The Future of Abutters' Rights: Access

HARRISON LEWIS, *Assistant Attorney General, North Carolina*

• The subject matter of this session is concerned with the future of abutters' access rights. My invitation to speak asked me to undertake a topic "dealing with problems involving abutters' rights of access which must be considered in connection with highway construction." This did not sound too difficult since I felt I was acquainted with some of the problems if not the answers. The more I have contemplated the subject of the future of abutters' rights of access, the more I am convinced that I am ill-equipped to handle it. Frankly, I do not know with any certainty the current status of abutters' access rights in my own State, and I would be presumptuous if I purported to predict the over-all future of abutters' rights of access in the United States.

It has been suggested that this discussion, together with Mr. Zoellner's discussion of the future of abutters' rights of light, air, view, and noise had been visualized as a thinking session rather than one that concentrates on sharpening lawyers' skills, and that it was intended to look critically at the recent cases with a view of determining where they are leading the evolution of legal doctrine on these subjects. In addition, it should involve a probing of the underlying attitudes of the courts regarding the way that the law should be used to balance the competing interest of private property and public improvements. This is a big order. To trace all of the evolution of abutters' rights of access would have taken a great deal more time than I could have possibly devoted to the subject so I have limited my discussion to cases decided in the last eighteen months to two years. Since this is a thinking session, I am going to leave most of the thinking and a good deal of the probing to you, and maybe from a discussion of these cases, you can come to some conclusion as to the future of abutters' rights of access.

It has been suggested that the powers which are available to the public for implementing access control fall into five categories[1]: (a) the power to regulate private use of property referred to as the police power; (b) the power to appropriate private property for public use on compensation referred to as eminent domain; (c) the power to make contracts in the aid of public purposes; (d) the power to tax and license; and (e) the planning function of public agencies. In England, it appears that access is controlled primarily through the power to tax and license and the planning function of public agencies, and it may well be that the ultimate future of access in America may lie within the scope of these powers, particularly the power of planning.[2] However, at present, the use of these two powers in access control in America is relatively insignificant, so I will limit my discussion to cases dealing with the first three powers.

The access cases decided in the last eighteen months or so, can be categorized as follows:

1. Change of Grade Cases.—These cases are often treated as if they were a separate category from access control by the Courts and various writers; however, since the only damage that can result to abutting property from change of grade is either

[1] Netherton, "A Summary and Reappraisal of Access Control." HRB Bull. 345 (1962).

[2] Mandelker, "The Changing Nature of Abutters' Rights." HRB Bull. 345 (1962).

due to an alteration of access or an interference with light, air, and view, I feel that they are properly included in this discussion.

2. Cul-de-Sac Cases.—These are sometimes referred to as non-abutters' access cases; however, this is somewhat of a misnomer since the individual property rights affected arise out of the property being an abutting property on some public way.

3. Control of Access on New Location Cases.

4. Cases Dealing with Conversion of Existing Non-Controlled-Access Facilities to Controlled-Access Facilities.—Included as a subheading are those cases which deal with the substitution of a service road for access to the main lanes.

5. Traffic Control Cases.—These include the control or regulation of traffic within existing right-of-way and in conjunction with the acquisition of new right-of-way.

6. Contract Cases.—These are the cases that arise out of interference with access established by an agreement or judgment.

7. Value Cases.—These are cases that deal with the valuation of access rights.

Change of Grade

Under the category, change of grade, the first case I would like to discuss is that of *Smith v. State Highway Commission,* decided June 15, 1962 (126 S.E.2d 87). The facts are as follows: Prior to the work complained of by the Highway Commission, the Smiths owned a lot fronting on East Bessemer Avenue in the City of Greensboro, N. C. A right-of-way of 100 ft for East Bessemer Avenue had been acquired by the City of Greensboro in 1955 and was thence conveyed to the State Highway Commission. In constructing a grade separation between East Bessemer Avenue and US 29 near the Smith property, the Highway Commission raised the grade on East Bessemer Avenue to 6.1 ft at one end of the Smith property, 8.5 ft in the center of the Smith property, and 12.8 ft at the other end of the Smith property. Prior to the construction of the grade separation, the Smith property was at grade with East Bessemer Avenue. All work was done within the existing right-of-way. The Smith property also had frontage on another street parallel to East Bessemer Avenue and was level with said street. The evidence indicated that to connect a driveway with East Bessemer Avenue after the change of grade, it would be necessary to extend a ramp 35 ft into the Smith property at the lowest point of the fill and 46 ft into the Smith property at the highest point of the fill. All of Smith's evidence indicated that the property had been substantially damaged. At the close of Smith's evidence, the Highway Commission moved for a nonsuit which was denied. The Highway Commission put on no evidence and the jury rendered a verdict in the sum of $6,925. With some fear and trepidation, we appealed.

Although North Carolina had a line of cases some twenty years old or older which held that change of grade was noncompensable, these cases were decided before the concept of the controlled-access highway, and at a time when abutters' rights of access were not so much in the limelight. Interference with access had not been stressed in these cases. The Smith's contention was that they were entitled to recover for the change of grade because of its substantial interference with their right of access to East Bessemer Avenue. The North Carolina Supreme Court, in a succinct and well-written opinion held that the nonsuit should have been granted. Their reasoning was as follows: "When a public highway is established, whether by dedication, by prescription, or by the exercise of eminent domain, the public easement thus acquired by a governmental agency includes the right to establish a grade in the first place and to alter it at any future time as the public necessity and convenience may require." And in explaining this, they

went on to say: "The easement thus acquired includes the right to alter the grade in East Bessemer Avenue at any future time as the public necessity or convenience may require, without any liability to an abutter for the impairment or loss of his easement of access, for the reason that his easement of access is held subject to the public right to make use of the way for travel and other proper highway uses and anything that would constitute a proper exercise of the highway easement is no infringement of the abutters' rights. The public has a paramount right to improve the highway for highway purposes." They go on to say that since the right was acquired to begin with that a change of grade which impairs or even destroys the property owners' right of access is not deemed a taking in the constitutional sense so as to require compensation therefor. They do include, however, a little disturbing dicta in a quote from Nichols: "This rule does not, however, apply to cases of partial takings, where damage to the remainder by reason of change of grade is involved. . . ." This, I think, is correct if it refers to the grade on the newly acquired part, but I have some reservation concerning its soundness if the change of grade is within the limits of the existing right-of-way. This case is particularly interesting in two aspects, the first being that nowhere does it use the word "police power" which is a much bandied-about expression meaning different things to different courts. In this case it was not necessary to discuss it. The basic reasoning behind the decision is that it is a right previously acquired. The second interesting aspect of the case is the concept that the abutters' easement of access is held subject to public right to make use of the way for travel and other proper highway uses, and anything that would constitute a proper exercise of the highway easement is no infringement on the abutters' rights. We see in this case a balancing of private and public right.

In contrast to this case is the case of *Board of County Commissioners of Lincoln County v. Harris,* 366 P.2d 710, New Mexico, 1961. In this case, the condemnees owned a piece of property containing a store and filling station. The property cornered on US 70 and a street in Lincoln County, New Mexico. The Highway authorities lowered the grade of US 70 a mere 20 inches which made ingress and egress from the highway somewhat more difficult. The street on the other side of the property was not altered. There was evidence in the case of substantial decline in market value and the Court held that under the constitutional damaging provision, this was a taking. The State apparently contended that it was an act of police power. This was rejected by the Court in a portion of the opinion which to my notion displayed a rather foggy conception of police power. They cited a California case which held that the police power should not be exercised except where an emergency existed. I have not had time to check into it, but I cannot conceive that California only invokes police power where an emergency exists. Apparently, the theory of prior right was not raised. This case is an example of the damaging constitutional provision being used as a convenient hat rack to hang an award on in any given case. Frankly, I think many of the States with the damaging provision in the constitution get the cart before the horse and look at the value evidence to see whether or not there is a taking, rather than examining the public action to determine whether a property right has been damaged. I have always felt the same results should be reached in a damaging or taking State, since in the taking States, if the interference with a private right is sufficient, it will be held to be a taking whether or not it is appropriated and used by the public authority.

The last case concerning change of grade is *Seilig v. State,* 10 N.Y.2d 34, May 1961 (Fig. 1). This case is important for several reasons. First of all, I believe it is the first major case

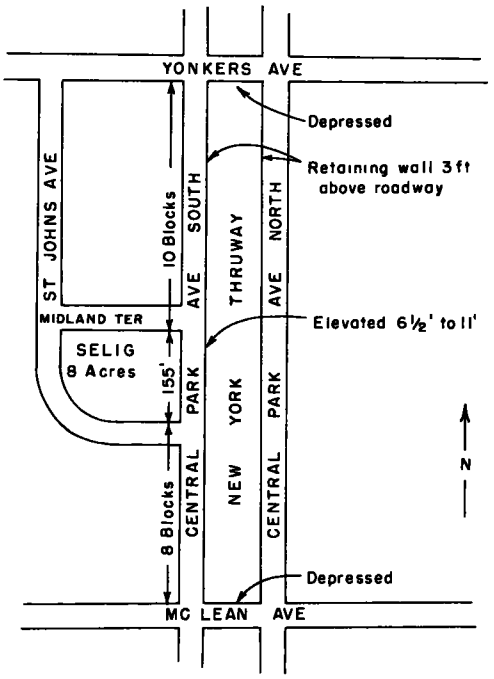

Figure 1. Change of grade, *Selig v. State of New York.*

concerning access which has been determined by the New York Court of Appeals since the Jones Beach case.[3] The case is also important with reference to the conversion of an existing facility into a controlled-access facility, so we will only discuss the change of grade aspect here. In this case, the center portion of a 100-ft right-of-way was either depressed or elevated and converted into a throughway. The outer margins of the streets were left as they were prior to the construction of the improvement. In the face of a statute making change of grade compensable, the New York Court held that since the grade immediately adjacent to the property was not changed, no compensation for change of grade could be allowed. Access to the abutting lane had not been changed. Such damages as were occasioned were the result of diversion of traffic and not change of grade.

[3] Jones Beach Boulevard Estates v. Moses, 197 N.E. 313 (1935).

Cul-de-Sac

The next category of cases constitutes the cul-de-sac cases. Although these properties do not directly abut on controlled-access facilities, the problem often arises from the construction of throughways. In most States, the theory on which a cul-de-sac situation may be compensable arises out of the theory of an abutter having an easement of access to the adjoining street which extends to something more than the mere right to enter on the street from his property. The damage and inconvenience resulting must differ in kind rather than degree from that suffered by the general public. The case of *Mabe v. State*, 360 P.2d 799, Idaho, March 1961, arose on a demurrer to a complaint. The Court, in holding that the complaint stated a cause of action, carefully indicated that the diversion of traffic caused by the facts alleged was not compensable and was not a taking. However, it appears that the Court overruled the demurrer because there was certain language in the complaint concerning denial of abutters' right of access. However, from the facts, it does not appear that any marginal access was interfered with. The case does not discuss the difference in kind of damage vs degree which usually controls in this situation. It seemed that the Court did not close the door on a possible finding of noncompensability at the trial.

The case of *Gayton v. Dept. of Highways*, 367 P.2d 899, Colorado, January 1962, was another case which arose on demurrer to the complaint. It should be noted that Colorado has a damaging provision in the constitution. It appears that the Gayton-owned property fronted on an alley. The alley was barricaded at the end of the block by reason of construction of a throughway. However, access in the opposite direction to the city street system was left open. In this instance, the Court sustained the demurrer for the reason that the property owner did not plead any special or peculiar damage differing

from that suffered by the public. In most jurisdictions this would arise from a pleading of the facts, rather than a pleading of a conclusion.

In the case of *State Highway Commission v. Fleming,* 135 So.2d 821, Mississippi, January 1962, the street on which the Fleming's property abutted was vacated at one of the property lines so that the property cornered on the vacated portion of the street. The Court permitted recovery on the grounds that cornering with the vacated portion was the same as abutting it and that anyone abutting a portion of a vacated street was entitled to recover.

Another case which would probably fall into this category is *Berger v. State,* 223 N.Y.S.2d 23, December 1961. It appears that this property abutted on a horseshoe drive. It does not appear whether this was a public or private street; however, in the construction of a freeway, one end of the horseshoe drive was closed. In denying compensation for the closing of the drive, the Court based its opinion on the fact that Berger still had reasonable access and although access had been rendered somewhat less convenient, so long as available access remained, no damages could be awarded.

The case of *Dougherty County v. Pylant,* 122 So.2d 117, is a dead-ending case and the Court's opinion is contained in the headnote or syllabus which merely holds that where a street on which plaintiff's property abuts is closed by an obstruction at one end making the street a cul-de-sac, although obstruction is neither immediately in front of the property nor touches the property, if the obstruction diminishes the right of the owner to free and uninterrupted use of the street as a means of access to and from different highways, it constitutes a special damage to the property—different in kind from that inflicted on the public and there is a right of action. The case does not seem to delineate between a cul-de-sac that is compensable and one that is not. There is no reasoning or discussion of the law in the opinion.

The case of *Rosenthal v. City of Los Angeles,* 13 Cal. Rptr. 824, June 1961, is a cul-de-sac case which holds to the next intersecting street rule and finds inconvenience suffered by closing the street beyond this point is shared with the general public and is not compensable. This is probably the majority rule and although it may appear somewhat arbitrary, it at least draws the line. In each of these cases an entirely different theory is stated as grounds for recovery or denial of recovery.

Access on New Location

There are several cases concerning access to a highway on new location: *Mississippi State Highway Commission v. Stout,* 134 S.2d 467, 1961; *Morris v. Mississippi State Highway Commission,* 129 So.2d 367, 1961; *Mississippi State Highway Commission v. Herring,* 133 So.2d 279,, 1961; *D'Arago v. State Roads Commission,* 180 Atl.2d 488, Maryland, May 1962; and *St. Clair County v. Bukecek,* 131 So.2d 683, Ala., 1961. With the exception of the Bukecek case in Alabama, all of these cases hold that no right of access accrues to a controlled-access facility on new location; therefore, there is no right to compensation by reason of denial of access. However, the cases recognize that severance damages may result to the remaining property by reason of the location of an obstruction such as a controlled-access facility and that these should be considered.

The Alabama Bukecek case holds that property owners are entitled to compensation for denial of access to the highway on new location. The case reaches the same result as those cases concerning severance damage but by the wrong approach and reasoning. The opinion in the case is a lengthy example of legal confusion. It would be interesting to see the result in Alabama if a controlled-access highway were constructed so as to abut property without a taking of any of the abutting property.

The Maryland case of *D'Arago v. State Roads Commission* states the

rule correctly and sets forth the following reasoning: "It has, however, frequently been held that there is no right to consequential damages to the land not taken for lack of access to new limited-access highway built where no old road existed before. The reasoning is simple. At the time of the taking, there is no easement of access to the new road inuring to the benefit of the abutting land not taken. No existing right has been taken. And, of course, none will accrue in the future because, when the new road is declared to be one of limited access, no easement of access by implication can arise in the face of that contrary declaration." This is a modern application of restricted dedication. The Court's comments on the Bukecek case are as follows: "(It) distinguishes cases following the majority rule on the basis of Alabama law, which appears to differ from ours. We do not find the case persuasive."

The Mississippi case of Herring uses the following language: "Inconvenience of non-access to that portion of defendant's property condemned is an item which may be used along with others in calculating the over-all damage." On first reading, this would seem to mean that condemnees are entitled to recover for damages for denial of access, but if the entire case is read carefully, it appears that what they are actually holding is that diminution in the value of property by reason of an obstruction across it is compensable, not that the property owners are entitled to compensation for a failure to reap the benefits that they might have gotten had they had access.

Conversion of Existing Road to Controlled Access

A number of cases have recently been decided on the conversion of an existing road to a controlled-access facility. One of the most interesting of these was the case of *Nick v. State Highway Commission*, 109 N.W.2d 71, Wisconsin, May 1961. In this case (Fig. 2), one Reinders owned a

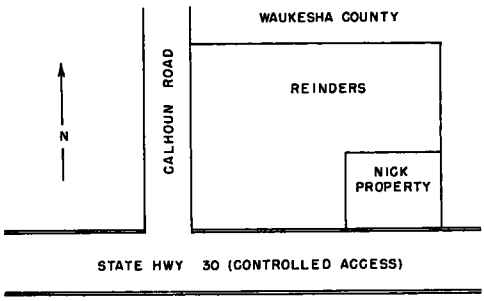

Figure 2. Conversion of existing road to controlled access, *Nick v. State Highway Commission* (Wis.).

tract of land bounded by Calhoun Road and Wis. 30 on the south. The Highway Commission declared Wis. 30 to be a controlled-access facility and prohibited direct access from Reinders' land to Wis. 30; however, access to Wis. 30 could still be had by way of Calhoun Road and its intersection with Wis. 30. Thereafter, Reinders sold a portion of his land to Nick. This parcel fronted on Wis. 30 only. Nick applied for a driveway permit which was denied. Nick then brought an inverse condemnation proceeding. The Court held that an impairment of the use of property by valid exercise of police power of a State is not compensable where no land itself is taken, and that the establishing of controlled-access highways was a proper exercise of police power. The Court compared the creation of controlled-access highways to the enactment of zoning ordinances. The Court also held that the question of damages was frozen at the time Wis. 30 was declared to be a controlled-access highway, and, therefore, Nick took it subject to the same limitations of access that his grantor was under. Since Reinders had no right to compensation, the purchaser could acquire no greater right. The concurring opinion was also interesting in that it commented on the holding in other jurisdictions that compensation must be paid to an abutting owner in all cases where direct access to an existing highway was barred, even though indirect access remained, acting on the assumption that access rights constituted

property distinct and apart from the land which they appertained. The concurring opinion, however, felt this to be erroneous because access rights were but one of a bundle of rights belonging to a parcel of real estate and that the over-all situation should be evaluated. Zoning legislation they point out might affect or extinguish one or more of the rights embraced within the entire bundle without compensation being paid the owner. The test employed in zoning cases was whether there had, in fact, been a taking which destroyed all beneficial use of the property without compensation being paid the owner. The same should apply to the barring of direct access rights. If, by reason of previously existing connecting highways, there is reasonable access to the controlled-access highway, no taking requiring compensation should be held to have occurred.

This is a case which recognizes the conflict of public necessity and private right and attempts to balance them in an equitable maner.

In this category, there were also several cases involving the conversion of existing facilities to controlled access with the substitution of a service road. The case of *Holbrook v. State*, 355 S.W.2d 235, Texas, March 1962, is, I believe, the most recent and has a somewhat unusual fact situation in that prior to the taking of a 2-acre strip, appellants were owners of a tract of land east of Loop 13 with substantial frontage thereon (Fig. 3). At that time, appellants' property directly abutted on a graveled highway separated from the main-traveled portion of Loop 13 by a vacant strip of grass. The purpose of condemning the additional land was to reconstruct Loop 13, including the graveled-frontage road, into a controlled-access highway consisting of four roadways separated by median strips, the two outer roadways to be frontage roads onto which the public in general, including appellants, would have direct access from abutting property in the same manner that they had to the graveled-frontage road on Loop 13 prior to condemnation. The two inner roadways would be one-way express roadways and access to and from the frontage roads was to be afforded by entrance and exit ramps so spaced as to afford protection and safety to the public. Prior to condemnation, only a few feet separated the service road from the paved main-traveled part of the highway. It was then physically possible to drive from appellants' property across the graveled-frontage road, over the grass strip and onto the main-traveled roadway of Loop 13. This was apparently not prohibited. Under the proposed reconstruction, no access was to be permitted to

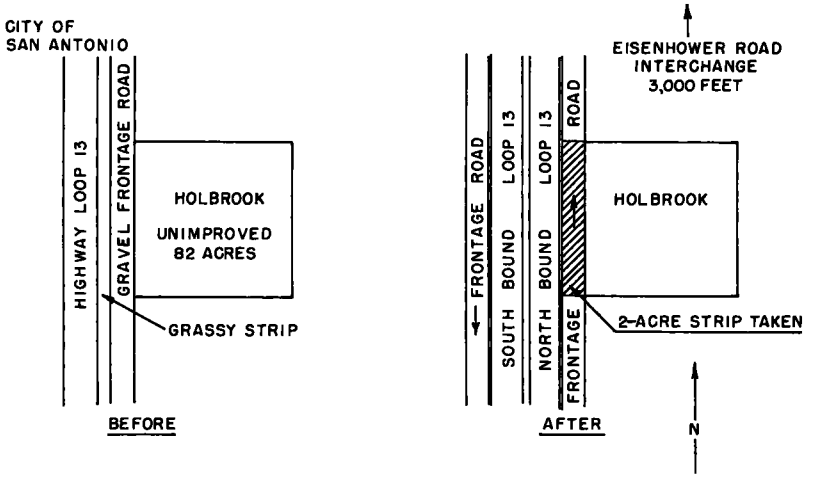

Figure 3. Conversion of existing facilities to controlled access, *Holbrook v. State* (Texas)

or from the two inner roadways except at certain designated points. Appellants' claim was based on the denial of the right to cut the frontage road curb and to obtain direct access to the main highway. The Court denied them relief, basing their opinion on *Pennysavers Oil Company v. State,* 334 S.W.2d 546, and held that change of traffic channelization and denial of access to the main-paved lanes was an exercise of police power. They noted that appellants had not been deprived of access to the highway on which their property abuts in that they have access to the highway system by use of the access road. The right to access is satisfied by and is limited to such an access as was provided.

The case of *Selig v. State,* 217 N.Y. 2d 33, 1961, is similar. In this instance, the Seligs fronted on a 100-ft wide street and in reconstructing the highway as a controlled-access facility, the center portion was elevated or depressed; however, a lane of traffic directly abutting the property was unaffected. In this case, the New York Court held that property owners were not entitled to compensation since such damage as they had suffered arose from a diversion of traffic rather than from a denial of access, and it was held that reasonable access to the nearest lane is all that is required.

In the case of *Nettleton v. State,* 202 N.Y.S.2d 102, July 1960, although the facts are somewhat obscure, it appears to be authority for the proposition that substitution of a service road is not compensable on the grounds that there is no complete destruction of access or denial of a suitable access.

In contrast to these cases is the Georgia case of *Clayton County v. Billups Eastern Petroleum Company,* 123 S.E.2d 187, Georgia, November 1961. In this case, petitioners seek damages for destruction of ingress and egress to property used as a gasoline service station. The property was located on a four-lane highway having separated paved traffic lanes, each of which carried two lanes of motor vehicular traffic north and south past the property. Vehicular traffic moving in either direction had practically unlimited ingress and egress to the service station. The highway was improved and a depression was created between the northbound and southbound lanes of the highway and a service road was completed in front of the property. Entrances to the main lanes were approximately 1,000 ft in either direction from the property. A fence was erected between a service road and the main lanes. All of the construction performed was done on existing right-of-way. The case was decided on a demurrer to the petition. The Court recognized that the property owner was not entitled to access at all points nor was there a taking if he was offered convenient access and means of ingress and egress were not substantially interfered with. They also recognized no liability for interference with traffic flow, and then reached the somewhat surprising conclusion that under the facts presented, this was a substantial interference with the right of access, noting that unlimited access has been enjoyed for seven years. The Court rejected the argument that since this was a through highway, its primary purpose was not for the service of abutting property.

The substitution of service road access is a question which has been passed on by possibly only twelve or thirteen States so far. Considerable confusion and diversity exists concerning this question. I think this confusion is typified by the case of *State v. Thelberg,* 344 P.2d 1015, Arizona, 1959, in which the Court unanimously held that substitution of service road was not compensable. On petition for rehearing, the Court, in an opinion in 350 P.2d 988, April 1960, unanimously overruled its previous decision and held that it was compensable. So far, some of the Courts that have passed on this question have held that compensation must be granted in all cases where

property is placed on a service road on the theory that an abutters' right of access extends to free and convenient access to the through or heavily-traveled portion of the road. This is so, regardless of whether accompanied by a taking of land or not. This theory results in payment of compensation for diversion of traffic. Some of the decisions grant compensation only when accompanied by a taking of land and are based on the reasoning that whenever abutting land is placed on a frontage road, it suffers consequential damages and decreases in actual value, but if no land has been taken from the abutter, there is no taking within the eminent domain limitations of the constitution, so there need be no compensation. But where land is taken from the abutter, the damage resulting from placing him on a frontage road will be reflected in the before and after valuation for the purpose of determining damages for the land taken. This is poor reasoning and is contrary to the greater weight of authority throughout the United States which holds that the decline in market value must be tempered by an exclusion of noncompensable items. It is also inequitable in that compensation is paid some property owners for damages that others must bear.

Decisions that refused compensation are based on the reasoning that the abutters' right of access is to the public roads system but not necessarily to the express portions of it, and even if there is a taking, the decline in market value due to the circuity of travel or diversion of traffic must be excluded. These latter cases tend to follow a concept that appears to be more in harmony with the balancing of private and public rights and embody the concept of reasonable access (for a complete discussion of this aspect of access control, see Covey, "Frontage Roads: To Compensate or Not to Compensate." Northwestern University Law Review, Vol. 56, No. 5, 1962.)

It appears that the States with "damaging" constitutions will be less likely to accept this theory since they tend to look at the market value first before deciding whether there has been a taking. If we accept the principle that circuity of travel and diversion of traffic are noncompensable, then the substitution of a service road should be noncompensable because all of the damages stem from these. Actually, there is no interference with the owners' access.

Traffic Control

The next category of cases may be referred to as the traffic control cases. These generally involve the installation of medians, designations of streets as one-way, or rerouting of traffic. The Courts do not seem to have as much difficulty with these cases as they have with the service road cases, although from a practical matter, I can see very little difference in a concrete median separating two lanes of travel and a grass strip and fence separating a service road and a lane of travel.

In the case of *Department of Public Works and Buildings v. Maybee,* 174 N.E.2d 801, Illinois, May 1961, a median strip was placed in the existing roadway in front of a gasoline station (Fig. 4). Denying compensation, the Court followed the theory that where the property owners' free and direct access to the lane of traffic abutting his property has

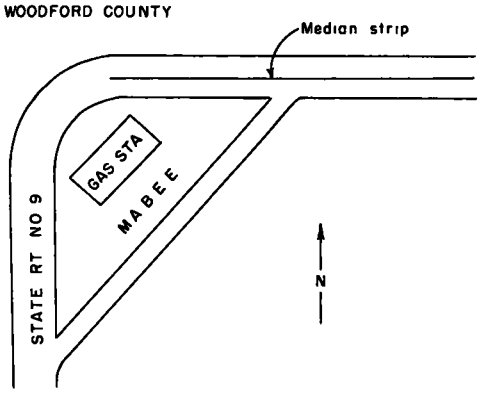

Figure 4. Traffic control, *Department of Public Works and Buildings v. Maybee* (Ill.).

not been taken or impaired, there is no taking. Once on the highway, he is in the same position and subject to the same police power regulations as every other member of the traveling public.

The case of *New Way Laundry, Inc. v. City of Toledo,* 168 N.E.2d 885, Ohio, July 1960, was also a median strip case in which the divider was located directly in front of the laundry property. The Court held that it was not compensable in that the installation of the median strip caused mere circuity of travel, and that the property owner was not entitled to the continuation of traffic past his property. They further went on to set forth the principle that an injury sustained by the opening or alteration of a highway was not compensable unless it stemmed from the taking of private property. It must be determined that the thing for which compensation is asked is private property. The two primary purposes for the existence of a street or highway are (a) to provide a means of passage for the public, and (b) to provide a means of ingress and egress from abutting lands, and any other rights that owners of such abutting lands may have with respect to benefits resulting from existence of the street or highway are held subject to the public right to make improvements for accomplishment of these two primary purposes.

In the case of *City of Memphis v. Hood,* 345 S.W.2d 887, Tennessee, 1961, there was a taking of additional property and the conversion of the roadway on which the property abutted a one-way street. This case held that compensation for the additional taking must be tempered by an exclusion of the loss of value due to the conversion of a one-way street since this was properly done within the police power.

The most recent North Carolina decision is *State Highway Commission v. Barnes,* 126 S.E.2d 732 (July 1962). In this case, before the taking of additional right-of-way, the Barnes' property abutted on US 421 and N.C. 210. Free access was had to travel in all directions (Fig. 5). After the taking of additional right-of-way and reconstruction of US 401, traffic was channelized which in effect permitted access to the southbound lane only. The trial court instructed the jury that they could take into consideration the construction of the islands and interference with access to the northbound lane. Our Supreme Court granted a new trial holding this instruction erroneous. The opinion cited most of the recent cases in the United States and discussed a number of them in some detail. The case distinguished nicely between police power and eminent domain. The Court held that this was a proper exercise of the police power and rejected the property owners' contention that since there had been a taking of land, it was proper to take this element into consideration. The Court cited the case of *Walker v. State,* (Wash.) 295 P.2d 328, and adopted the theory that access to the road system was all that was required. The Court also held that there was no right to have any traffic pass their property at all. Curbing was also placed at intervals along the margin of the right-of-way to channelize the driveways into the businesses located on the property. In this respect, the Court held that the property owner was not entitled to access at all points and recognized the substantial interference concept. They then went on to say that the property owner was entitled to recover compensation for the installation of this curbing to the extent, if any, that it impairs free and convenient access thereto. This leaves it hanging. It seems to me they should have decided whether under the facts this was a substantial interference. They seem to leave it to the jury. Actually, there was little contention that this damaged the property.

There is nothing particularly new about these cases. They are merely the most recent of a relatively long line of similar cases; however, I feel that they are important in that they are strong arguments for the non-compensability of the substitution of

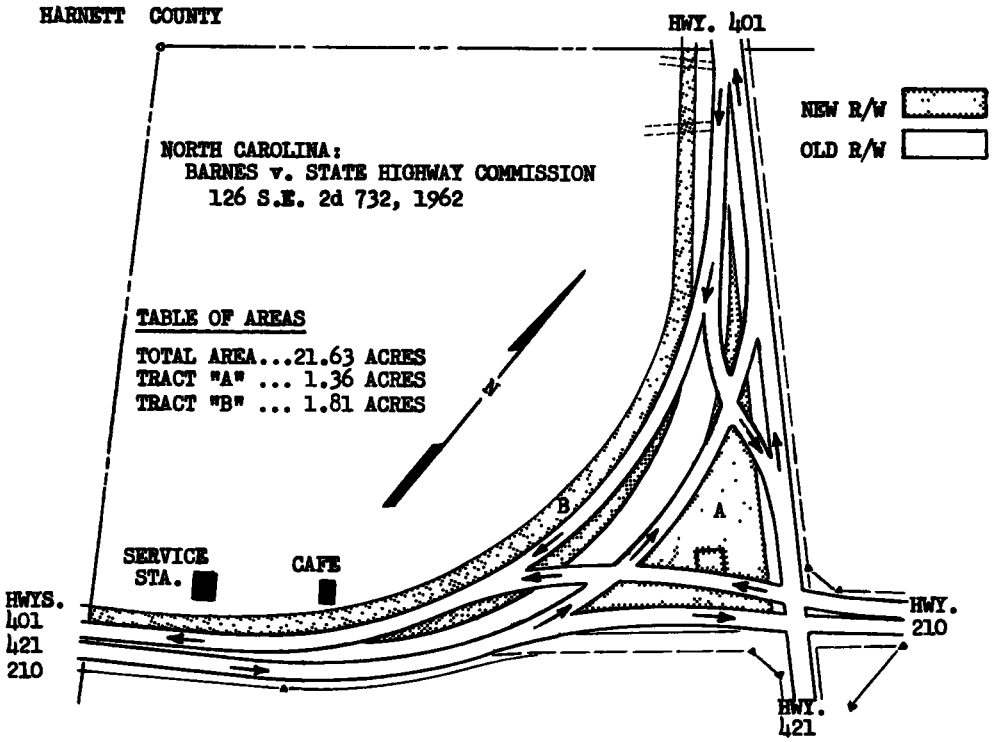

Figure 5. Traffic control, *State Highway Commission v. Barnes* (N.C.).

a service road. The same theories on which compensation is denied in these cases should be equally applicable to the service road situation.

Contract Cases

The next category of cases which I call the "contract cases" are cases of our own making in that the abutters' right of access stems not only from the law concerning abutters' access but out of agreement or judgments entered into between the property owner and the Highway Commission. These cases arise when this access which has been so determined is later altered. So far, there are relatively few of these cases; however, I expect that we will see many more of them in the future when the access control now being imposed is altered.

During the early and middle 1950's in North Carolina before the current concept of Interstate highways and access control had fully matured, the North Carolina Highway Commission entered into a variety of agreements concerning access. The language in the agreements changed about every two weeks and most of it was devised by various Right-of-Way Agents to cover what they thought the ultimate access situation would be. They range all the way from promises to build service roads to a grant of access at points two and three miles distant from the property. I hope that we will never have to find out what many of these agreements mean. So far, we have had to face it twice.

In the case of *Williams v. Highway Commission,* 252 N.C. 772, 114 S.E. 2d 782, the Highway Commission purchased a right-of-way from Williams. In this right-of-way agreement, the following language appeared: "It is further understood and agreed that the undersigned and their heirs and assigns shall have no right of access to the highway constructed on said right-of-way except at the following survey stations: 761+00 right." This survey point was located

on the property in question. In 1959, the Highway Commission denied Williams the right to use this access point. Williams then brought a civil action to recover damages for alleged breach of contract. To the complaint, the Highway Commission demurred. The plaintiffs contended that they had no property right in the point of access but that they had a contractual right which was not subject to condemnation. The Court, however, held that such rights as they had in the point of access granted was an easement of access and that the denial to Williams of the right to use said access constituted a taking of that easement appurtenant to their property for which they had a remedy in inverse condemnation.

The second case of interest was the case of *Ferrell v. Highway Commission,* 252 N.C. 830, 115 S.E.2d 34. In this case a consent judgment had been entered into between one King and the Highway Commission in August, 1956. The judgment described the control of access as follows: ". . . that the right of access to the main paved lanes of said project will be limited to service roads constructed or to be constructed on each side of the main paved lanes with no right of access to the said main paved lanes except as provided by the respondent herein and with the right of selection to be solely in the discretion of the respondent (State Highway Commission)." Thereafter, Ferrell purchased the property and secured an assignment from King of all his interests and rights arising out of the consent judgment pertaining to said land. Ferrell then demanded that the Highway Commission construct service roads to provide access to the highway from plaintiffs' land and the Highway Commission refused. Ferrell then brought a civil action for specific performance, or in the alternative for recovery of $7,000.00 damage to the land by reason of the breach of the contract. Again, the Highway Commission demurred. The Court recognizing the principle that when private property is taken under circumstances such that no procedure provided by statute affords an applicable or adequate remedy, the owner, in exercise of his constitutional rights, may maintain an action to obtain just compensation therefor. However, the Court sustained the demurrer. The Court held that for the palintiff to proceed in the action, he must show that defendant obligated and agreed to construct service roads as part of the consideration for the right-of-way, that the Commission failed to perform the agreement, and that there is no procedure by statute affording an applicable or adequate remedy. The Court held that the previous consent judgment was a contract but that the purpose of the contract was not to provide and assure access. On the contrary, the purpose of the agreement was to limit access. The judgment merely meant that the Ferrells would have the right of access only by such service roads as might be constructed in the future.

In the case of *Feuerborn v. State of Washington,* 367 P.2d 143, 1961, the property lay in the southeastern quadrant of an intersection of a county road and a State primary highway and abutted both (Fig. 6). There was access to and from each road without any restrictions. In an action for condemnation of the northwest portion of the landowners' property, the State presented a plan of the proposed road construction, indicating that access to the State highway would be limited with the eastbound on and off connections to the county road. Right turns from the county road would be permitted onto the highway and from the highway onto the county road, but no left turns would be permitted. Four months after the condemnation action was completed, the State Highway Commission adopted a new plan of construction which eliminated the proposed eastbound on-off connections to the county road. Under the revised plan, the county road would have connected with a frontage road, making access to the State highway possible only at the two interchanges to be

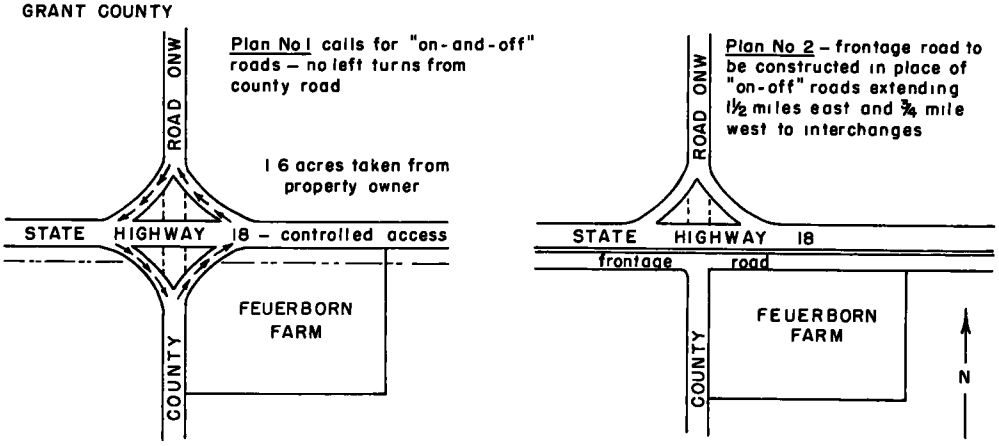

Figure 6. Contract case, *Feuerborn v. State of Washington.*

constructed 1½ miles to the east and ¾ mile to the west of the property. The landowners brought action for additional award of serverance damages. The Supreme Court held that the State would have to pay additional compensation caused by deviation from the original plan when such plan had been introduced as evidence and in mitigation of the severance damages. The Court ruled that the State was bound by the plan it had submitted on the issue of damages. Since the State received a benefit of the original plan, it could not later repudiate it. The Court would not uphold the State's contention that compensation was not payable because the closure of the intersection was an exercise of police power. This was so even though there was a statute which provided that circuity of travel was not a compensable item. The Court does not indicate what the jury was charged concerning the consideration they might give to the plan of construction. The control-of-access language in the judgment would indicate that the Highway Commission had acquired the right to do what it did in the second plan. This case seems completely to ignore that, as a general rule, the State must pay for not what it proposes to do but what it acquires the right to do. I cannot help but wonder what the result would have been had the highway been constructed as originally proposed and then at a later date altered to the second plan. One also wonders what would have been the result if the settlement had been by way of right-of-way agreement rather than judgment. The whole case seems to hinge on the concept that what the Commission did was just not fair to the property owner, and in so doing, appears to bypass many principles of law which might have lead to a different result. I am also led to wonder what would happen if some alteration in the highway were deemed necessary after judgment is entered in the second trial.

Mr. Dushoff, in his paper presented at the AASHO Legal Affairs Committee meeting in 1961, stated that he felt that this type of situation was desirable and would even stipulate that property owners would have a new cause of action if changes were made in the construction since he felt that, under the payment for rights-acquired theory, the opposition could argue that all sorts of changes might be made in the future and that he could have little success in condemnation action. I would rather pay for it once and be finished with it, than risk a suit every time public necessity requires the alteration of the roadway.

Value Cases

During the past year or eighteen months, there have been a number of cases that treat in various ways dam-

ages arising out of the taking of access. Since the different Courts vary so widely in their review of damages, I do not believe it would be productive to discuss many of them; however, there are two which I would like to call to your attention. One is the case of *City of Haywood v. Unger,* 15 Cal. Rptr. 301, 1961, which holds that increase in traffic is a proper consideration as a special benefit. This is interesting in that on the contrary a decrease in traffic cannot be considered as a damage, and at first glance, this would seem inconsistent. However, if one examines the concept of benefits, he will find that the enhancement of property value is almost always caused by items which, if they were removed, would be noncompensable, such as, increase in traffic, less circuity of travel, and convenience.

The case of *Mississippi State Highway Commission v. Stout,* 134 So.2d 467, 1961, holds that a landlocked or completely severed and isolated parcel is not, as a matter of law, valueless. The Court held that it was still a question of fact, which I think is proper. However, there are cases which seem to hold that to the contrary.

In the case of *Kirkman v. State Highway Commission,* decided by the North Carolina Supreme Court on May 15, 1962, and not yet reported, the Commission condemned a direct access point to a motel which had been granted under a prior agreement in bringing a State highway up to Interstate standards. The motel still had access from the Interstate by other means. The trial judge failed to charge as to benefits which we assigned as error. We were primarily appealing from a terrible verdict—$35,000 as opposed to our evidence of $400, and the prime basis of our appeal was that the trial judge had expressed an opinion in his charge to the jury. It was not the type of case to appeal to make good law, and we did get an expression of opinion from the Supreme Court that although there was some evidence that it was a dangerous access, it was not sufficient evidence of benefit to be considered in relation to the market value of the property. We failed to get across to the Court that the elimination of this access was only a part of a large project of elimination of many accesses which had the ultimate effect of placing this particular property in a rather favorable position on the Interstate system. This case seemed to indicate that benefits, as well as damages, should be limited to the property actually taken; to wit, the access point. However, in the past we have had a recent expression from the Court that benefits derived from the entire project should be considered in offsetting damages (*Templeton v. Highway Commission,* 254 N.C. 337, 118 S.E.2d 918).

I have not reviewed all the 1961 and 1962 cases but we have covered most of them. I may have overlooked some and some I have omitted on purpose because they did not appear to be of any particular interest. From these cases, my first impression is that abutters' access rights are still in a fairly good state of confusion. However, I think we may be able to see some trends developing.

The abutters' right of access has been recognized in the law periodically for quite a number of years, but it is only in the last twenty years that the concept of the controlled-access highway has developed, and more particularly in the last ten years. The Interstate system will probably be about complete by the time that most problems concerning control of access have been resolved in the various States. The law almost always lags behind the need.

In the cases we have discussed, we find the two extremes in the New Mexico grade change case and in the Wisconsin Nick case. Both were very similarly situated properties. In the New Mexico case, access to one highway was made slightly less convenient by a slight change of grade and in the Wisconsin Nick case, access to the highway was totally denied. In the New Mexico case, the scales tilt heavily in favor of the private owner

and in the Wisconsin case, a balance seems to be reached. The rest of the cases seem to fall between.

I have discussed these cases by categories not only for the sake of convenience, but because the Courts seem to place the cases in categories and often reach different results, depending on the category in which they fall. This is partly due to precedent and partly due to a failure to recognize that the same basic property rights or lack of property rights are involved in each. Our Supreme Court has stated twice in the last month that the North Carolina culde-sac cases had nothing to do with change of grade and installation of a median strip. They used language to the effect that to different situations different legal principles apply. They are right as far as the facts are concerned, but as far as the law is concerned, the same property rights are involved in each and the same basic legal principles should be applicable. They must, of course, be applied to each fact situation.

The law has built up a small storehouse of phrases concerning abutters' rights of access. These include the term "access" itself, "diversion of traffic," "circuity of travel," "police power," and "consequential damages," yet in the cases we find an inadequate definition of the concept for which these terms stand, and we find a merging and overlapping of the concepts. The phrases are often parroted and then misapplied to the facts. I think a prime example of this is the Billups case in Georgia where the service station was put on a service road. In that case, there was no indication that the owner of the property had any difficulty getting to and from his property. The only thing that has been changed was the difficulty in which the main stream of traffic might have in getting to and from the station. The Court held that this was a substantial interference with access. Whose right of access is it—the property owner's or the public's? Had his property been taken or his business? Often there seems to be a failure to examine critically whether the thing damaged is private property. We find the same mixing of concepts in the terms "police power" and "eminent domain." The Courts often discuss a compensable taking under the police power. There can be no taking under the police power by definition. Compensable taking can only occur under eminent domain. When a compensable taking occurs, you are out of the field of police power and into eminent domain. What the Courts have done here is drawn the line as to compensation but extended the terminology into an area where it does not belong.

The "damaging" constitution States seem to be headed more in the direction of liberal compensation. In these States, it is hard to determine where compensation will be paid by an examination of the reasoning and logic in the cases. It is necessary to find a previous determination of a similar situation. The "taking" constitution States seem to come nearer following universal principles applicable in various situations. I think we can also see an expansion of the reasonable access concept in the recent case.

The future of abutters' right of access lies to some extent in our hands as highway lawyers. It is much easier for the Court to write a clear, logical opinion consistent with sound legal principles if it is supplied with briefs and arguments that meet these tests. We are in a better position than anyone I know to supply these. I was amazed at the number of opinions in which there was little indication of the reasoning and almost no citations at all. I cannot help but wonder if this is not our fault to a great extent. We can also aid in the development of sound law by carefully selecting those cases which we appeal. The law should be the same whether a service station or a residence is placed on a service road, but I predict that you will have better success with a residence. The personal injury lawyer often says "never mind the liability—give me a

case with plenty of injury." This is even more applicable in the field of eminent domain.

For us to aid the Court in sound legal reasoning, it is necessary for us to have a thorough understanding of the problems and underlying principles and it is hoped that through sessions such as these, we can gain a better insight.