Control of Roadside Land Use, Billboards, and Subdivisions

MAX COOK, *Chief of Legal Division, Oklahoma State Highway Commission*

• We do not have many of the problems that the rest of you have partly because we are a very young State. The first highway department was organized in Oklahoma in 1923, and then for another 10 years it was practically nothing. As a teen-ager I can remember when there were less than 1,000 miles of paved highway in Oklahoma. I can remember when we used to drive 25 miles over unpaved roads just to enjoy driving over 5 miles of paved highway. Today we have over 10,000 miles of State highway and have allocated 700 miles to the Interstate System, with about 300 miles completed.

My subject is control of roadside land use, and we do not have any control. But I do have a little something to say about control of access and that is concerned with the use of roadside land. For any of you who took down Mr. Hyder's citation on the Thelberg case, I want to call your attention to the rehearing of this case which held against the State. This is 350 P.2d 988 (1960). The first Thelberg case was in 1959. We have this question coming up for the first time in Oklahoma, and we have started briefing this question for the 10th Circuit. In addition to that we have found decisions in Florida, Mississippi, Texas, New Hampshire, and some others. Yesterday Mr. Hyder was very optimistic about protecting access and putting people on service roads, but out of 16 States on which we have briefed this question, there are only 3 that have held that you can do this without compensating them for impairment of access.

As to the problems of interchanges, they have been nonexistent in Oklahoma. We have not had a single condemnation action in Oklahoma involving an interchange. Our design engineers merely run the fence on the Interstate System down as far as they think is necessary after a field inspection, and we have never had a lawsuit. The reason may be because we acquire the land for our interchanges way in advance of the time we acquire for the roadway. Sometimes we put several agents at work and try to acquire it overnight. We do not let the neighbors get together and talk to each other. We get in there, buy it up, and get it over with.

I suppose everyone is troubled with encroachments. We have thousands of them. Recently we made an arrangement with Oklahoma City to remove them on a stretch of road. We had originally counted 41, and before they could get started removing them there were 62. But we have a cure for that. Oklahoma City will never get another project built within the city limits until those encroachments are all removed. When we go into a town to build a highway we enter into an underwriting agreement with that town providing that they will remove and keep the highway free of all encroachments from that time on. If the Bureau of Public Roads does not approve that job because there are encroachments on it, the town never gets another job within its limits. If it is in a county, we have the same type of underwriting agreement with the county commissioners. And if they do not fulfill their obligations, that county never gets another road job. We have never heard a word from the politicians about these agreements. As a matter of fact, in four counties of the State when I go in to try a case I use four State senators to help me on my side. They are

lawyers, and I hire them because they are the best ones in that part of the country.

The next matter is billboards. I think it is facetious for me to come to Wisconsin and tell the people about billboards. If all of you have not yet obtained a copy of John Armstrong's paper entitled "The Wisconsin Billboard Case"[1] you ought to find one and read it. It is very good.

In 1958 the Federal-aid highway law was amended to provide additional payments to the States if they would clear the sides of the roads of billboards, and some of the States took advantage of this offer. Wisconsin was one of the first. There are 19 other States that are working on this same type of program.

The Federal Government pays ½ percent of the cost of construction if you will clear the sides of the road back 660 ft, and they will pay 5 percent of the cost of the right-of-way.

There needs to be an answer to the billboard problem. There is no question that it is bad.

DISCUSSION

Netherton.—What do you estimate it would cost Oklahoma to control roadside advertising under a police power program?

Cook. — Probably nothing, but I might be wrong. A while back we curbed off an ice cream stand on the theory that we could designate only certain driveways into that stand. We got into a lawsuit over it and argued that we could do it under the police power. But our supreme court said, "Yes, you can curb him under the police power, but you have got to pay him for it." So it might be the same way with billboards. I do not know.

Netherton.—You might be better off to use the device of buying up the advertising rights as part of the right-of-way and getting 90-10 participation of Federal-aid funds.

Cook.—Well, we get 90-10 participation.

Netherton.—Do you make it a practice to pick up the advertising rights along with the right-of-way?

Cook.—Oh, no. We would not get 90 percent participation on the advertising rights. We only get ½ percent of the cost of the project plus 5 percent of the right-of-way.

Netherton.—As I understand the 1958 act, it is double-barreled. There is a formula for becoming eligible for a ½ percent bonus. But there is also authorization to buy up advertising rights and charge them into the cost of right-of-way acquisition. For this the Federal Government would pay 90 percent. It is in Title 23, Section 131(d).

Cook.—I did not realize that was there.

Netherton.—It seems to me that this is important when you have to make a policy choice as to which way you will set up your program to regulate billboards. Will you use some kind of licensing system? This costs some money to administer, but at the same time it also brings in some money to pay for its administration. Or, will you buy up these rights? If you do, you have them and can control their use. You can relax them, expand them, or adjust them to fit the situation you find you need.

Cook.—Does this still use the 600-ft set-back?

Netherton.—Yes.

Lindas.—Do you have any local control over billboards in Oklahoma?

Cook.—No.

Lindas.—We have had one in Oregon which is administered by the Department of Labor. Do not ask me why the Department of Labor. Billboards are regulated as to number, and are under a permit system.

Cook.—Do you do this under the police power?

[1] Armstrong J., "The Wisconsin Billboard Case." PROC., AASHO, pp. 108-133 (1961).

Lindas.—The legislature passed a law regulating erection of billboards on all highways of the State of Oregon and they have to apply to the Department of Labor for a permit to put a sign up. Just two years ago, we entered into an agreement with the Bureau of Public Roads relative to the Interstate System, and they have until 1965 to comply with the provisions of the Federal law. In 1965 we are going to eliminate these billboards under the police power. I do not know how we will do it then, however.

Carlson.—What about compensation for advertising rights on new alignment? On new alignment there are no access rights to begin with, and certainly there is no advertising. Do you think that the advertising rights there are worth anything?

Cook.—A court decision came down in Oklahoma just recently and said that they were not worth anything.

Thomson.—Do you have county zoning in your State or is zoning carried on under the powers of the municipalities?

Cook.—We have some county zoning in our metropolitan areas.

Thomson. — Has there been any thought to regulating billboards as part of the zoning law for areas along some of your major four-lane highways? This has occurred in eastern Iowa, and also around Des Moines. Also one of our counties, by resolution of its supervisors, prohibited billboards and is enforcing it. I think this shows not only that the local governments have the power to deal with billboards but that even in rural areas these gentlemen will go along with you.

Canada.—I was at the Highway Research Board meeting in Washington last January and attended the session on billboard control. I returned home enthusiastic, and we cleaned off the highways. We had an act on our books from 1947, amended in 1949, providing for permits. Nobody had enforced it or worried much about it. There was one case back in 1947 or 1948, when the Eli Whitney Tobacco Co. was afraid we were going to take down all their billboards. They started a case to have the law declared unconstitutional, but our supreme court declared it was not unconstitutional. So we went over and talked to the Governor about it. We had prepared a briefcase full of arguments on why we should enforce the outdoor advertising law, and were ready for at least a two-hour argument with the outdoor advertising industry's people. We walked in, sat down, and the Governor asked us what we wanted. We said we wanted to talk about starting to enforce the billboard law. To which the Governor replied: "Well, why haven't you been enforcing it all along?" That seemed to solve our problem politically right there.

We are about two-thirds through. To give you an idea of what you can do in this field, we were severely handicapped just by the number of men available. We tried to do it in a three-step program, getting the little signs first, then the next biggest, and finally the big boards. I anticipated a tremendous number of lawsuits. They have not materialized. I have had only one suit, in Dade County. I mention this because the first day of the clean-up we had two trucks and two crews and they picked up 1,800 signs in one day along about 10 miles of State highway.

This program can be done if you have a law on the books. You just have to get out and pick up the signs. You cannot just talk about it and write briefs.

Lindas.—Were these signs within the right-of-way?

Canada.—Yes, they were within the right-of-way or within the statutory 15-ft setback. We took down all the signs within the right-of-way first; we took down all the signs within the 15-ft setback and all the unpermitted signs next. Now we are working on the great big ones.

Lindas.—Are you removing the large ones?

Canada.—Yes, sir. One man called me up just shortly before I left to come here. He had a sign just outside of Tampa where we have a 250-ft right-of-way. We only have four lanes built on it now, but we have the extra space. There are motels along the right-of-way, and this man claimed his sign was worth $6,000. It was mounted on big concrete blocks, with arrows pointing from it, and all sorts of things. He said: "Now, how long are you going to give to move this sign?" I said: "Well, you got a 30-day notice didn't you?" He said, "Yes, sir." "How many days have gone by?", I asked. He said 25. "Well," I said, "that leaves about five more days." He asked, "How are you going to move it?" "Oh," I said, "that's very simple. We have these great big bulldozers, and that's the way we move them. When that bulldozer gets there somehow they find a way to move those signs."

This is the way you have to go about it if you are going to enforce a signboard law.

Netherton.—I would like to ask a question about interchanges. I know that at the last session of the Wisconsin legislature they tried to do something about anticipating land-use control around these interchanges. Kentucky also tried to do something. I would like to know about these proposals or anything that any other State has thought about doing on this problem.

Beuscher.—The bill in Wisconsin was a pretty crude bill. It went through the House by a large vote, and then nothing happened after it got into the Senate because the chairmen of the highway committee there did not like it. It was a little late in the session, and so it has not cleared there. It may very well pass next session.

Essentially it proposed that there be established around every Interstate System interchange at least, and possibly around some on other systems in the State, an "interchange zone" about 1½ miles in radius within which there would be special control of land uses. It gave the counties the first opportunity to work up a zoning plan, and if they did not act within a certain time the highway commission would have power to do it.

Amey.—Some of you may recall a circular memorandum from the Bureau of Public Roads, dated June 11, 1962, relative to "Devices to Protect Future Highway Acquisition from Project Enhancement." As you know there is almost invariably an interval of time between the date on which a contemplated project is announced and the commencement of acquisition of right-of-way. From the date of announcement there is anticipated value enhancement to the properties involved by reason of this expectation.

I would like to tell you about Arizona's experience in this matter. We had a statute, ARS 18-155(d), allowing the commission to determine the date of acquisition by resolution filed in the county recorder's office. If the highway commission thereafter started a condemnation action to acquire property within two years the date of valuation was established as the date of the resolution. This was held unconstitutional in *State v. Griggs*, 89 Ariz. 70, 358 P.2d 174 (1960). I point this out as a matter of caution. This matter of protecting against enhancement of value is fraught with difficulties. I handled this case before our supreme court myself, and I never had a more difficult job of trying to support the constitutionality of any legislation. I recommend that you read this opinion.

G. D. Becker.—The Bureau of Public Roads is taking a great interest in this matter, and is encouraging States to use their Highway Planning Survey funds for studies of this problem.