board is authorized to prescribe, by regulation, other factors or considerations to be used in obtaining sufficiency ratings.²¹ The board is to use the results of the rating of roads in determining priorities, not otherwise provided by law, when preparing the budget and work program.²²

The Indiana statutes define sufficiency rating to mean any rating which assigns a numerical value to each road section, reflecting its relative adequacy based on an engineering appraisal of structural condition, safety, and traffic service. It provides that the sufficiency rating principle be applied, as far as it is practicable to do so, in determining the projects to be included in the long-range construction program.²³

The Iowa State Highway Commission is directed by law to have published annually a sufficiency rating report showing the relative condition of the primary roads.²⁴ The statutes of Illinois, Indiana, and Iowa provide that the relative urgency of proposed improvements be determined by consideration of the physical condition, safety, and service characteristics of the highways.²⁵ Indiana also provides for the utilization of studies, data, and information made available by Purdue University.

The Louisiana Department of Highways, in fixing priorities on a project basis, is to consider primarily the condition of the roads, streets, and structures making up a part of the State highway system. Also to be taken into account is the relative urgency of the improvement considering in their order, general needs, traffic volume, accident records, technical difficulties in the preparation of plans and the procurement of rights-of-way, as well as unforeseeable emergencies such as floods.²⁶ The department of highways in Louisiana is directed to have prepared, at least every two years, a sufficiency rating of its highways for the purpose of aiding in establishing priority of improvements on the basis of the most urgent needs.²⁷

The Nebraska law provides that the relative urgency of proposed improvements on the State highway system shall be determined by a sufficiency rating established by the department of roads, insofar as the use of such a rating is deemed practicable. The sufficiency rating is to include, but not be limited to the factors of surface condition, economic factors, safety, and service.²⁸

INTERGOVERNMENTAL COOPERATION

A number of State statutes that deal with the highway programming process, directly or indirectly, contain provisions that provide for certain types of intergovernmental cooperation in the process. For example, the chairman of the State road board in Florida and the State highway commissioner in North Dakota are similarly authorized and have the responsibility for the coordination of the total highway program within their respective States. This coordination includes the designation of the highway system, the development of construction standards, and the review of the annual programs for each of the major systems, to insure coordination of planning and gene-

^{21/} Fla. Stats. 1957, 335.07.

^{22/} Fla. Stats. 1957, 334.21.

^{23/} Burns' Ind. Stats. Ann., 36-2943.

^{24/} Code of Iowa, 1958, 307.5 as amended by 1959 laws, H.F. 463.

^{25/} Smith-Hurd Ill. Ann. Stats., ch. 121, 4-301; Burns' Ind. Stats. Ann., 36-2943; Code of Iowa 1958, 307.5 as amended by 1959 laws, H.F. 463.

^{26/} La. Rev. Stats. 1950, 48:192A.

^{27/} La. Rev. Stats. 1950, 48:192B.

^{28/} Rev. Stats. of Nebr. 1943, 39-1337.

ral conformity with the law. In North Dakota, programs for the road systems of the counties and cities are to be initiated by the respective county and city authorities and approved by the State highway commissioner.²⁹ The Florida local authorities are authorized to cooperate with the chairman of the State road board.³⁰

Boards of county commissioners in Colorado are authorized to use a highway sufficiency rating method in determining priorities for the construction of roads, streets, and highways under their specific jurisdiction. In this connection, the Colorado Department of Highways, upon request of the counties, shall furnish detailed instructions regarding the performance of such studies and their use in the establishment of priorities for construction and shall keep the counties informed as the latest developments and techniques regarding them.³¹

A variation is in the New Hampshire law, which provides that the New Hampshire Department of Public Works and Highways is authorized to cooperate with the department of administration and control in long-range capital planning to meet the needs of the State, as requested by the Governor and council and subject to their approval.³²

Upon the request of the board of county commissioners of any county in Maryland, the State Roads Commission shall furnish plans and plats showing how the county road system may best be improved as a concomitant to the State system. The plan shall suggest an annual program of construction based upon the county funds available for construction and further suggest the types of roads to be built and furnish estimates of the cost thereof.³³

Iowa law provides that in the preparation of the county secondary road program, the board of supervisors shall meet and consult with the township trustees as to the improvements needed for the secondary roads in the various townships.³⁴ The board has statutory authority, subject to approval of the State highway commission, to adopt a comprehensive program for the next calendar year, based upon the construction funds estimated to be available for that year. This has been interpreted to mean that the highway commission has authority to approve or disapprove the program only in relation to whether or not such construction program conforms to the standard plans and specifications and manner of construction.³⁵

The Illinois statute authorizes the Illinois Highway Department to make investigations to determine the reasonably anticipated future need for Federal-aid and State highway purposes, including the making of traffic surveys, the study of transportation facilities, research concerning the development of several areas within the State and contiguous territory as affected by growth and changes in population and economic activity, and the collection and review of data relating to all factors affecting the judicious planning of construction, improvement, and maintenance of highways. It also provided that such investigations may be conducted in cooperation with counties, municipalities, the United States, sister States, agencies of any such governments, or other persons, in pursuance of agreements to share the cost thereof.³⁶

ADVANCE ACQUISITION OF HIGHWAY RIGHTS-OF-WAY

The acquisition of highway rights-of-way, substantially in advance of its actual use for highway construction purposes, is a device that may facilitate the programing process. It will also save large sums of highway funds in the process.

The acquisition of lands in advance of its use for highway purposes is authorized in

^{29/} N.D. Rev. Code of 1943, 24-0208.

^{30/} Fla. Stats. 1957, 334-11.

^{31/} Colo. Rev. Stats. 1953, 120-13-37.

^{32/} N.H. Rev. Stats. Ann., 228:6.

^{33/} Ann. Code of Md. 1957, art. 89B, 77.

^{34/} Code of Iowa, 1958, 309.10.

^{35/} Atty. Gen. Op. March 26, 1958, which further found that the purpose of this legislation was to provide local self-government with a plan of checks and balances, the board to confer with the township trustees and adopt a sound program, with a final check and approval of the program by the highway commission, re: Code of Iowa, 1958, 309.25 to 309.30.

^{36/} Smith-Hurd Ill. Ann. Stats., ch. 121, 4-303.

Title 23, U.S. Code, and Federal reimbursement will be permitted for lands acquired up to seven years in advance of construction need, under the present Federal-aid laws. Additionally, the statutes of 19 States now explicitly authorize the acquisition of land for future highway use.³⁷ Six other States sanction the use of this device, without benefit of a specific statute on the subject, by virtue of a favorable court decision.³⁸

The idea of establishing what has been identified as a right-of-way revolving fund is growing among the States seeking to alleviate their right-of-way difficulties. It is also of assistance in the programing process. This technique generally contemplates the setting aside, either from highway funds or from general funds, of a sizable resource with which to acquire necessary lands, early in the planning process, just as soon as the location and nature of the highway improvement become apparent. When regular highway funds for the project become available subsequently, the revolving fund is reimbursed for the advance previously made. The only cost to anyone of this device is the debt service, real or theoretical, of the revolving funds. The intent of the legislature in establishing such revolving funds is to provide the money necessary to protect future highway rights-of-way from rapid land development and, in special cases, to acquire improved property in cases where existing substandard improvements might have to be removed and replaced by new and costlier structures.

This device is being used in at least 10 States.³⁹ During the past year, Ohio and Utah took a big step forward in highway right-of-way financing and programing, by passing new laws permitting the borrowing of substantial amounts of State pension funds for advance acquisition of highway rights-of-way. In Ohio, it is estimated that approximately 1 billion dollars of State pension funds are now available, and under the law, up to 10 percent, or approximately \$100,000,000, can become available as loans for highway right-of-way acquisition, subject of course, to certain types of agreements being executed with the appropriate State agencies involved.⁴⁰ The law has recently been upheld by the high court in Ohio.⁴¹

CONCLUSION

This paper has summarized briefly the state of the law with respect to highway programing. There is really not a great deal of law on the statute books, and what there is might well be improved upon, in terms of the actual need for a broad and flexible legal authorization in this field.

There are elements, which, in the aggregate, can be taken to characterize the highway programing activity at its best. Many of these have already been enunciated, perhaps not in so many words, but in substance. And because they have been mentioned perhaps in a context not as specific as we might desire it, these elements may need to be carefully extracted from the rest of the substance that has been presented. If it were possible, then, to end up with a limited number of these elements, carefully identified, it would be a not too difficult job to formulate a suggested provision of law that embodies them. This could then become available for the consideration of those States that might be interested in strengthening their own legal structure on this point. It could also constitute a rallying-point for effective effort tending toward upgrading of the whole highway programing process.

^{37/} Arkansas, California, Colorado, Florida, Idaho, Indiana, Louisiana, Maryland, Nebraska, Nevada, New Jersey, New York, North Dakota, Ohio, Oklahoma, Texas, Utah, Virginia, and Wisconsin.

^{38/} Arkansas, Illinois, Iowa, Kansas, Mississippi, and Missouri.

^{39/} California, Indiana, Maryland, New Mexico, New York, Ohio, Utah, Washington, West Virginia, and Wisconsin.

^{40/} Ohio Rev. Code, 5501.112.

^{41/} State ex rel. Preston v. Ferguson, Ct. #36283, March 30, 1960.

Discussion

Morf.—In looking through Tables 1 and 2 in your paper, where you are abstracting the essential provisions, I was hunting for a certain word, which to me is an important attribute of a program. That is the word "publish." I find it in only three instances in these two tables, in connection with Iowa's and Indiana's long-term program, and in connection with Illinois' short-term program.

Levin.—That is very interesting. Apparently Morf is strongly of the opinion—and I would certainly agree 100 percent that publication is an important component of the programing process.

Morf.—The publication of a program is the commitment to it. So long as you have a list that you keep in your drawer and refer to from time to time, this to me is an administrative list, but it is not a program.

Donnell.—I would like to disagree. A program does not have to be published in order to be a program that the State highway department is going to use.

Levin.—Morf, do you think that publication should be required by law?

Morf.—It is an indication of the validity of the program's status if it includes the word "publication." If it does not, it becomes an administrative list.

Levin.—Of course, Alaska says, "The Department of Public Works shall establish . . ." Just what does "shall establish" mean?

Morf.—I grant you there are many shades of meaning, but I believe that there is in fact a considerable difference between what is nominally a public record but in itself very obscure, and distribution of five or six thousand copies of a program for publication in the newspapers.

Hall.—I would like to raise a philosophical question. Is it not possible that things like standards or sufficiency ratings or priority programing are administrative or engineering items, and not matters for legislation, whereas the statutes that will provide for a revolving fund for advance acquisitions of rights-of-way are a legislative matter?

Levin.—You would rather not see such things as sufficiency ratings written into the statutes or required by statute, as some states do?

Hall.—It is a personal philosophical opinion that we should have as little engineering by law as is possible.

Kimley.—There is another term that Mr. Morf did not mention. He got the word "publish" in there. I would like to identify a little more in detail the term "long-range plan." Is that for two years, five years, ten years, or twenty years? Or more? In my opinion, the longer the range of the plan, the more valid it is for publication. The shorter the range, the less valid.

Levin.—Unfortunately, many of these statutes do not have any precise definitions of the terms they use. Some of them do. Some of them define in great detail what a sufficiency rating is, probably because the judges and the legislators and others would not have understood it without the definition. But they do not have any very sophisticated definitions of long-range planning.

Burnes.—The more of these devices you get into the law, the more you circumscribe the administrative prerogative of the administrator. Some of these things are administrative tools, like the sufficiency rating. So there is a question in my mind as to how much of this programing operation should be actually spelled out in legislative detail.

Levin.—What we now have, for example in Colorado, you would discourage entirely? You would urge Colorado to repeal what they now have? Or those other states that spell out such details?

Burnes.—I think so. It depends on the situation in the State, but, as a general rule, I do not think that this sort of thing should get into law.

Livingston.—I would like to comment. I wrote it into law. I accept the philosophical soundness of the premise that you should not write administrative provisions into any law. The law should be generalized, and the administrative provision should be left out. But Burnes just touched on the situation which sometimes makes you, from a practical standpoint, diverge from your philosophy.

We were having trouble of a type that many are aware of, and the only way we could take our programing and budgeting out of the arena of politics was to put them on the basis of engineering, making them a matter of statutory mandate, rather than trying to sell the idea. The statutory mandate overcame the political complexion of things. I believe that an idea is proved sound if it is successful—and this one has been successful.

Levin.—We have been wrestling with this very thing ever since we undertook the highway laws project four or five years ago. Do we try to encourage only a bare minimum of legislation?

Actually, a very strong case can be made for giving the highway department broad authority to build highways that are in the public interest, with authority to make any additional administrative rules and regulations needed to implement this basic authority, and letting it go at that.

But in some States this just will not do—for example, in the law governing contracts in Hawaii. We executed quite a law on that, but legally there is no sense in it, because Hawaii law defines contracts very well. We know when we have an offer and an acceptance. And yet in the highway field alone, the legislators, apparently because of the large sums of money involved, have felt constrained through the years to throw all kinds of so-called protections around the expenditure of this money. And they do so by tacking all kinds of qualifications on the execution of highway contracts. I am sure that what Livingston has said applies equally to that particular aspect of Hawaii law as it does to the subjects under discussion here.

So there is a grave policy decision that one has to make here, whether to include a lot of administrative provisions in the law, a few, or none at all.

Morf.—I feel somewhat the same way about the need for persuading people once, rather than once a year, and that there are certain bases for programing.

Table 3 has the title, "Statutory Factors to Be Used in Establishing Highway Sufficiency Ratings." If Illinois is in this table, it is in here by inference, because Illinois law says nothing about sufficiency ratings. It says: "in order of urgency." And it does not say how this order of urgency is to be established, whether by sufficiency rating, or by economic analysis, or anything else. It says: "in view of the safety and service and physical conditions of the highway."

This law does not commit the highway department. It happens to coincide with the major terms that are used in the sufficiency rating, but I do not think it says that you must use sufficiency ratings as we are using them now. I believe that Table 3 is useful, but I think that incorrect inferences are being drawn from its compilation.

Levin.—We will just take the term "sufficiency rating" out of the heading. As suggested it was assumed that sufficiency ratings were meant, because the statutes seemed to use about the same factors. But we should not presume to identify the stipulations of the law with a sufficiency rating when the law does not refer specifically to these ratings.

Livingston.—I would like to point out the very adequate description that you have given, where you adopt a philosophy by incorporating administrative provisions into the law, but then leave an out for yourself so that you do not get strangled by your own administrative provisions.

The paragraph reads: "Let us consider a few specific laws. The Colorado statute directs"—and this is lifted practically verbatim from the law—"the Highway Department to promulgate laws for the systems under its jurisdiction. In establishing con-

struction priorities, the State Highway Commission is to make use of a sufficiency rating which takes into consideration traffic volume, composition of traffic, width of roadbed, pavement type, and such other construction factors as the Commission deems necessary in order to adequately compare existing highway facilities with the known desirable standards for highways."

Notice the way that loosens it up, so that at any time we feel it necessary from an engineering standpoint, we can change that rating to compare with standards that are known to be desirable. So it is written into the law that we must use some kind of administrative tool, but we are left free to adjust that at any time we wish.

Levin.—That is a very good provision. The Colorado law is really in some ways a model.

Titus.—In that same paragraph, how would you interpret the words "make use of"?

Livingston.—Court determinations are often made on the basis of legislative intent, when the meaning is obscure. The intent, then, of the legislative body, or the committee, which wrote this provision, using an engineer's words, was simply that a sufficiency rating is only one of the tools necessary for programing, that it should not be the only item to be considered, but that it should be used.

In other words, we actually lift out of this data those road sections that have inadequate sufficiency ratings, and take note of other programing considerations in addition, in order to develop the program itself. So the law says only "make use of."

Granum.—This seems to me to go deeply into the question of making a choice of projects. Implied is a schedule of work, wherever it mentions long-range plans, but it does not necessarily require some of the other things that we have been discussing in the way of systematic programing procedures, with control features and so on. This may be an administrative matter.

But it is my belief that to be effective these things really ought to go together; and that if there is anything to be contained in the law, there ought to be some reference, it seems to me, to a systematic approach to choice of projects and the handling of them thereafter, or words to that effect.

Livingston.—I certainly concur. There is one other thing that is part of this basic law, which, because of the way a portion has been excerpted, has not appeared here. The law requires that the engineering for any projects which appear in an annual construction program shall have been done in the preceding year. This is another one of the devices for making the programing procedure systematic.

Granum.—Your law actually says that?

Livingston.—Yes, sir. And we are having a hard time enforcing it. There are many provisions of law that are mandatory on highway administrators, but are mandatory only in their wording, because there is no penalty for their evasion; except I presume, the impeachment of the officer for dereliction. Isn't this correct? I do not know.

Levin.—Well, it would not have to go that far. You could have a taxpayer suit which challenged some action of the highway department. In fact, it is conceivable that even in the acquisition of lands, the property owner could say, "You haven't followed the law in the derivation of this particular project, and accordingly you can't acquire my lands." If, after examination of the facts, the court felt that the failure to comply with procedural requirements of the statute was of sufficient importance to void the project, it might make the highway department start all over again.

Livingston.—Then no highway engineer in the United States is on safe ground.

Levin.—Well, apparently this has not been a serious legal deficiency, if you want to call it a deficiency at all. Courts seem to realize that the administrative process has got to have some flexibility, and they are willing to impart some by judicial interpretation. They do this every day.

R. Johnson.—It seems to me that whether these administrative techniques are included in

the law would be largely dependent upon the desirability of doing it. It would depend on the situation in the specific State, because if there is a long tradition of the highway department being allowed to plan by use of these various techniques over a long period of time, without political influence, and a tradition of sound techniques, then there probably would be little need for a law to cover this sort of thing. On the other hand, if there is a history of political influence, it might be very desirable to get the specific administrative technique into the law.

That situation, it seems to me, is somewhat similar to the pros and cons of a civil service versus a merit system. If anything else has existed by virtue of long tradition, then the civil service law could be unduly restrictive. I think the same principle applies here.

Campbell.—You say in your paper that this job is not quite finished. Do you have in mind any other subjects to include in it?

Levin.—Well, I do not believe these tables, for example, are completely adequate. We are in the process of continuing the job, and in another month or so it will be completed.

For example, we have developed quite a comprehensive law on system classification, relating to the establishment, definition, and factors to be used in the derivation of highway systems, and a whole lot of material like this. But you ask yourself, "How much of this is pertinent to highway programing?" I wondered, "What is land acquisition for future use doing in there?" So you ask yourself the second question: "Isn't it all interrelated?" From this point of view, I think we will add a short section summarizing the system classification law, and then bring these tables up to date.

I do not think we quite went through all the States. We went through as many as we could, up to the point when I prepared this paper.

Granum.—With regard to developing model law in this or some other situations, it seems to me that Johnson's comments are quite pertinent. There are so many variations in the tradition, the history, the facts, the problems confronting the States, that you may find it exceptionally difficult to develop model law. Not that it would not be a desirable thing to work toward.

For example, Campbell's paper emphasized among other things the idea of having a parallel rating on economic benefits that would attach some importance in terms of priority decision. Now, should this be written into the law? Sufficiency ratings or some form thereof are written in some States. Should more sophisticated approaches, perhaps, be written into the law?

Levin.—I do not know. This is a policy matter that I think highway officials themselves should decide. I certainly agree that there are variations among States.

But perhaps one State has decided that they want to get something into their law on highway programing. There are a lot of pressures there that they want to counter, for the very reason indicated. So then they ask themselves, or ask us, or ask their sister States: "What do we put in the law on this? What would you consider the best kind of written statement?"

Now, fortunately, Colorado certainly has made an excellent beginning. In fact, re-examination may indicate that Colorado has everything in the law that could or should possibly be in there. And maybe all we need to do is hand out a copy of Colorado's law and then they can consider it.

This is what I mean by a model law, but sometimes I think we should not be talking of model laws as such. I am thinking of a law that suggests elements for consideration. It does not mean that any State has to accept all of them. It just means that one State has been thinking along certain lines and has the problem well thought out in a form which experts in the highway field think contains the essential elements of a particular subject.

That is the only purpose a so-called model law serves. It does a lot of thinking for all of us.

Wiley.—Only recently we had a study group going over the New Mexico Highway De-

partment and I was asked whether we should not write into the law the provision that we should use sufficiency ratings. Well, for the last seven or eight years we have been extremely successful in having sufficiency ratings used in programing, and I was of the opinion that to write it into the law might be the equivalent of saying, "We are going to make you do the very thing you have been doing." That might not sit so well. On the other hand, this might be the very time to get it in the law. I do not know.

Livingston. —If I were to rewrite that brief paragraph, I would eliminate the term "sufficiency rating," and would just say "an engineering rating." This would allow us to encompass the economic factor and the other. But this is the only thing I want to change.

Granum. —It looks to me as if you have enough leeway as it is.

Livingston. —I think so too. But if I were to rewrite it in the light of what has transpired, this is what I would do.