Strategy and Tactics in Highway Condemnation Cases: An Analysis

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• The means by which the various States acquire rights-of-way for public highways through condemnation proceedings differ greatly. However, it is believed that the essentials are similar, and it is those essentials that will be discussed.

Those States in which the highway authority has its own legal counsel are in a fortunate position, and the growing number of States that combine all land acquisition in one department, encompassing appraisals, negotiations, and legal representatives, are in a more advantageous position. If counsel is with the organization he can in some measure at least govern the appraisals, negotiations, and other preliminary processes, and this places him in a much better position to conduct his condemnation case.

This is so partly because the preparation of a trial involving eminent domain may best begin with the first visit of a highway representative to the landowner. These early visits are reflected in the attitude of the owner throughout the proceedings. If the owner is antagonized in early negotiations, that attitude is reflected throughout all subsequent proceedings, and the landowner's judgment and consequently his testimony will be, intentionally or unintentionally, biased with an inclination on his part to volunteer very damaging statements in his testimony. These statements may have a perfectly reasonable background or explanation; they certainly do affect the jury.

I am inclined to believe that the attitude of the negotiator and those who make early contact with the owner has some influence on his statements with respect to the damages which he has sustained. If he becomes resentful, he is more inclined to exaggerate his known damages. If the attorney for the condemning authority is in a position to do so, he should so far as possible require the negotiator to so conduct himself that he will be welcomed by the same landowner in later acquisitions, which will inevitably occur in many cases. The negotiations should be conducted so that the negotiator can go back to the same owner and acquire more land, because the odds are that eventually he is going to have to do that very thing.

The negotiations may become a main issue in condemnation proceedings. Some States require that there be an attempt to negotiate in good faith, others require only a failure to agree, and some require no negotiations whatever. Whatever the rule in the States, it is far better in all cases that the negotiator be in a position to make an offer to the owner and be familiar with the elements of that offer.

As a sidelight in this connection, quite often the income tax becomes a major problem to the owner, and the disposition of that tax may affect his decision. The Internal Revenue Service has very recently dug up an old case which is not in point but they have sent a ruling out to their personnel that it be followed. It provides that unless the owner and the condemning authority agree at the time of acquisition on the damages that the entire burden is on the landowner (the taxpayer) to show that some of the damages should not be taxed; for example, severance damages under certain conditions. If there is a failure to agree at the time, then the

burden is on the taxpayer, and he subsequently becomes very unhappy because he is not told that by the negotiator. So the negotiator should be in a position to make an offer and be familiar with the elements of that offer.

In some States, general benefits and in others special benefits may be offset against direct damages. In other States, they must be offset against consequential damages, which in some States are not recognized. Throughout all States, however, there is the basic rule of before-and-after value, and on this the negotiator who is familiar with his cause may safely resist an attack on the failure of negotiations insofar as that must be the basis of jurisdiction in a condemnation proceeding.

Assuming a failure to agree with the owner and the institution of proper legal proceedings, we arrive at the stage which is procedural in most States; that is, the appointment of commissioners, or reference to a board of review, involved in condemnation proceedings in most States.

The wide variety of the degree of efficiency and abilities with which these men, usually three in number, proceed to determine damages is probably the source of greatest concern. Some States have laws contemplating only a cursory glance or windshield appraisal of the property involved by such individuals. Other States have a permanent board, sometimes necessarily composed of those conversant with real estate values, and in others, the commissioners or viewers need be only a friend of the court.

In many States, the question of the degree to which the opposing parties may disclose their available evidence of value is a problem. If the appraisers are inadequately prepared, then their disclosure will enable the opposing party to have a considerable period of time within which to prepare to alter the fallacies of the appraisal so presented. Subsequent deficiencies discovered in the appraisal may not easily be properly explained once the expert witness has given his opinion of value. If the appraiser is properly qualified, however, his finding of damages or value, as the case may be, should be given great weight by those selected at this stage to determine value regardless of their competency and qualifications.

Our own experience has been that you are far better off if you have proper appraisals to tell these men what those appraisals are. The objection has been raised that this discloses your hand to the other side and they may have a period of several months after the commissioners' report and until the jury trial to pick holes in that appraisal. I think this disadvantage is far outweighed by the advantages, because you may have, as we have had in Missouri, a very competent appraiser that dies and this vitally affects your case. If you have put on your case, you usually lead the opposing party in putting on his case, so that you may have the same advantage so far as deficiencies in his appraisal are concerned. You have this further advantage that at that time the landowner commits himself as to his damages and to value. Now if a considerable period of time elapses between this report and the jury trial land values may have tremendously increased, and unless he has committed himself at that earlier date to value, he may come in on the jury trial with a tremendous value that he will get by with because juries know that land values in that area are increasing. It is my opinion that you should in all instances put your best foot forward at this commissioners' hearing or board of review and try to entice the landowners to do the same thing.

After receiving the findings of these commissioners or the board of viewers, whose judgment in most States has the same weight as a court decree, the attorney for the condemning authority must then consider what the prospective results in a jury trial are, such as to justify the filing of exceptions, or a notice of appeal, or document by whatever name

called, which will place the issue of damages before the court or court and jury, and this is one of the more difficult decisions in the condemnation field.

In this respect you should be governed to some extent by the number of properties that you have acquired on the project by negotiation. If you have been able to deal for most of the properties, that should be an indication that your prices and your appraisals are in line. If you find that you have not been able to negotiate for a substantial percentage of the properties, there is some reason why you have been unsuccessful. It can, of course, be deficiencies of the negotiator, but it can also be due to the fact that there is a particular influence in that area which is causing prices to go up at an unusual rate.

The procedure in all States requires that there be justification for all cases and if there is any doubt in your mind as to the propriety of the award or the damages that have been received, then certainly you should file such steps as are necessary to preserve the point for further review by a jury or otherwise as your State laws require. We have found that there are two general areas in which it is most difficult to acquire property.

If there has been a competent negotiator and if the greater number of properties on the project, where the same appraisers may have been involved, have been acquired through negotiation with the owner, then there should be some indication to the attorney that the appraisals on the condemned property involved or the determination of value based on the appraisals, as is usually the case, have been reasonable; if the preliminary tribunal's award appears to be excessive, then the attorney would be influenced to take steps for a reconsideration of damages.

If, on the other hand, the negotiator was competent, an unusual number of owners have failed to agree, and the court's award is so high as to fall within a category where it might or might not be excessive, perhaps there would be justification in accepting the award. The procedures in all States require written justification of the action of the attorney of the condemnor who has this responsibility. If there is in the opinion of such individual on available facts a serious doubt as to the accuracy of the award, he should require such further appraisal or investigation as will enable him to make a proper decision.

Usually the department will find the greatest variance between its appraisals and the award of the court in those areas in which unusual population growth is being experienced. Another such area will be that in which fertile agricultural land is to be found.

As all of you with experience know, however, a hundred other factors may affect the awards. I know of a situation in which a survey party, not those in our own State department I am happy to say, threw rocks at a farmer's cows in the course of a survey when the latter became curious about the uses of a transit. Something of a mass meeting was held that evening, and in my opinion, the awards in later acquisition were affected by this incident. The general reception and treatment of the public by survey parties, by core drilling teams, and by maintenance personnel all have some bearing on the eventual amount of damages to be paid where the decision of same must go to commissioners or a jury.

The age-old issue of one offer as opposed to the, I believe outmoded, horse-trading attitude has its effect, although I am aware that some States have reverted from the former to the latter.

With this preliminary background, we come to the actual preparation for trial before a jury. If acquisition is in charge of a legal department, when it became apparent that the property would be involved in condemnation, there have been photographs and inspections by experts, probably in addition to those making the original appraisal. If this is not the practice

of the acquisition branch of the department involved, then it must be made such. I will merely mention that certain exhibits must be prepared because on this program you are to have an exhibition and lecture which involve many visual aids.

In general, there must be a sales map indicating transactions involving property in the area which can in any way be considered comparable, adequate photographs to represent fairly improvements, or the area generally if there are no improvements, and such plats or sketches as will fairly represent partial takings if one be involved plus the plans of the condemning authority which affect the property in any way. The trial attorney must have viewed the property if it be still existent, or if there is a partial taking involved, with his prospective witnesses.

In our own State, we are trying to follow the practice of having condemned property viewed by the attorney, who will in all probability be concerned with trial, before demolition. I think it should go without saying that no attorney can ever go to trial safely without having gone over the matters thoroughly with his witnesses. And he also is in a better position if he has actually viewed the property. We follow a policy in our State of having an attorney in the department view every property before it is demolished. Sometimes the situation is such that that particular attorney cannot subsequently try the case, but certainly he is in a far better position to do so if he actually viewed the property.

We then come to the selection of a jury. In some States, the condemning authority is considered to be the plaintiff and has the right to examine the jurors first, whereas in others the landowner is considered to be the moving party. In either event, it is essential that the attorney for the State indicate by his questions on voir dire an attitude of fairness in all respects. Among the questions which should be asked, if practice permits, are (a) whether any of the jurors are employed by the condemning agency or have members of their immediate family who are so employed, (b) whether any of the jurors have any immediate interest in either the project or the property in question, (c) whether any have been parties to condemnation proceedings involving the instant or any other agency having the right of eminent domain, (d) whether anyone has discussed this case with the jurors, (e) whether any of the jurors are represented by the attorneys for the landowner and, if practice permits, whether immediate members of their family bear the relationship of attorney and client with landowner's attorney, (f) whether any of the jurors are, directly or indirectly, interested in any way in the property as mortgagee, stockholder of a company holding a mortgage, or have any such known interest, and (g) whether any of the jurors are related to, have business connections with, and the extent of their acquaintance with the landowner's known witnesses. If permitted, inquire whether the jurors have any prejudice or preformed opinion in the cause by reason of the fact that eminent domain is involved. Finally, inquire whether there is any reason known to any juror why that juror could not fairly and impartially return a verdict based on the evidence and the instructions of the court.

In the event that a juror should be found to have some connection with the condemning authority or such interest as would disqualify him, or has formed an opinion about it, then the attorney for the State should make the request that such witness be excused without opposing counsel having to so do.

Having been given a jury list for peremptory challenges, the attorney should consult with the local prosecuting or district attorney if his duties require participation on the part of the State. In most States he is obligated by law to furnish assistance in any case where the State is a party. They can be of considerable

assistance in selecting a jury. They will know many things which you in your first visit will not know about these jurors. And then I think you should consult with your negotiators and appraisers to determine whether there is any transaction in their past which would prejudice any juror for or against them and cast an influence on the trial which is adverse to your interest. Negotiators, appraisers, and the witnesses who reside in the area should be consulted with respect to their knowledge of the jurors' qualifications.

In the opening statement to the jury, the attorney should, first, be careful to report accurately the values to which the State's experts will testify constituting compensation to the owner, describe as nearly as possible the condition, size and description of the property before the taking and as it will be, if a partial taking, after construction of the proposed roadway. The attorney should express himself as favoring the principle that the landowner receive just compensation as directed by the laws of the State involved. If the State assumes the burden of proof, in some cases, it is necessary that the State show the interest of the respective defendants, such as fee owner, mortgagee, or lessee. It is particularly desirable in some cases that the mortgagee be shown to be directly interested in the outcome of the trial, as in Missouri, on occasions, where there has been a return of excess award, the mortgagee has been held directly liable for such return (see *State of Missouri ex rel. State Highway Commission v. Brown,* 95 S.W. 2d 661).

I would caution all of you to include the mortgagee in your list of defendants. This is because of a somewhat bitter experience in Missouri. An entire condemnation case was tried some time ago and there was no reference made to the mortgagee anywhere in the trial. The mortgagee had been satisfied with the condemnation award, but there was a substantial recovery back to the State from the commissioners' award. We found that the owner had moved out of the State, and since in this particular case we had not named and pointed out the interest of the mortgagee we had to go to the State of Florida and transfer the judgment in order to get the money back. In most States, if the mortgagee is made a party to the case and you recover some money back he is liable for that amount. Generally, practice now permits a stipulation with respect to these facts. Second, it is generally proper to introduce the plans or right-of-way map or other document by whatever name called which clearly reflects the property taken and, if a partial taking, the plans for the proposed construction if it bears on the remaining value.

At this point, it is sometimes advantageous to offer, by the party identifying the plans, those photographs which the State expects to offer in its principal case. The courts generally are beginning to admit photographs if they can be identified as fairly representing the condition shown even though the actual party taking the photographs is not present. I think that all the States have now gotten away from the position that the photographer who took the shots must be there to identify them. If the witness can state that this picture fairly represents the situation that exists in the area in question it is admissible.

At this point also, it is generally advantageous to submit any sketches or plats which are considered essential to an understanding by the jury of the issues. If the type of surface of the roadway on the proposed construction is to differ from that on an existing road, such fact should be brought out by the plaintiff. After offering the detail plans, plats, sketches, and photographs which would enable the jury to better understand the issues, a witness for the State should then indicate the areas involved. The condemning authority should then offer such expert witnesses as are to testify in the cause.

As a side remark, I have found that in urban areas, the jurors expect so-called experts to indicate values, whereas quite often the experienced appraiser will receive much less acceptance in a rural area. Real estate men who have had long experience in selling property in the rural areas will influence a jury far more than one presenting a number of degrees or abbreviations of organizations to which he might belong.

Once the witness is identified, the first question should be directed at his qualifications and experience for a determination of the values involved. The witness should be asked such questions as will disclose his familiarity with the property involved and indicate the nature and extent of the work he has done in an effort to arrive at the damages. Such questions should be asked as will place in the record the benefits which the property will receive if any. These may include, depending on the State law in your respective jurisdictions any of the following:

1. A better disposition of surface waters.
2. A better type of traveled roadway.
3. A means of access from one portion of the landowner's property to the other in a partial taking. For example, he may, as a result of the taking, have better means of getting back part of his property because the highway construction will remove or enable him to avoid difficult terrain.
4. A resulting commercial value or higher and better use for the property in the event of a grade separation on limited-access highways, a grade crossing causing additional flow of traffic, a better visibility to approaching traffic. As a sidelight in this regard, we once took and showed in court a movie taken from a car traveling on the Interstate System on which a change of route had cause a hotel on an elevated position to stand out in the view of motor vehicle operators for a substantial distance in each direction. We took a movie from a car approaching the hotel in both directions, and we were able to reduce the award to practically nothing, and we felt justified because subsequent experience has shown that the property had a tremendously greater value after the taking than before, in spite of the fact that a residence and 9 acres of land were taken.
5. The property may have sustained additional value by reason of being susceptible to use for commercial advertising. There is much agricultural land in my State today from which more substantial returns were received from signboards than was ever received from its agricultural use. There is an area near Springfield, Mo., (unfortunately, we have not been able to pass a billboard law) on a stretch of 9 miles of highway where, I believe, there is not 100 feet where there is not a billboard on that stretch of highway. Unquestionably it was $300 an acre farm land before, but the income from this land now for billboards is tremendous, and advertising far exceeds any other use to which it could be put in the foreseeable future.
6. The relocation of utilities may prove a substantial benefit particularly in a case of overhead lines or underground pipes carrying liquids or gases. If your particular jurisdiction does not recognize benefits as such, then this matter should be presented on the ground that they bear on the after value of the property remaining after the improvement.

In the event there is a partial taking of a building which affects an internal operation, such as an assembly line, the State should have such experts as may be required to indicate how rearrangement of the facilities may be made or may have been made in order to continue to carry on the owner's business. Unless you do that, the landowner is often able to show by his witnesses that he is put entirely out of business. So whenever you have a partial taking of a commercial building which will cause a rearrangement of the operations you should have a competent

contractor to go in and make an exact estimate of the cost of relocation of that machinery. Sometimes it is difficult to get a man who is qualified to do it, but such people do exist.

The costs of replacing exterior walls through the area taken in a partial taking should be ascertained by a competent contractor and introduced in evidence. Nearly all States have stated through their highest courts the legal principle that in such partial takings there is an obligation on the owner to rebuild. For those of you who have never had the question raised, the leading case in my own State on the subject is *City of St. Louis v. St. Louis, Iron Mountain, & Southern Railway Company,* 197 S. W. 107.

It is quite possible that testimony with respect to the particular tract would involve the question of a higher and better use, and the issue may involve a possible subdivision of a large tract. Most States have, I assume, laid down a rule with respect to the amount of damages that may be involved in the taking of the prospective subdivision, but a recent Arkansas case seems to express capably what I believe to be the better rule, that the area must be considered as a whole, and the value of the number of lots which will be taken may not be added to arrive at the damages. The case is styled *State Highway Commission v. Watkins* and may be found at 313 S.W.2d 86.

The question of the recent sale of the property involved in the condemnation may be a matter bearing on value or damage or that involving the value of a comparable property may arise. There have been decisions in which the courts have ruled that the consideration expressed in a conveyance or the revenue stamps attached to the conveyance as indicated by the certified record of recording are admissible and prima facie evidence of the consideration. One such case is *Redfield v. Iowa Highway Commission,* 99 N.W.2d 413.

Evidence of former sales of the particular property if within a reasonable time should normally be admissible. The time period may be such that some testimony as to the general increases of land values or decreases during the period must be offered in testimony. As to what constitutes a reasonable time, there is a case in which a sale 6½ years earlier was held admissible in Utah in *Weber Basin Water District v. Ward,* 374 Pac.2d 862. The Supreme Court in Missouri has thus far expressed its opinion favorably in a case involving a period of under two years, its latest ruling on the subject being *State Highway Commission v. Rauscher Chevrolet Company,* 29 S.W.2d 89. This may be done provided the State is able to show the relative general change in value of the area during that time. Ordinarily, in urban areas at least, that is not too difficult to do because of the various tables and booklets put out by appraising authorities with respect to such areas.

At this point, we may well consider the testimony of the landowner and his cross-examination. States generally permit the landowner to testify as to the value of his property or to the amount of damages sustained by him regardless of his qualifications in that respect.

The State's attorney must remember, in his treatment of the landowner throughout questioning, that right of eminent domain is opposed to the landowner's concept of his constitutional rights to be secure in his home not only from searches and seizures but from any other invasion, including that which permits a public improvement to encroach upon his property, in one of the rapidly diminishing number of countries where individuals may own in fee simple real property. The safest ground, we have found, is to question him closely as to comparable sales in his area, rather than to hold him up as having no knowledge whatever of values. Ask him whether or not he is familiar with various comparable sales which you should have on your sales map. Ask him whether he is familiar with the considerations paid in these sales.

During both direct and cross-examination of the landowner, the attorney should be particularly careful to protect the record so far as voluntary statements indicating animosity toward the condemning authority by reason of the exercise of the right of condemnation is concerned. In most jurisdictions, the jury trial is concerned only with the question of damages, and statements which may be involuntary or calculated to arouse sympathy of the jury should and must be kept out of the case. For example, a statement by the landowner that "it was my land and they had no right to take it."

Usually the State's attorney is on sound ground in making inquiry of the landowner and his expert witnesses with respect to comparable sales in the area. It has been our experience that usually there are such comparable sales, and to our staff and to our courts this is the most sound measure of value. If the appraisers for the authority have done their work properly, all sales in the area are known; the general type and fertility of the soil, if agricultural property is involved, are known. If the property be urban and improvements become the principal factor, there are usually sales of the same general character of property which are available. The item of reproduction costs may sometimes enter into the evidence of a trial. I think probably most of the States have held that if there are no comparable sales that can be found, or if there is a dispute about whether or not such comparable sales exist, then you may, particularly with a special use building, go into the question of cost of construction less depreciation. If the property is of recent construction, then the appraiser should have contacted the original contractor and should have obtained from him an estimate as to the cost of reproduction of the existing building involved. This information resulted in our being readily able to reduce the claim of a large corporation by almost $300,000 in recent negotiations. Its officials did not have their own costs, and when they were produced from the original contractor, there was ready agreement.

The item of fencing is quite often of major importance and usually there is a good price in the area for such work, which the landowner will usually admit after questioning.

One of the big differences in the testimony of the condemning authority and the landowner may result from differences in their views as to the status of fixtures; that is, whether they are real or personal property. We find a consistent trend toward expansion of the definition of "real property" by the courts. There is also a growing tendency to extend the term "trade fixtures" to include all equipment necessary to the production of an end product. In this connection, to be fully and properly advised, the State's attorney must have the following:

1. If the landowner is a corporation, the attorney should obtain, by interrogatories or by deposition, the classification under which the property involved is carried on the company's books.
2. Most States have certain tax assessment classifications (such as a merchant's and manufacturer's tax) which require proper classification of the equipment owned and operated by the company. Others have assessment lists which place each class in a proper category, and these or certified copies thereof must be available.
3. If there is a lease involved, such lease should be available for use in the trial, particularly if it classifies certain equipment as personal property.
4. There is quite often a trade practice in the particular trade or manufacturing business involved with respect to certain items and their treatment as personalty. For example, bowling alleys, which have a practice of reselling used bowling alleys, and the alley may have a definite value for this purpose.
5. In addition to all the preceding, the principles of long standing with respect to intent and mode of attach-

ment to the realty, whether there can be removal without affecting the building involved, whether the building was specially constructed for an intended use, whether there are pipes or ducts extending between floors to various articles of machinery, must be pursued to arrive at the correct answer.

Among the particular items which are more commonly criticized by the landowner are the type and location of driveways, the drainage, and the location of utility poles or lines adjacent to the property under the new improvement. The attorney should check these items in advance for the reasons for the contemplated plans involving same.

I assume that by now most jurisdictions have resolved the question of access to outer roadways and compensability for lack of access to thruways on highways interstate in character. Some are, I know, now engaged in arriving at a judicial decision on this subject, because I have recently corresponded with those States.

The adoption of certain standards of construction by AASHO and the terms by which they are designated has caused some difficulty. (And I have been trying for several years to get AASHO to change their nomenclature of what I call an "outer roadway.") For those States where the decision is yet pending, let me urge the use of the term "outer roadway" in those situations where there exists on a single right-of-way one or more central lanes which we may designate "thruways" and one or more outside lanes which are built specifically for the purpose of local traffic use. To receive the value of the police power which is an inherent right in every State, the entire facility must be treated as a single, complete roadway unit. To designate the outer lanes as "service roads" implies a roadway separate and apart from the thruways, and this has, in my opinion, resulted in unfavorable decisions in those States where the term has been used.

If you ever have this problem, you should consider having your design engineer label this so-called frontage or service road as an "outer roadway," and thereby imply that it is merely one out of three or four units of the same roadway. This places you in a favorable position to argue to the court that the police power may properly be used to control movement back and forth between the various roadways of which the highway as a whole is composed.

This point is crucial in your line of legal reasoning because in the very nature of things there can only be one boundary line along which an abutter can claim access rights. Once he has crossed this line he is, legally speaking, either within the expressway or outside the expressway, depending on whether he is moving to or from his roadside land when he crossed this line. And if he is within the limits of the expressway when he crosses this line, he must share with everyone else the restrictions on turning and moving from lane to lane and roadway to roadway.

Where is this point at which access rights are determined? It is the outer right-of-way line of the highway. Everything outside this line is private land; and everything inside it, including the so-called service or frontage roads is part of the highway.

An early California case, *People v. Ricciardi,* 23 Cal. 2d 390, 144 P.2d 799 (1943), got everyone off to a bad start in this matter by giving the impression that even after a landowner had crossed the outer right-of-way line onto a frontage road, he still had a right of access to the through traffic lanes of a freeway. Of course, there were certain complicating facts in this case that helped the court make its mistake. A fence had been built between the frontage road and the through traffic lanes and the frontage road had been transferred back to the county. But these factors did not and cannot change the functional relationship between the frontage road and the through traffic lanes.

They still function together as integral parts of the same highway.

It is my belief that access to a highway may be controlled through conveyance of property rights at one point only, which is the right-of-way line. Once the abutting owner is across such line, he has no greater right of access to other lanes of the highway than any other motorist using the nearest lane of traffic.

To compensate the abutting owner for loss of access in such cases as such could logically result in a rule that any other motorist occupying the same place on an outer roadway should be compensated because he could not get across to a second and forbidden lane of the highway.

It is now, I believe, well settled that the States may eliminate the right of access to an abutting owner to the nearest lane of a multilane highway constructed in front of his property without payment of compensation for such limitation. The leading cases on this are as follows: *Nettleton v. State,* 202 N.Y.S.2d 102; *Pennsylvania Oil Co. v. Texas Highway Commission,* 334 S.W.2d 546; *Arkansas v. Bingham,* 333 S.W.2d 728; *State Highway Commission v. Thelberg,* 334 Pac.2d 1015.

There is a growing tendency, and properly so, on the part of the courts to expand the testimony which may be given by an expert in this field. Previously, I mentioned the admissibility of sales prices as indicated by consideration expressed in the document or by revenue stamps. Recently a decision in Kentucky, *Stewart v. Commonwealth,* 337 S.W.2d 880, has extended the rule to permit an expert to testify as to the prices involved in comparable sales where he has made an investigation of such prices.

In Missouri, we have made certain economic studies as to the effect of new construction of major highways on abutting property. I do not suppose there exists a State in which certain so-called "economic studies" have not been made. To me this is money wasted unless such studies are put to a specific use. Logically, this may be done in areas and under conditions comparable to those included in such study. We are now offering such studies in cases where special benefits arising out of the location of an interchange are involved, to show to the jury the results in comparable areas where an interchange has been constructed. We believe this to be proper testimony and admissible. I think that the time is here when a true expert in the field who has studied the results and the inevitable increase in values of property abutting an expressway may logically apply them to a similar situation where there is a taking for construction of a similar facility.

We are also preparing our experts with respect to these studies so that they are able to say that in an area having similar characteristics the reasonable result to be expected from the construction of this highway is an increase in the value of abutting property and also a vast commercial growth surrounding the interchanges which are constructed on those highways having control of access. And we have applied this principle to smaller towns; we just prepared a case involving a town of 6,000 and we took the real estate men from other towns having comparable population and located on highways having similar traffic, and we will offer those people to show what has occurred under conditions which we show and believe are similar. And I hope that it stands up. All of us ought to strive for an enlargement of this field of expert testimony. It has always been assumed that experts would testify regarding a specific site, but that principle ought to be enlarged.

There is one additional point which I offer for consideration and that is the question of the assessed valuation of the property involved. Most statutes require that real property be assessed at its "true value." Many jurisdictions have now progressed to a stage in which a certain percentage of that true value is to be universally applied. In my State, our State Tax

Commission is proceeding on the theory that 30 percent of true value is a proper assessed value. I believe that in a proper case, such valuations may be admissible. I refer particularly to those States in which the owner signs an assessment sheet, which is practically universally required. That courts are beginning to lean in the same direction is evidenced by a recent decision in Vermont, where such valuation was held admissible to contradict statements of the owner in *Colson v. State Highway Board,* 173 Atl.2d 849; see also *State v. Hartman* (Texas), 338 S.W. 2d 302.

Finally, there is a practice that appears to be growing of assigning market value to certain types of fixtures in accordance with a local practice in the area. An example of this appears in an appellate decision in my State, arising in the City of St. Louis and in which our State Highway Commission was not a party. The evidence in a particular condemnation case involving the City of St. Louis was all to the effect that filling stations were sold in that area at a price based on the number of gallons sold monthly multiplied by a certain number of cents per gallon. Both parties in that particular case apparently agreed that that was a good measure of damages and, on appeal, the court held that since there was no evidence to the contrary, the value could be computed in that manner. Another example, there is an inclination on the part of certain States to allow fixing the value of liquor stores on the monthly or annual sales multiplied by a factor. I am of the opinion that such a rule might well extend to the amount of sales of certain roadside activities and might well prove a "Frankenstein" in certain cases. There may be any number of reasons why the sales of a particular filling station or liquor store or comparable business which is subject to this test may not be an accurate measure of value, and I think we should insist on adhering to the old principles of "market value."

In his argument to the jury, after all evidence is closed, the advocate for the condemning authority should, depending always on the circumstances as they then appear, attempt to do the following:

1. Point out to the jury that the position of the authority is that just compensation be awarded.
2. That the witnesses for the authority have not had and could not have any personal interest in the outcome of the trial.
3. Itemize the special benefits that the owner is receiving, if any, as result of the contemplated improvement.
4. Enumerate comparable sales which have been established as such during the course of the testimony.
5. Emphasize concessions made by landowner's experts in the course of cross-examination.
6. Emphasize the procedure used by the authority and the details appearing in the testimony to arrive at a fair valuation of the damages at issue.

Then, after a verdict, check with members of the jury, if permitted in your State, to determine the factors on which they based their decision, which may be of inestimable assistance to you in future litigation.

An attorney representing a public agency in condemnation proceedings has, in my opinion, one of the most difficult duties to perform. He is beset on every side by those who would seek to have him disburse more of the public funds than he in good conscience believes to be the fair amount due the landowner. He will frequently find individuals in the judiciary who will, to gain favor with local constituents or attorneys, place him in a position of disadvantage. The recent disclosures by the Blatnick Committee of dishonesty in some States has, it appears to me, made the position of those in the highway field even more difficult. In this day of progress, when so many additional public facilities are necessary to the public welfare, I cannot conceive of

any position which is more important than that of securing fair treatment and just compensation to the individual for property taken and fair administration of the laws of eminent domain on the part of public agencies.

DISCUSSION

ROSS D. NETHERTON, *Counsel for Legal Research, Highway Research Board, Presiding*

Canada.—You mentioned that the Federal Internal Revenue people had a ruling on the tax law. Do you have that citation?

R. L. Hyder.—The case they are using is styled *U.S. v. Spencer,* and it was decided in 1954 in, I believe, Vermont. In my opinion, the case does not hold all they say it does, but there is an intimation there that if the owner does not properly report at the time the apportionment between damages and value of land taken that the burden is on him. They sent out a circular to every agent in which they cited this case, and they are attempting to put the burden on the landowner in all cases. There is an intimation in that circular that this apportionment must be expressed in the deed itself, but they have told us that in practice they would accept a letter from the highway department with the same weight.

G. A. Williams.—Do you give your landowner an itemized statement as to how much is for damage and how much is for land value?

Hyder.—We do if we negotiate with him.

Williams.—A question on benefits: Did you say your witnesses came in and gave a monetary amount as to what the benefits are?

Hyder.—Yes, I did.

Williams.—Well, how can you get away from speculation such as we have found in certain economic studies that this area has increased in valuation? You cannot say that everything in this area has gone along at the same rate of progress, can you?

Hyder.—We assume that the progress in this area with respect to sales will be comparable to that in one having similar population and similar characteristics of traffic. And we point out that the values have gone from so many dollars to so many dollars, and we can naturally expect that same rate of increase. But to stay away from this if you want to you can merely cite an after value, and then they can break that down on cross-examination to evoke the same thing, which is probably a better way of getting at it.

Thomson.—I notice in your remarks you state that the law is well settled, that the State may eliminate the right of access if you provide access for the owner to the nearest lane of a multilane highway.

Hyder.—Actually it is not really well settled, but I wanted to point out that in those five cases which are the other way this situation does not exist. There they called it either a service road, which implies a separate entity, or a frontage road, which also does the same. I do not believe there has been a case where this principle has been use by the authorities where there has been an adverse decision.

Thomson.—I have been of the opinion that the Thelberg case and the Bingham case[1] were somewhat at variance, and I think that if these citations listed are pertinent to this point perhaps we could get a comment from Mr. Donham (of Arkansas) and Mr. Amey (of Arizona) on this.

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[1] State *ex rel.* Morrison v. Thelberg, 344 P 2d 1015 (1959). 350 P.2d 988 (1960); Arkansas State Highway Commission v. Bingham, 333 S.W.2d 728 (1960).

Hyder.—I would like a comment from anyone about it. We have tried to get this nomenclature changed by the Bureau of Public Roads, but so far we have not been able to get it done.

R. F. Carlson.—I think it was our Ricciardi case which started the problem. That is the case where we did construct the frontage road as part of the construction. We have had cases lately, and the courts have held them noncompensable, where we took an existing highway and converted it to a frontage road, and then put the freeway next to it. This is a qualification on the Ricciardi decision.

Hyder.—Do you think that in your Ricciardi case if you had treated this as a multilane unit, with two outer and two inner roadways, you would have had a different result?

Carlson.—If we had done it as stage construction, and widened the existing highway there, and then later on put a fence in there to divide the roadway we probably would have reached a different result.