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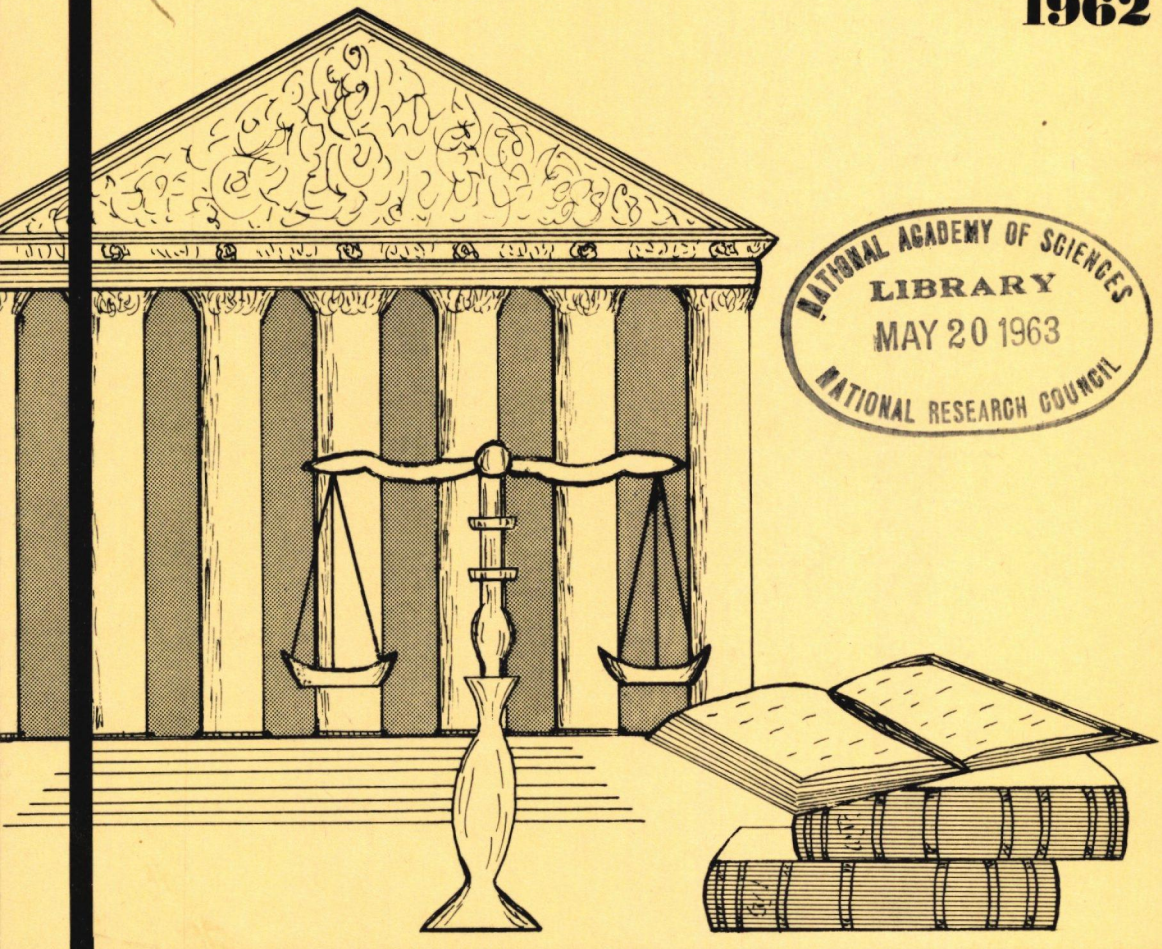
Special Report 76

Selected Problems Relating to Highway Laws 1962



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HIGHWAY RESEARCH BOARD

Special Report 76

Selected Problems Relating to Highway Laws

1962

A Compilation of
Papers and Discussions
Presented at the

Workshop on Highway Law
July 16-20, 1962

Sponsored by

Highway Research Board

U.S. Bureau of Public Roads

University of Wisconsin Extension
Law Department

Division of Engineering and Industrial Research
NATIONAL ACADEMY OF SCIENCES—
NATIONAL RESEARCH COUNCIL
Washington, D. C.
1962

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Preface

The papers and discussions included herein are the products of a workshop held at the University of Wisconsin, July 16-20, 1962. This workshop, sponsored by the Highway Research Board, the U.S. Bureau of Public Roads, and the University of Wisconsin Extension Law Department, was attended by approximately 75 legal counsel representing 32 State highway departments and the U.S. Bureau of Public Roads.

The program was designed to offer the group an opportunity to become acquainted with the results of recent legal research in selected aspects of highway programs. Furthermore, the meeting served as a valuable point of contact between those engaged in highway law research and those who are most acutely aware of emerging problems worthy of future research activity. Because this workshop was the first of its kind, the program was broadly based, covering selected topics within the fields of highway legislation, condemnation procedure, inverse condemnation claims, tort liability, and contract administration.

The principal papers presented are printed here in full. Group discussions have, however, been edited and in certain instances summarized to keep the compilation to a convenient size. The order of materials has been rearranged in some instances in order to keep group discussions of related subjects together.

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Contents

Highway Laws Research

R. R. BARTELSMEYER, *Chief Highway Engineer, Illinois Division of Highways, and Chairman, Executive Committee, Highway Research Board*

• IN RECENT YEARS, much emphasis has been placed on research in connection with the Nation's greatly expanded highway building program. In fact, an enormous amount of research emphasis is presently being devoted to the over-all subject of transportation. However, only a limited amount of research has been conducted on the many direct and related problems pertaining to highway laws. It is, therefore, most encouraging to see this Workshop stress the rather limited legal research being carried on, affecting the many aspects of the highway program.

In looking over the list of subjects included in this Workshop program, and the capable and experienced speakers assigned to handle them, I feel that anything that I might say touching on legal research will be very thoroughly covered in the next few days. My remarks, therefore, will be very general. I shall refer to some Illinois cases and what was accomplished in an attempt to remedy them.

Much has been said and written concerning the Federal Interstate and Defense Highway Act since its enactment and the impact created in the areas through which the highways are being constructed. Even though approximately one-third of the construction work has been completed, much remains to be done to secure the rights-of-way necessary for the completion of the system.

It must be kept constantly in mind that rights-of-way, not only for the Interstate System, but also for all other highways, must be secured promptly in order that needed highway improvements can be completed on schedule. I am glad to see that a substantial portion of this conference is devoted to the many phases of the right-of-way problem.

Usually, it is not too difficult to accomplish preliminary surveys and plans in accordance with predetermined schedules or dates. Even construction work can be accelerated with the modern equipment and contractor's ingenuity and techniques available today. However, we are well acquainted with the frustrations encountered in a hotly contested right-of-way acquisition problem. Therefore, the more information and knowledge that becomes available in this area, the more proficient we should all become in expediting this operation.

It is interesting to note from the report of the Bureau of Public Roads, Highway Statistics, that the disbursements for right-of-way acquisition for all State-administered highways during the year 1960 was more than $750 million. Nearly $3½ billion were spent for construction of the highways involved.

One of the most perplexing problems in connection with the acquisition of rights-of-way, especially for freeways, is the severance-damage appraisal of remaining parcels. I understand that this subject was given considerable attention during the Land Economic Studies Committee session of the American Right of Way Association's recent seminar at Minneapolis.

The Manual for Highway Severance Damage Studies prepared by the Highway and Land Administration Division of the Bureau of Public Roads has been called to my attention. It is noted in the memorandum of submittal to the AASHO Committee on Right of Way by its Secretary, David Levin, that over 80 percent of

the States are now engaged in studies of severance damages or have made some preparation for undertaking these studies. Also, that ultimately the data collected for individual cases are expected to form a "bank" from which individual States can draw information on comparable cases.

It is noted that for the Interstate System alone some ¾ million parcels of land will be required and that over $6 billion will be paid for approximately 1½ million acres of land needed for that system. The Manual goes on to say that, of the total cost of highway rights-of-way, severance damages suffered by people whose property is partially taken have been found to constitute a significant portion. That information suggests that damage payments range up to as much as 70 percent of right-of-way costs. Whether these payments are justified and whether the damages claimed by property owners are in fact actually experienced when the highway facility is completed has been receiving increasing attention. A specific purpose of the Manual is to provide suggestions for obtaining maximum usefulness from the severance damage form which has been developed by the cooperative efforts of interested persons in the various States, the American Right of Way Association and the Bureau of Public Roads. This is most assuredly a great step forward in the process for the acquisition of rights-of-way.

Before the passage of the Interstate Act in 1956, the State of Illinois could acquire only the actual land needed as right-of-way for the construction of highways. During the 1957 session of the State legislature, a bill was enacted into law, to the effect that, when in the judgment of the acquiring agency it is more practical and economical to acquire the fee to the inaccessible remnants of the tracts of land from which rights-of-way are being acquired than to pay severance damages, said agency may do so by purchase but not by an eminent domain proceeding. This legislation has proved to be beneficial as well as economical in the acquisition of rights-of-way for freeways. Doubtless, it would be much more so if it had authorized the State to acquire such parcels whether inaccessible or not and by condemnation proceedings as well as by purchase.

Courts and juries in eminent domain proceedings often award damages for such remnants in amounts approximately the full values thereof. When the "bank" of severance damage cases, previously referred to, has been assembled and brought to the attention of tribunals in condemnation proceedings, it doubtless will be very effective in bringing about more justifiable awards for severed parcels. Most assuredly, the result of these severance damage studies will be of great assistance to appraisers and negotiators in the acquisition of rights-of-way.

For generations the Illinois Division of Highways struggled with the provision of the State Constitution which prohibited the taking of private property for public use until final just compensation has been ascertained and paid. The 1957 session of the Legislature passed a law that authorizes the State to acquire lands needed as rights-of-way by a "quick taking" procedure. However, this is more or less an emergency proceeding, and it must be shown, among other things, that it is urgent that the lands be acquired promptly for a particular highway project programmed for construction. The State has made use of this law in many instances and it has enabled the Division of Highways to get projects under construction much earlier than previously.

During its fall term of 1961, the Illinois Supreme Court ruled that the General Assembly had not authorized the Department of Public Works and Buildings to condemn property already devoted to public use. Therefore, unless and until the Legislature passes a law granting such power, the Division of Highways must either purchase needed public property or confine its improvements to existing rights-of-way or those that can be acquired.

Also in 1957, the Illinois General Assembly amended the Freeway Act by authorizing the closing of roads that join or intersect the Interstate highways. Prior to the order of closing, a hearing must be held in the county where the crossing is situated. No crossing may be eliminated which shall unduly discommode or interfere with local traffic, or destroy reasonable access to schools, churches, markets, trade or community centers. Needless to say, much use has been made of this legislation in connection with Interstate highway construction.

Recently, the Bureau of Public Roads, through the division engineer, called attention to the fact that severance damages caused by a property being relocated on a frontage road, whether identified as "circuity of travel" or "impairment of access" are generally non-compensable in eminent domain and therefore non-federal participating. The information, apparently, stemmed from an inquiry of the State of Indiana concerning a particular project. It is noted that this question has been passed on by the courts of 10 States. Five of them have taken the position that the owner has not suffered compensable damage to the remainder of his property for impairment of access so long as he has been provided with a frontage road giving him access to the public highway system. The other five States take the contrary view that the owner has suffered compensable damage because he no longer abuts the same highway, the same flow of traffic, as before the taking. Apparently the question has not been decided by the Supreme Court of Indiana. The question of compensability under Illinois State law has not been directly ruled on by the Supreme Court. It will be interesting to pursue this matter as it comes up for decision by the high courts of other States.

I reviewed this legislation on right-of-way matters with the hope that it might prove useful to others in their endeavors to obtain enabling acts to help solve their problems. We are always very happy to be the recipients of advice and suggestions from others which would tend to strengthen our highway laws.

There are of course many other related problems in addition to right-of-way and I am glad to see that time is alloted for them in this workshop. I am sure you are all aware that AASHO is providing for a continuous research program (through the participating member States) to be administered by the Highway Research Board. One of the six original study areas chosen is to investigate the reliability of the presently accepted methods for determination of benefits, both user and non-user, from highway improvements. The discussions of this workshop conference could very well outline other highway law areas in which definite research could be activated and conducted by this established and financed medium.

Lawyers and engineers having the responsibility of high-level supervision of personnel engaged in the numerous and complicated functions of highway building have many interests in common as administrators. They stand in the middle of the bridge of communication, between the public and the agencies they head.

Recently the subject of my remarks before the Western Association of State Highway Officials was "Today's Research — Tomorrow's Practice." I stated that in no field of activity has the effect of change through research and development had a more immediate impact on everyday life than in transportation —particularly the concept of individual transportation as provided by the motorcar-highway combination.

The new issue of *Highway Research Review* of the Highway Research Board contains a description of some 2,000 research projects now under way or completed during the past four years. These projects are spread over the whole field of highway engineering, highway planning, other highway related projects, and highway laws.

In the matter of highway laws,

engineer administrators must rely on the advice and counsel of legal advisors. Together we must be sure that the public understands and accepts what we are attempting to accomplish. The communication with the public, even as it relates to research, must be efficiently maintained. Since all of our activities, including research, are supported from tax funds, public acceptance is a most essential ingredient.

It is most important that those shouldering the administrative responsibility of the huge highway transportation program, both engineers and lawyers, recognize that they can participate to only a very limited extent in the actual details of research needed to provide the best results. Their principal task is to enlist public support and understanding for research and needed legislation, and to provide the personnel, facilities, and intellectual climate for such undertakings within their own agencies. And then—most important—make sure that the results of the research work are used and implemented to produce a better product or end result.

In conclusion, your discussions on highway laws at this workshop—including perhaps a review of needed research, as well as a review of accomplished research in this field—are most urgent and essential at this time.

Highway Programs and Highway Laws

DAVID R. LEVIN, *Deputy Director, Office of Right-of-Way and Location, Bureau of Public Roads*

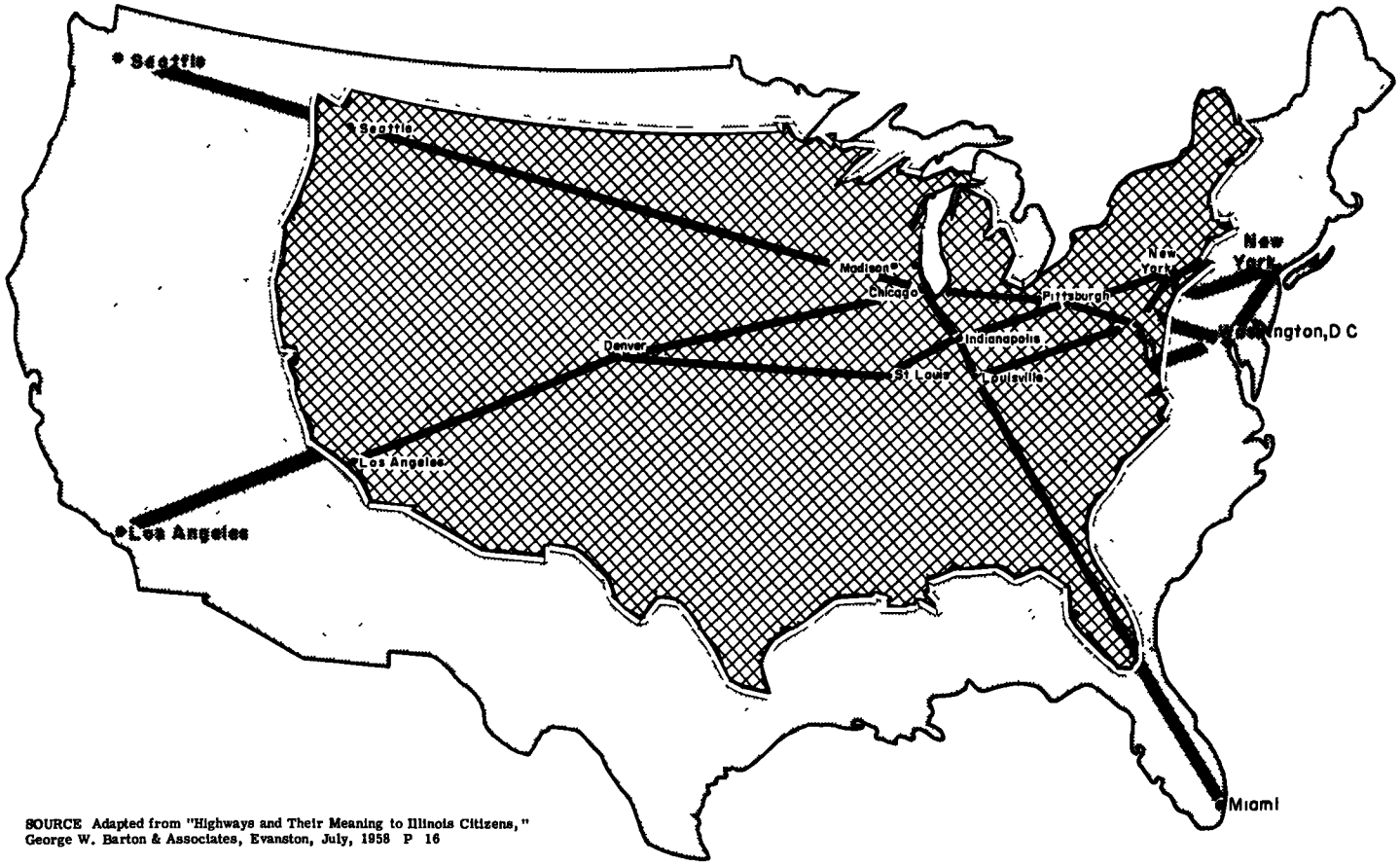
• THIS IS, as far as I know, the first time that so many highway lawyers have been assembled under one roof. I hope that this can become an annual or at least a biennial affair so that highway lawyers can continue to exchange problems of mutual interest.

As you know, three or four decades ago this business that all of us are associated with was a relatively simple one. Its orientation was largely engineering. Today, however, there are whole racks of new problems—not engineering problems, but social problems, economic problems, and certainly plenty of legal problems. I thought that I would touch on perhaps fifteen of these new and emerging problems, all of which have legal overtones.

One of the first problems is that of intergovernmental relations. Figure 1 was compiled to show how distance will shrink with the completion of the Interstate System by simply taking the new time between these major points that the Interstate System will take to traverse, in relation to what it is today on highways of normal access design. About a 28 percent economy is achieved. Incidentally, this figure in itself can become a valuable courtroom prop, especially when translated into the same kind of configuration of one's own State. Especially in dealing with the Interstate System, this can be a dramatic portrayal of what this system really entails in terms of time-distance savings (Fig. 2).

There was recently an interesting new development which involves intergovernmental relations and I need not tell you how important, from a legal point of view, this can be. We, of course, have had it all the way along, in connection with control of access legislation. This has permission of a sort to contact other forms of government within the State in order to facilitate planning or financing, or land acquisition or even construction and maintenance of the Interstate System. It does not go to the point of traffic enforcement as this is in some ways a no-man's land, and it is developing some problems of its own. But recently the counties, as represented by the National Association of County Officials (NACO) (they are a very powerful group in just about every State) have matured to the point where they want to improve their relations, at least formally, with the State highway officials, and have recently established a new group which is the joint AASHO-NACO Committee. This group has determined that the legal and administrative relationships between the States and the counties need up-grading, and need up-grading immediately. They have set in motion a comprehensive program of research and reform, which they hope will result in a much better relationship between the State and the counties and an up-grading especially of their own administrative and legal mechanism. I assume that through the highway planning survey program in many of your States, you will soon be asked, or your State will soon be asked, to sponsor research programs that will examine, within the confines of a particular State, what these State-county relationships are, and of course I am sure that many of the lawyers here will be associated with this project.

We are getting heavily involved in the urban areas today. This is not a frill, really; it is based on the important shifts in population. As you



SOURCE Adapted from "Highways and Their Meaning to Illinois Citizens," George W. Barton & Associates, Evanston, July, 1958 P 16

Figure 1. Relative saving in driving time on Interstate System (smaller map) compared with present highways. When system is completed, driving time between Chicago, for example, and other major U.S. cities to average 28 percent less than at present.

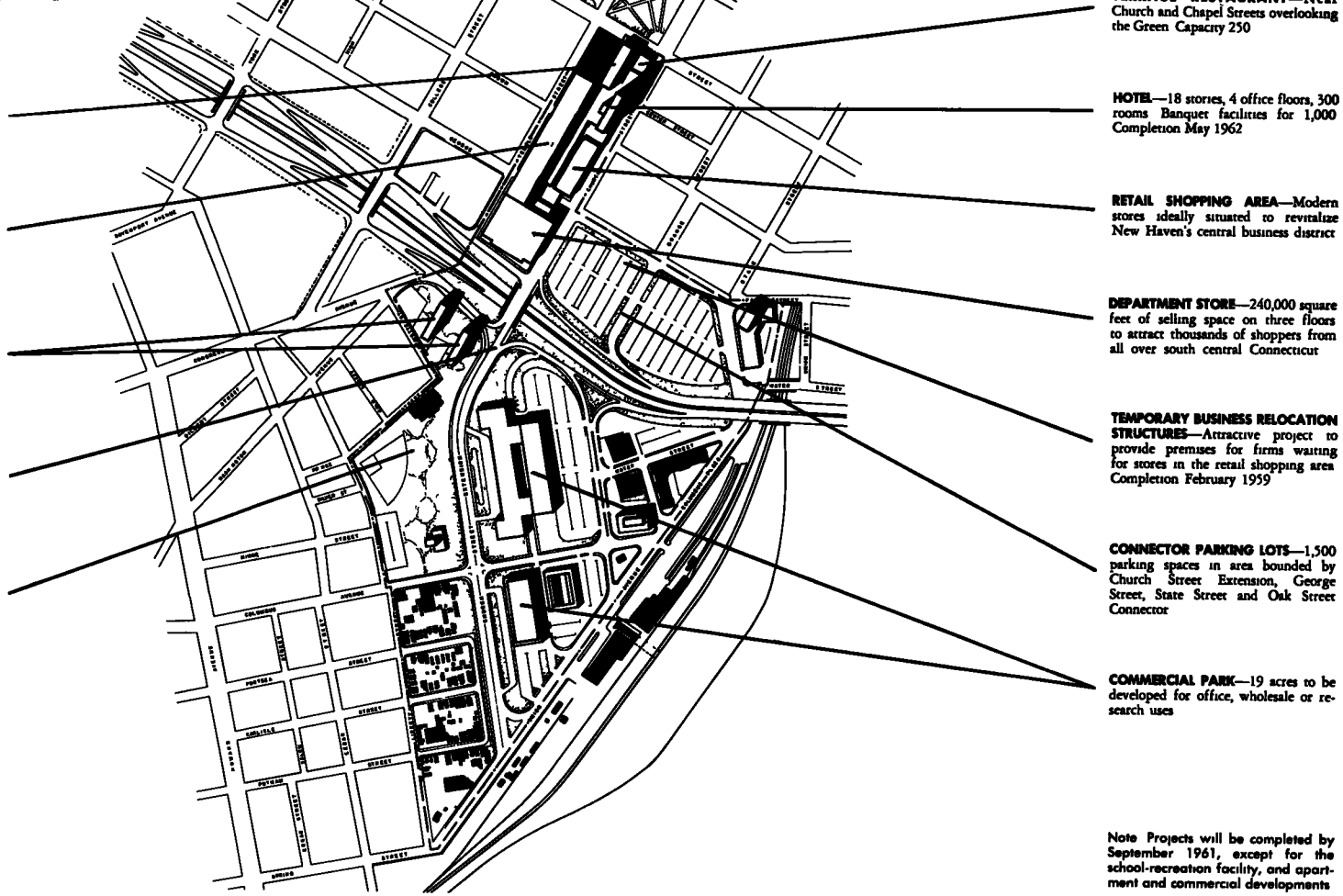
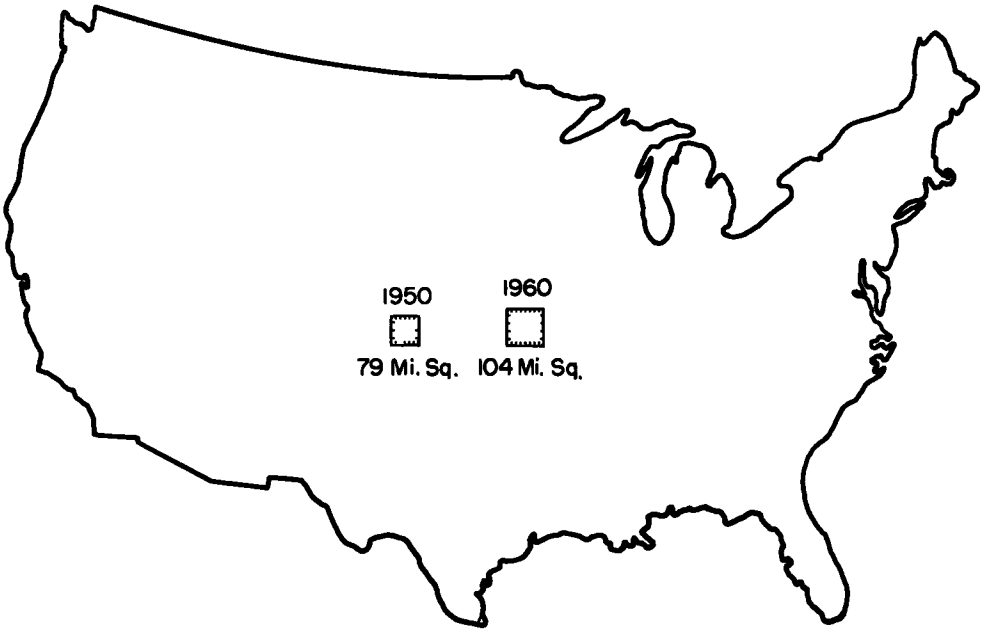


Figure 2. Church Street, New Haven, Conn., redevelopment and renewal area.

know, something like two out of three Americans now live in urban areas. If we extrapolate the population curve, by 1970, three out of every four Americans will be living in urban areas, and by 1980, seven out of every eight Americans will be living in such areas. Therefore for us in the highway business if we are going to do a realistic job, we have to build a surface transportation plant that will cater to the people where they are five, ten, and fifteen years from now rather than where they were for the past twenty or thirty years. Figure 3 shows this dramatically.

If you add the physical areas of the central cities of all the urbanized areas in the United States, they add up to a little square about 104 mi on end, and this comprises something like 3 percent of the total land area of the United States. Yet in this little 104-mi square, there lived in 1960 almost 58 million people, or about 30 percent of the population. So, in this little square, we have to provide a modern surface transportation system to cater to 58 million people. As all of us have discovered, to our dismay sometimes, this is no simple task. Increasingly it is generating all kinds of legal problems.

Another new problem which is emerging in some of the States, although it is not entirely new because we have already seen the necessity of actually being involved in this, is trying to build highways in urban areas in conjunction with other kinds of public programs which also involve the urban areas. A particular illustration is New Haven, Conn. New Haven was one of the first cities to take advantage of the 1947 and 1949 housing acts, and accordingly, it is farther along with its urban renewal activities than most other States or



ITEM	1950	1960
AREA (SQUARE MILES)	6,213	10,838
POPULATION	48,377,240	57,975,132
NUMBER OF CENTRAL CITIES	172	254

Figure 3. Central cities of urbanized areas in the United States, 1950 and 1960. (Source: Department of Commerce, Bureau of Census)

cities. You can see a section of modern highway with an extensive urban redevelopment area here. This, incidentally, is one of the best examples of how the highway program and urban renewal program have been developed simultaneously; where the officials, both State and local, talked to each other at the very earliest stages and all the way down to the present time when the physical structure is being completed.

This is also a good illustration of a rather complete functional unit. As you know, we have been criticized sometimes to the effect that we are trying to build highways and we are ignoring some of the other non-highway elements. This is an illustration where just about all of them were taken into account. For example, here is provision for school and recreation areas, and of course, there are many commercial buildings, a bank, a high-rise office building, etc. As you know, in this connection we are cooperating more and more with the Housing and Home Finance Agency, and a program of considerable planning proportions is being developed with this Agency making use of its money and also the 1½ percent fund. There are legal problems involved in all of this.

David Black indicated that legislation is being considered now (the 1962 Federal-Aid Highway Act) with respect to planning. The following quote from the Act may also have some legal implications in its applications:

> It is declared to be in the national interest to encourage and promote the development of balanced transportation systems, embracing all appropriate modes of transport in a manner that will serve the states and local communities efficiently and effectively. To accomplish this objective the Secretary shall cooperate with the states as authorized under this title, in the development of long range highway plans and programs, properly coordinated with plans for improvement in other forms of transportation, and formulated with due consideration to their probable effect on the future development of metropolitan areas.

In other words, this is a much broader directive than we have ever had before from the Congress of the United States. To continue:

> After July 1, 1965, the Secretary shall not approve under section 105 of this title any program for projects in any urban area of more than fifty thousand population unless he finds that such projects are based on a continuing comprehensive transportation planning process carried on cooperatively by States and local communities in conformance with the objectives stated in this section.

The objective is stated. If this is enacted into law we are given about three years to execute this fully. Now here again, anyone who has been involved in these affairs knows that there are all kinds of legal problems generated by these and other developing relationships, or by the new emphasis. The relationship has been there for a long time, but the increased emphasis which this has provided will generate some new legal problems.

Another problem this new bill will involve is relocation. Here again, we are being confronted more and more not with the physical engineering problems but with human problems—problems of sociology and psychology and economics. What do we do with the families that are sitting on the land needed for highway purposes. Of course, we have always tried to compensate these families in a manner that we thought was pursuant to the law and consistent with the just compensation provisions of the Constitution, and I think largely we have done a good job. But as good a job as we have done on the compensation side, there has been some public clamor. We have received more criticism from this particular element than any other aspect of the highway program. To diminish this reaction, the Congress has proposed a provision in the 1962 Federal-Aid Highway Act which involves two things: One is payment of compensation for families and persons that are displaced from the highway right-of-way, to the extent authorized by State law. This compensation could go up to, but cannot exceed $200 in the case of a residence relocation and $3,000 in the case of a business relocation.

This is a fairly definitive kind of program and it will be capable of administration within certain limits. There is, however, another provision that may prove even more troublesome:

> The Secretary prior to his approval of any project under section 106 of this title for right-of-way acquisition or actual construction shall require the State highway department to give satisfactory assurance that relocation advisory assistance shall be provided for the relocation of families displaced by acquisition or clearance of rights-of-way for any Federal-aid highway.
>
> The Secretary shall approve, as a part of the cost of construction of a project on any of the Federal-aid highway systems, such relocation payments as may be made by a State highway department, or a local public agency acting as an agent for the State highway department for this purpose, to eligible persons for their reasonable and necessary moving expenses caused by their displacement from real property acquired for such project. However, the Secretary shall not require a State to pay relocation payments where not authorized by State law.

This is quite a set of requirements. It involves economics, it involves sociology, and many other elements.

Figure 4 is many years old actually and it is testimony to the fact that highway officials, even without regard to the proposed requirement just referred to, in a good many States have been aware of this problem and have sought to do things to alleviate adverse social impact. Here is a case of an expressway improvement, where a number of houses were on the right-of-way that was needed for the new construction. The adjacent area was low land and they had a lot of excess dirt from the highway right-of-way. As construction permitted, this excess fill was dumped in the low areas, which then made some very nice building sites. Then they moved over the structures that were capable of being moved; the others were demolished. In this way, of course, highway officials were able to eliminate a lot of criticism, and they also saved themselves a great deal of money because, instead of paying a lot of severance and other kinds of damage, they just paid the moving costs and the cost for re-establishment. The owners were quite pleased too because their homes and facilities were generally better.

This is being done in a number of cities. New York City, for example, has a Tenant Relocation Board, which has done an amazing job of seeking alternate accommodation for the displaced.

Here again, we might need some new legislation at the State level in order to comply, not necessarily with the Federal-aid requirements—in a way, these requirements are the result rather than the cause of the problems about which we are talking. The Federal-aid legislation recognizes a condition which has existed for some time so that I am sure that with one or the other phase of the problem we will probably need some new legal equipment at the State level.

Another problem involves severance damage. We have a growing program of severance damage research, which has very definite operational objectives. That is, we are not spending research money just for the sake of keeping in research. On the contrary, it is felt that we can save a lot of right-of-way dollars by doing this research, and then applying the findings to the regular appraisal and right-of-way acquisition processes.

Figure 5 shows a negotiated case, for example, which had a "before" value of $19,000. The State needs this land for highway purposes. This is controlled access from 78th Street along this frontage. The State paid $4,800 for the land and $2,000 for severance damage, or a total of $6,800. If this is subtracted from the $19,000 before value, there is an imputed value of the remainder of $12,200. Well, lo and behold, almost before this pavement of the highway improvement was dry, the owner sells a small part, 100 by 160 ft, of this remainder for $37,500 on the open market. This was not ten years after; this was within a short time after the taking by the State. If this sale is in the open market between a

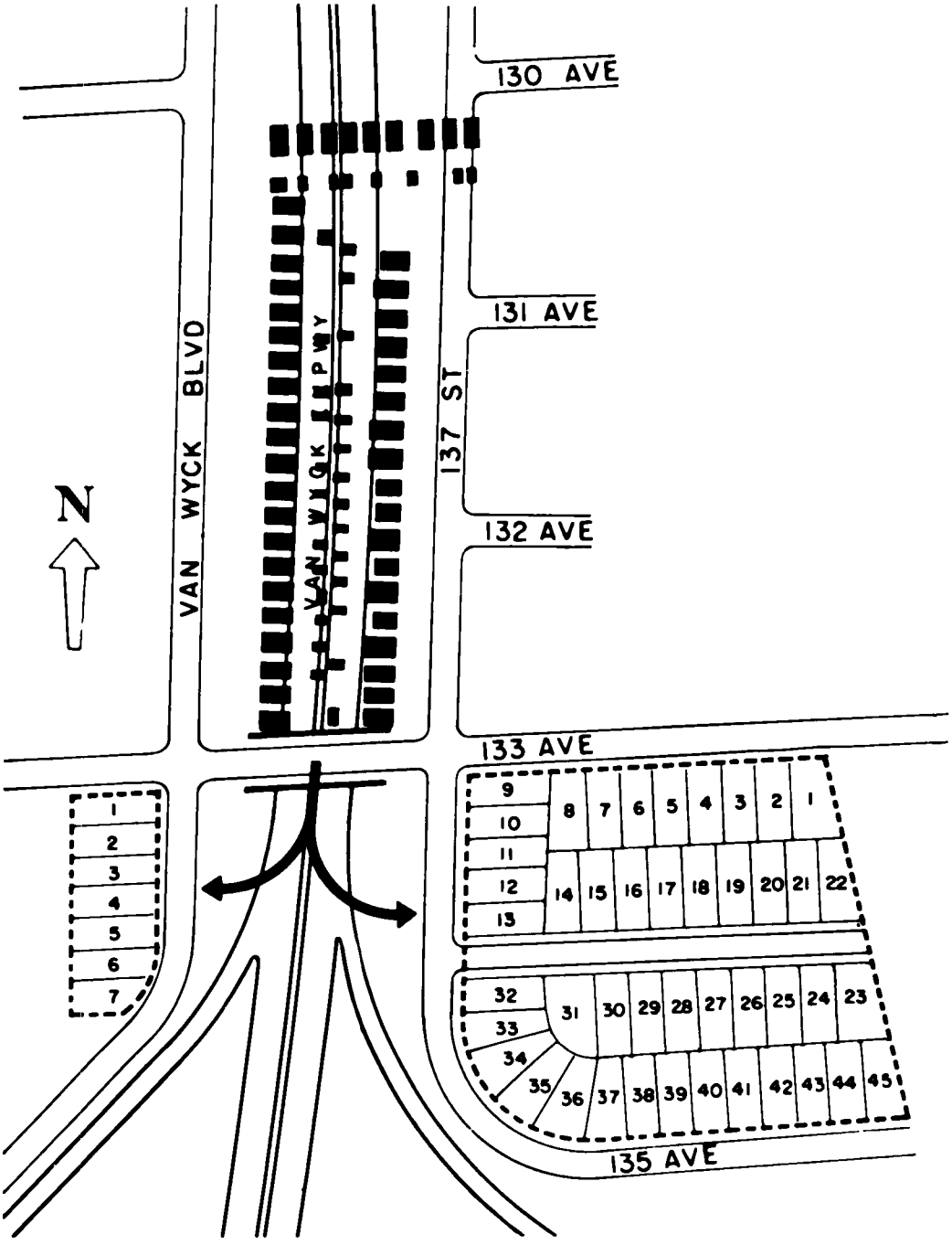
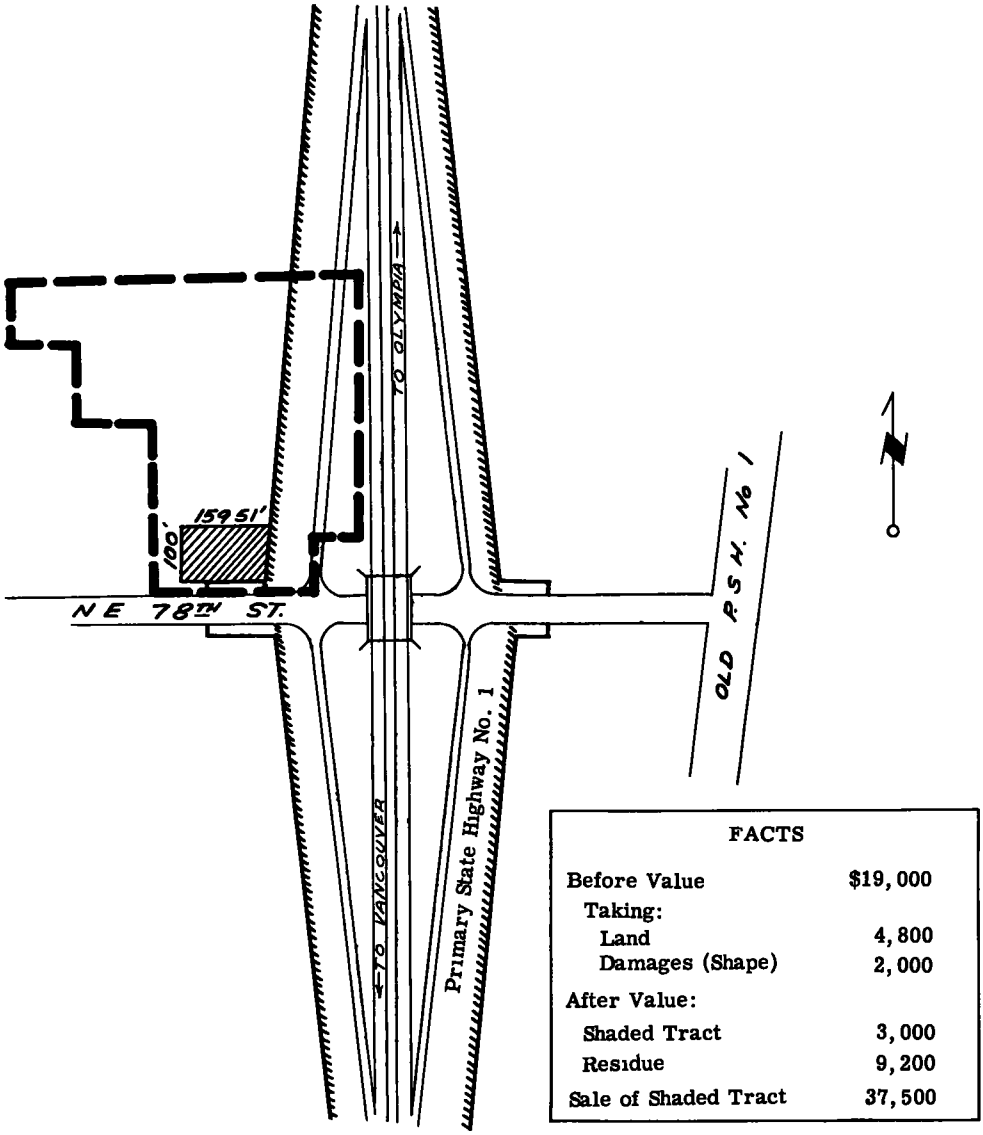


Figure 4. Land acquisition and tenant relocation, Van Wyck Expressway.

willing buyer and a willing seller at an arm's length transaction—if this small piece is worth $37,500—what business did we have paying $2,000 severance damage? There was no damage there. Of course, we did not have any alternative before the fact in paying this damage.



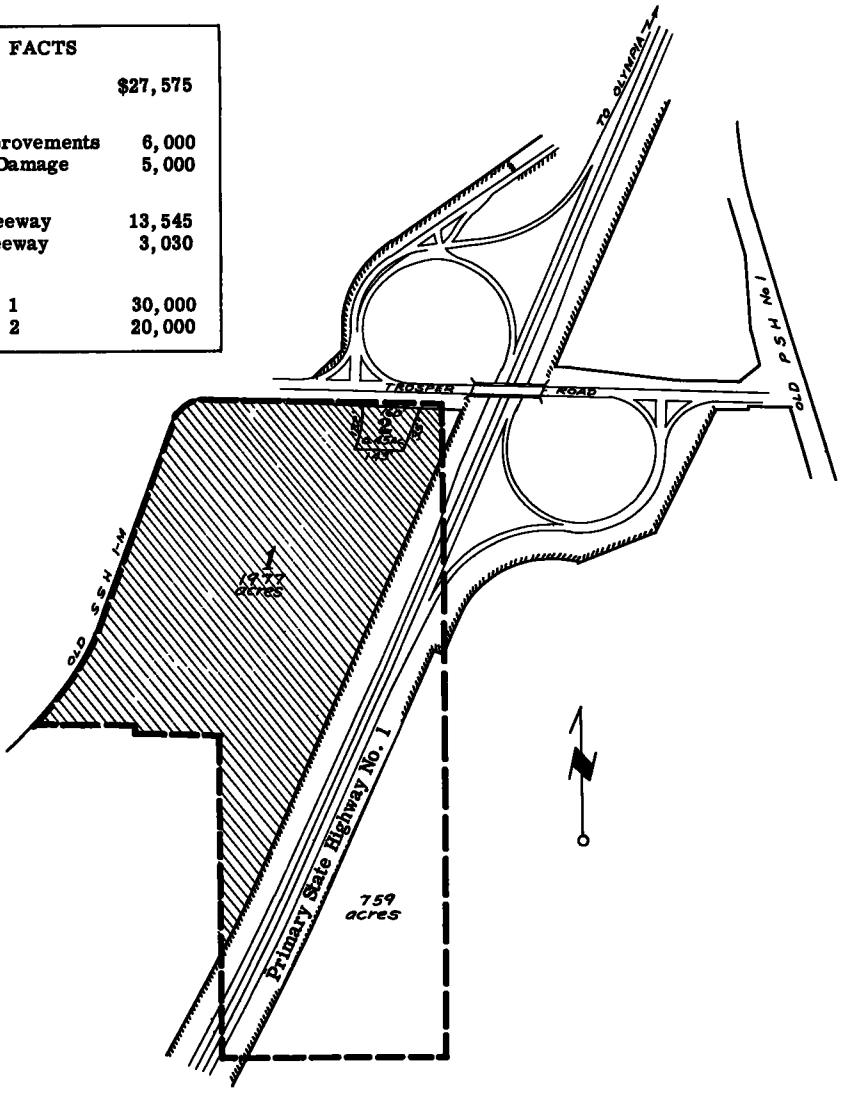
SOURCE: Land Economic Study, No. 5, Washington State Highway Commission

Figure 5. Severance damage study interchange.

Our hope is that once we get a bank of severance damage cases in every State, and a national bank which we are developing right now, we will be able to get enough comparables out of these State and national banks so that in future cases, we can show, to the satisfaction of courts and juries, and in all the negotiated cases to the appraiser for the property owner, that there is no severance damage. In most States we could not go too much farther than that because some States cannot offset benefits against the value of the actual taking. But at least we can begin to eliminate or diminish the large severance damage item.

Figure 6 shows another case. The original value is appraised at $27,595

FACTS	
Before Value	$27,575
Taking:	
Land & Improvements	6,000
Severance Damage	5,000
After Value:	
West of Freeway	13,545
East of Freeway	3,030
Sales:	
Portion No. 1	30,000
Portion No. 2	20,000



SOURCE: Land Economic Study, No. 2, Washington State Highway Commission SD 2

Figure 6. Severance damage study interchange.

(this is agricultural). The State goes through the middle of the farm with a primary State highway, controlled access. For this, the State pays $11,000 severance damages. You take $11,000 off the $27,595 and you have an imputed value on the remainder of about $16,595. Here again, just within a short time after this transaction with the State, the owner sells parcel number two for $20,000 (commercial), and he sells parcel number one for $30,000. In other words, he recoups $50,000 plus $11,000 from the State which is $61,000, and he still has 7½ acres of land. So apparently our appraisal technique today is not sufficiently sharp to estimate properly the actual value. And naturally in retrospect, we should not have paid this. But here again, under rules existing now without the benefit of these comparables, we may not have any alternative but to pay these kinds of damages, and we will continue to pay them until we can de-

velop a persuasive background backlog of data which the courts and juries and property owners in negotiated cases will accept.

Now we have a going program of this research, and we have a manual that Mr. Bartelsmeyer talked about. The manual involves a suggested standard form. It is a rather simple form. It is designed for machine operation. Most States have either the "650" or the "1401" equipment. You have the machine capacity to work with the severance damage program. If you put all your severance damage cases on this form, once you develop the technique, you begin to get a bank of comparables. You may have an agricultural piece of land which presents appraisal problems; for example, 80 acres of dairy land in the middle of Wisconsin, 12 miles from the closest urban area. For fairly good agricultural land, an acre would sell for about $450 in the open market. It is a bad severance, like the last one mentioned. If you want to get comparables from the bank, all you have to do is punch appropriate codes, and out will come all of the cases that have the same set of basic characteristics as the subject property, and you can immediately have a bank of comparables. From this point on, you can use them as any other comparables. If an appraiser will have to testify in court, he will probably want to make these comparables part of his own personal experience. At least you have a quick and scientific method of getting to these comparables.

The next question that would arise in connection with this particular program is, can you use these data in court? We have recently done a little study called "Economic Evidence in Right-of-Way Litigation" by Sidney Goldstein, a member of our staff; he has examined most of the pertinent law, at least in a brief way. As of now, in many States, we are still fighting uphill on the legal side, on this issue. In a good many States, this kind of evidence is not admissible on direct, although sometimes you can get it in through the cellar door in qualifying an expert, but in some States, it is admissible. We have made a plea in the study to have it admissible on direct. And I think the more scientific this study becomes, the better chance we will have of it being recognized in the courts. For example, we make analogies in the article to U.S. census data. Now if you want to use census data, you can use it right out of the book; you do not have to take the census yourself, you do not have to testify that you were one of the census takers or that you were associated with the actual process of evolving the results. You can use the data because it is an unbiased, scientifically-derived economic survey and nobody disputes it. It is admissible as an exception to the hearsay rule. We are hopeful if we do these severance damage studies pursuant to this specification, that this will become as scientific a survey as census.

Incidentally, we are looking for the negative as well as the positive. So far, we have a number of cases where we did not pay enough severance damage. Of course, if you count the number of cases right now in the national bank, I think you will find that there are about nine pluses to each minus, but that is the way the cards fall.

Another matter that involves some legal problems comes from Iowa where a segment of the Interstate System cut through a farming area (Fig. 7). Looking at what the superimposition of the Interstate would do in interchange area, on these farms, Mr. Boone would have had four fragments, Mr. Baty, formerly having a nice little square, would have had land on both sides of a limited-access highway and how would he intercommunicate between these two separated pieces of land. The same with Johnson, and look what the improvement would do to Mr. Spencer.

The appraiser who originally looked over the situation started to make notes as to the value of the land taken and damages to remainders. Talking to Mr. Baty he asked: "Would you be willing to deed this

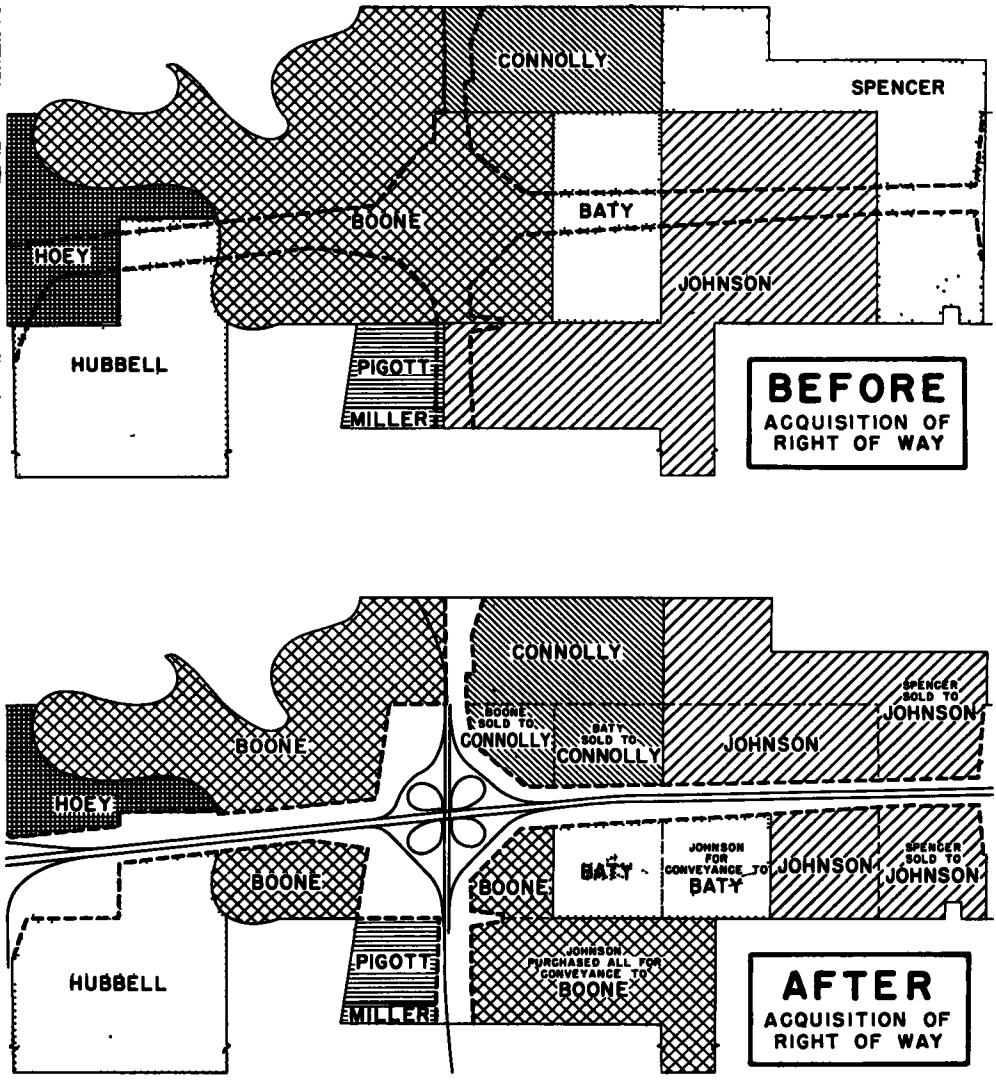


Figure 7. Portion of right-of-way on Interstate 35, Polk County, Iowa.

parcel of land to Mr. Connolly on this side, if we could prevail on Mr. Johnson to deed you some over here?" Mr. Baty thought it would make sense. He would have about the same area, all on the same side of the highway instead of on two sides. Encouraged by this, the appraiser from the State began exploring the thinking of the other owners, and with a little effort and time, and a lot of resourcefulness, he arranged a whole series of exchanges.

He got Baty to sell a parcel to Connolly, and he got Johnson to sell him one so he now ended up with a nice parcel on this side of the road. As we agreed, Spencer wanted to retire from farming entirely anyway, so he sold out to Johnson; Johnson now ended up with two nice parcels, on both sides, but he has sufficient area on each side to do something with it. Baty sold some of his land to Connolly, so Connolly now has in fact more land than he formerly had, and in one quadrant of the area. Now Johnson sold this to Boone, so Boone

did not actually come out too badly; he was fragmented but it must be remembered that the interchange area in even some of the rural areas becomes very valuable, so he was not about to complain either.

As a result of this, the State saved a great deal of severance damage money. Perhaps even more important than the savings are the public relations implications of this effort. If this had been executed as it was originally, owners would have been muttering for years as to what the highway department did to them in their agricultural operations. How they are singing the praises of the State! They got paid fairly well and they now have what continues to be logical agricultural arrangements. We are going to have to get into this kind of thing more and more whether we like it or not, because we are maturing and as we do so in a democracy, we must take cognizance of these social and economic problems, and we are increasingly saddled with them.

All kinds of legal problems are involved. I think in Iowa, in that particular case at least, they engineered most of the transactions between the owners. They had some other transactions where this activity was funneled through the State highway department, and the highway department deeded it back to the owners. There are some legal tricks involved. For example, you must have authority to acquire land that is not needed for the highway right-of-way proper —land that you can use for exchange purposes. Not all States have this, and there are some other legalities too—can you use highway funds for this purpose?

There are some significant studies going on at the University of Wisconsin, with highway funds. They will help every man who continues to be associated with highway legal problems. One is the study of condemnation cases, in which researchers are examining all of the condemnation cases, especially the highway condemnation cases, with the view of trying to find out what happened, in how many of them the highway department was successful and under what conditions, and the range of compensation starting with the appraisal of the highway department and going through the lower, intermediate, and high courts for adjudication. What happened to the actual awards and why? Many other elements are also included.

The other study involves the acquisition of land for future highway use. We know that there are many opportunities for saving large sums of money. If we can anticipate the future by at least five to ten years, we will be doing quite well. Yet there are a lot of legal complications to this business of acquiring land for future use. We need State highway authority and we need a State revolving fund. We need to make sure we can get Federal reimbursement for this if a Federal-aid highway is involved, etc. There is a tremendous number of cases on the acquisition of land for future use, and the general tenor of them does not question the period of time involved. One involved a water case where the court allowed the acquisition of land as far as fifty years in advance for water purposes, for a water development company. The courts are more concerned about certainty of use and about the fact that you chose a plan and a program. They do not care whether it is going to be five years or twenty years, but they do want you to walk into court, especially if this is a litigated case, capable of testifying that you know what you are doing, that you have a plan and a projection on this, and this is a part of a larger program that you have in mind. If you can do this, the chances are you will be successful in the acquisition for future highway purposes.

While we are dwelling on research, in Washington recently, increasingly we have been getting a lot criticism from the Bureau of the Budget and a little from the Department of Commerce and quite a bit from the General Accounting Office, too. We are

told we should be probing into certain kinds of areas with highway research monies and then put the findings to use in operations in these areas. One suggestion involves the psychology of highways. For example, they say we should be spending a lot more money on highway safety research. They have been telling us that if five people were found dead one morning because of defective drugs, there would be a Congressional investigation overnight and the Food and Drug Administration would be asked to explain this. They say that highways continue to kill 38,000 people every year, and what are you doing about it on the research side? Recently we have set up an Office of Highway Safety and I think they want us to spend a lot more money on safety research. The fact is, if we are honest about it, we have not communicated with the motorist in the highway safety field. Maybe there is something wrong with the legal approach here. Maybe, the Uniform Code should be drastically revised. This is another emerging problem.

Another area for legal scrutiny is the electronic highway. In Detroit, they are experimenting with the electronic or the automatic highway. Engineers have identified about ten different schemes, involving different types of vehicles and different types of control mechanisms. Here again, what are the legal implications of the electronic highway? After a little thought it was found that we have certain established legal relationships and accept the responsibility now for certain highway defects.

For example, we build some electronic equipment on the highway and provide the counterparts on the moving vehicles. Something goes wrong with one or the other of these. Who is responsible and for what? Does the highway authority suddenly become legally responsible and for what period of time in the future, and what about the responsibility of the manufacturers of the vehicles and the dealers? It is quite possible under several of these schemes, that we are going to have to go beyond the electronic right-of-way, whatever that might be, in order to install certain kinds of gadgets. Here again, we are going to have to acquire some rights from the abutters in the areas beyond the right-of-way to permit installation of some of these.

Another problem is one involving the control of land uses at interchanges. Figures 8 and 9 show a section of Interstate, in California, that is under construction. In one corner of the interchange, there are two industrial outfits. Figure 9 shows four years later. There are eight or nine industries in the area. With respect to industries, as well as commercial enterprises, there are all kinds of linkages. Suppliers like to be close to the people they supply, because it eliminates cross-hauls and facilitates other efficiencies. So in these particular cases, with these two industries as a starter and the opportunities for rapid transportation by a system of modern design, you have all kinds of activities piling in here. This makes sense from the private industry point of view. This trend has made this country great, and we do not want to discourage it.

I do not know whether the design capacities of these interchanges are already exceeded, but it is possible that they are, or they may be long before 1972. They were supposed to have been designed for capacities as of 1972. If this trend continues here and if the same thing happens in all the other quadrants for the same reason, we might be exceeding the design capacity. Design engineers assume a design capacity before they can design any one of these sections of the highway and it is on this basis that they design facilities. Therefore, if things became badly congested, and backed up traffic to an intolerable degree, public authority would be forced to rearrange these access facilities and in so doing they might be completely disrupting the entire circulatory system of these private uses. In other words, these uses and their private accesses have been de-

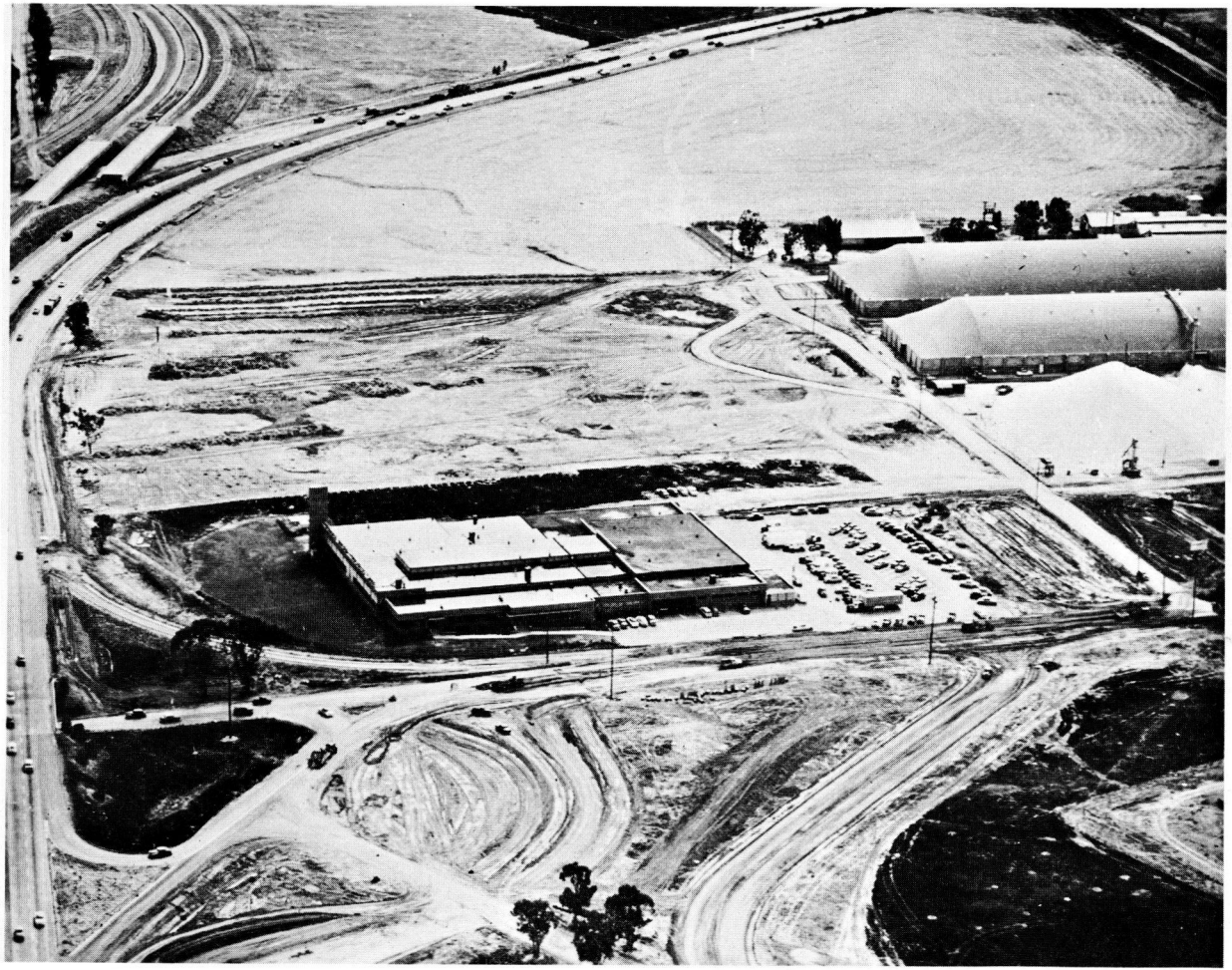


Figure 8. California interchange, before.

Figure 9. California interchange, after.

signed in relation to these public access facilities. If you change this component, you might be putting a lot of inefficiencies into this private operation that were not there before, so actually it is to the private as well as to the public benefit, to make sure that both of these uses can live side by side for a long time to come.

Now the legal problem is this. We have zoning; we have subdivision controls; we have some other gimmicks. Nobody has yet found anything that really works well in these interchange areas. This is a new legal problem that is staring us in the face right now. We are going to have over 41,000 mi of modern highways. We are going to have something like 14,000 interchanges, and the bulk of the Interstate investment is in these interchange areas. They run from $150,000 to a couple of a million dollars each, in the urban areas.

Figures 10 and 11 show another case. We have a nice pastoral scene here, rolling land, and if you look hard, you can see a couple of houses behind these shrubs here. Let's see what happens to this area several years later. This happens to be an approach to an expressway and it looks different now. It involves Sears, Roebuck. In the commercial field, just as in the industrial field, wherever Sears or Montgomery

Figure 10. Sears interchange, before.

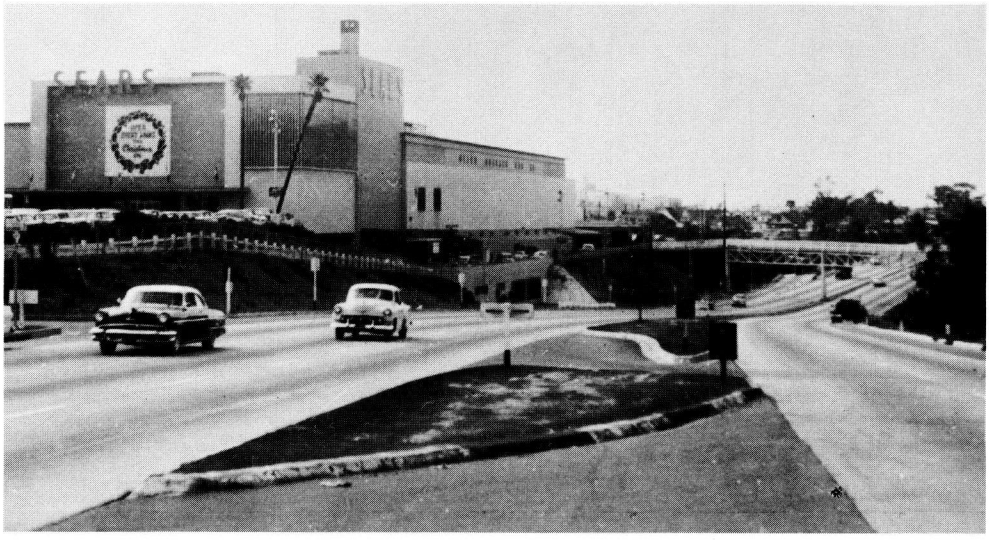


Figure 11. Sears interchange, after.

Ward go, they attract a series of satellite businesses. Sears is like a magnet and a lot of people will come to Sears. They provide ample parking, so other businesses like to be in the shadow of these big giants. When you add this together you get a huge commercial complex. Here again, I ask what this does to interchange capacity figures.

We collectively have to think of some good legal solutions because in the end, without legal authorization and sanction, we cannot do anything to control this. I am not saying we should prevent development at interchanges but what we have to make sure of is that, through a proper local mechanism or through a proper State mechanism, we reconcile private land uses in the interchange areas with interchange capacity.

Figure 12 shows the main legal layers and superlayers. There are other areas, too. For example, air rights, and we are getting into this under the new authorization of the Federal-aid laws. We can now make use of air-rights for both public and private uses, under or over the Interstate System. This leads to all kinds of legal problems. We are becoming much more aware of water rights. Prof. Beuscher seems to be

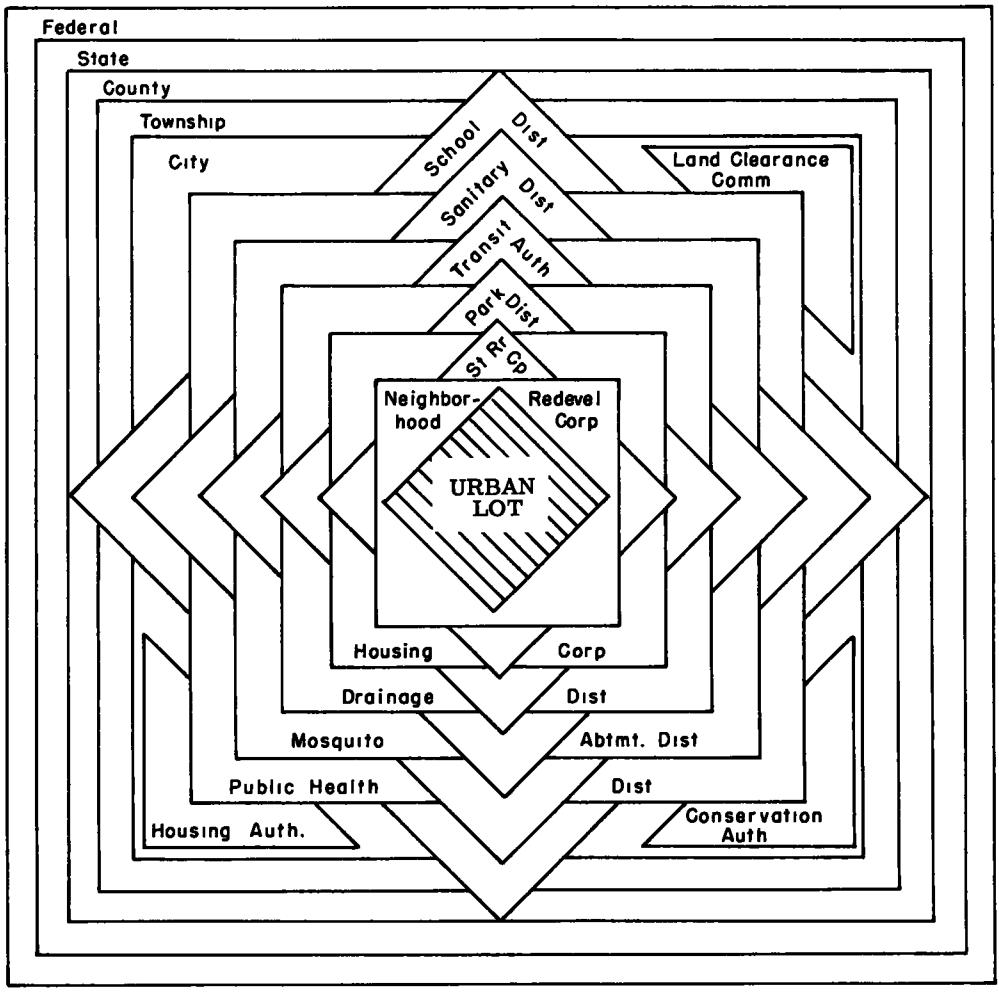


Figure 12. The maze of political and corporate entities having power to affect an urban lot.

in the middle of all these new modern legal developments that are looking to the future, involving water. Water and highways and drainage are getting to be very serious problems. Water has always been a serious problem, especially in the West. But now there are many groups that are concerned about water and what the highway system in both the urban and rural areas is doing to watersheds and pre-existing water arrangements and pre-existing rights and responsibilities. Here again, we are going to be plagued on the legal side with a lot more problems involving water than we ever have had before.

There is one last thing I would mention. You know they say that the highway lawyer or the average lawyer spends approximately three-quarters of his time in the law library. We have automatic data-processing machines in most State highway departments and for those of you who do not know, both the American Bar Association and some of the private groups that are interested in developing machinery for this have in fact already developed several systems of putting a data retrieval and classification system on the machine which in effect would certainly diminish, if not eliminate completely, the need to use law libraries except for certain limited purposes. In fact, one system would set up one or two National centers for data retrieval, and all you would have to do is subscribe to a telephone service. Such a service would be worth a lot of money, both in not having to invest large capital sums in law libraries, but also in savings of valuable time.

DISCUSSION

J. H. BEUSCHER, *Professor of Law, University of Wisconsin, and Chairman, Committee on Highway Laws, Highway Research Board, Presiding*

R. D. Canada.—In the new Federal-aid bill there is a requirement for coordinated planning of urban renewal programs and highway programs in urban areas. In Florida our urban renewal program is still embryonic. Have you given any consideration to the problem of financing this type of acquisition from highway funds or on a loan basis until such time as we are ready to qualify for urban renewal funds? This is a very real problem. We have a makeshift arrangement at this time but it is not completely satisfactory.

D. S. Black.—There has been some change in the language of that bill in committee. It now requires that it just be a matter of transportation planning, requiring that by 1965 a State must have instituted a "comprehensive transportation planning process." As I understand it this bill would not make approval of highway projects dependent on receipt of urban renewal funds.

Canada.—The problem is that in many urban areas today we cannot acquire the property we are going to need for urban renewal. Our urban renewal people are willing to do this, but they do not have the funds yet. We are also preparing, in Tampa, for example, to put in the interchanges for the Interstate highways. When we put in these interchanges we know from experience that the value of that property which is now the subject of urban renewal is going to jump. If we have to wait three or four years to acquire it after we have completed our interchange, the urban renewal people are going to be paying twice what they would pay if they could acquire it now.

Black.—So you want to get property that will be needed for urban renewal purposes in the immediate vicinity of highways, and know if we would advance funds for this acquisition of that additional property. I do not think that could be done. We

have under consideration a method to provide easier advance acquisition of right-of-way, but our whole authority is limited to acquisition for highway purposes, and under present law we could not advance funds for urban renewal out of the Highway Trust Fund.

H. J. Morton.—That is correct, we had a request in one State where we have used Federal condemnation to acquire some additional land for urban renewal. We came to the conclusion that we could not spend highway funds for this purpose. We checked it with the Justice Department on the technique of condemnation concerned, and were told we could not do that either. So, on both counts it is a negative answer.

Beuscher.—I hope you can work this out. The funds involved are all public, and it does seem that we should be imaginative enough to figure out how, in investing our money in highways, we could protect the public from paying twice for the land ultimately needed for another public purpose. And I am not so sure that this other public purpose is not so intimately related to the highway that we should not have an amendment that would make this possible.

Canada.—The planning coordination phase does not trouble me at all. Our planning is going along nicely. It is just that urban renewal started later and its funds are not yet available.

Black.—Of course, the Highway Trust Fund is not a bottomless well, either. It could be that, in regard to reimbursement and planning, we will have to parcel it out over a period of time. The tax structure for the Trust Fund is based on what it will cost to complete the Interstate System, and it would take quite a drastic change in the concept of the highway legislation to permit this expenditure for non-highway purposes.

D. R. Levin.—While you cannot spend Federal money, you might get some new State assistance. For example, in Ohio they have a billion dollars of State pension funds which, under their law, they can spend up to 10 percent for advance highway acquisition, and this is later reimbursed. They have actually used this to save quite a bit of money. It is conceivable that in Florida you might have substantial funds available.

Canada.—At its last session the legislature gave us authority to borrow against that fund, but for highway purposes.

Levin.—For highway purposes, yes. But if you fixed this up to use for highways and urban renewal, you would have what you wanted.

Canada.—I think this is the gist of the solution we have reached.

Levin.—In other words, there is no objection to acquiring more than they need for highway purposes; it is just that the Federal Government will not participate in the excess.

Black.—Yes, our sole concern is with the expenditure of Federal-aid funds for non-highway purposes.

Beuscher.—In connection with what was mentioned in the Federal-aid bill regarding a transportation planning process, I predict that as your highway work gets more intimately meshed with urban renewal and city, metropolitan, and regional planning you are going to become more involved with comparable, and perhaps stricter, Federal conditions to grants-in-aid. We have seen the requirement for a master plan in connection with urban renewal; we have seen it more recently in connection with the Open Space Program; and ultimately, I venture a guess, if we keep creating additional layers of governmental units in our metropolitan area so that we cannot effectively have a transportation or any other kind of planning process in that area, we may find that in connection with highway activities we will be required to show that the planning process has a sufficient meshing of

the activities between the local units to satisfy somebody at the Federal level. Maybe, if we live long enough, the solution to our metropolitan area intergovernmental problems will come in major part through conditions to grants-in-aid.

J. Montano.—Does the tenant relocation provision in the proposed Federal-Aid Act contemplate acquisition of property for relocating people?

Black.—No. This legislation, if enacted, will really not change anything for the moment. All it provides is that those States which now have laws providing for reimbursement for dislocated individuals will be reimbursed from Federal funds up to $200 per family and $3,000 for business. I think there are only a handful of States now involved, and this would be an inducement for others to enact such legislation. It is like the utility relocation reimbursement laws. In this connection the proposal also provides that as a condition to approval of land acquisition, there must be one or more feasible methods of orderly relocation of displaced persons.

The payment to the State will be the pro rata Federal share. The Bureau of Public Roads' Policy and Procedure Manual now states that we will not reimburse for items not generally compensable in eminent domain and cities; for example, costs of tenant relocation, change in grade, circuity of travel, goodwill, and business losses. All the proposal does is take one item out and provide that we will no longer regard tenant relocation costs as an item not generally compensable and hence not reimbursable.

Montano.—Would this participation be permitted if your State did not have a statute but had a supreme court decision saying that the item is compensable?

Black.—Yes, this would make it compensable under State law. It would not have to be by statute.

Levin.—Suppose a highway department wants to acquire some land on which to move houses; in effect they would be exchanging. Is this eligible for reimbursement? As I understand it, where a State is eligible to buy land for exchange purposes, would it not be considered a highway purpose?

Black.—Does this get into the "cost to cure" doctrine, which provides that it can be done if it does not exceed the cost of taking the land?

Levin.—Yes.

Black.—Then I assume it would be in the public interest and the Federal interest to do it.

Levin.—In that case, the answer is that it is appropriate if the State could save money, and I assume they would not do it unless this was the case.

J. E. Thomson.—Are you aware of any States that are experiencing this problem regarding controlled-access highways? As you know, the general rule in this country is that where you establish a new highway no access rights accrue since the landowner never had any. There are, however, situations where the State acquires access rights along an existing highway. In many cases we want highways with full control of access, but in Iowa there are many cases where establishment of fully controlled highways will retard development of adjacent land. Therefore, we have tried to get a uniform program for those highways we did not feel should be fully access-controlled so that we could treat all landowners alike and still keep the traffic capacity of the highway. We have developed what we call "special public road connections" to serve adjacent land. We require the landowner to agree to a setback along the highway for a frontage road if in the future it appears to be needed, and in many cases where they do not own enough frontage themselves, they have to get their neighbors to come in with them on the compact. This has never been

contested in court, but it has seemed to be a safety valve, and to serve a need. I think our system can be improved, but I am wondering how.

Levin.—A good deal of economic research has found that where there are factors of productivity and growth present, the establishment of a limited-access highway does not inhibit them. It just means that these factors have to be adjusted to access at interchanges or via frontage roads.

Other States have dealt with this by actually providing the frontage roads where the potential justifies it. These frontage roads are part of the Interstate design. Are you talking about a situation where the frontage road is part of the expressway design?

Thomson. — Where an existing highway is used, we do this to mitigate damages, but we have not gone out and provided them where no legal rights to access exist.

Levin.—This is a new idea. Does the compact become an encumbrance against the adjacent land, like an easement?

Thomson.—This legal aspect has never been tested.

Levin.—I do not know of any other State that is doing this, but it is an interesting idea.

Thomson.—We have been doing this for a number of years and a fair number of property owners have taken it up. The original theory was that we would have them no closer than a quarter of a mile apart and call them temporary public road connections. It did not work too well with some individuals who wanted to come in and put up some industries because they thought their access might be closed at some time. Of course, we did not intend to close access, but we might at some time want to change it and move it to another location, perhaps a quarter of a mile down the road. That may create a future problem. If the highway increases in its use, you may want to cut down the number of public access points, and we have found this frontage road program one of the most difficult to handle because people are afraid that they may at some time be put a half mile or a mile from an access point.

Levin.—Does this compact cost the highway department anything?

Thomson.—No.

The Role of Research in Legislative Advocacy

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

• Probably everyone at this meeting can remember when it was a popular myth that men of practical affairs—men whose daily calendars called for decisions one after another in order that "things got done"—did not have time for research. The impression was left that there was some basic incompatibility between the roles of the researcher and these men of action. This myth has now been exploded. And nowhere has it been exploded more clearly than in connection with the construction and operation of highway systems. The entire legal framework within which the present Federal-aid highway program and the road programs of State and local governments now function is a direct lineal descendant and beneficiary of research directed and, in some instances, conducted by the very people who now are responsible for making this program work.

Numerous examples might be cited. One, which profoundly influenced the terms of National and State legislation is the series of highway needs studies made to determine just how crowded, how obsolete, and how costly the highway system had become during the decades just prior to and following World War II. Of these studies the late Thomas MacDonald, as Commissioner of Public Roads, has said:

> Historically, nothing has so contributed to the stability of the road program and assured the authorizing State and Federal legislation as have facts gathered, analyzed and interpreted by the State and Federal Highway units assigned to this work.[1]

[1] Quoted in Hill, G.A., "The Effect of Highway Need Studies on National Legislation." PROC., AASHO, pp. 29, 30 (1950).

Similar testimony has also come from legislative leaders, administrators, and spokesmen for various segments of the public.

This close reliance—indeed, dependence—of the lawmaker and administrator on research is not, however, something reserved for times of great events involving basic shifts in the emphasis or direction of public policy. It is needed, and it should be evident, in the daily operations of highway lawmakers and administrators. It is the purpose of this paper to discuss how this relationship between research and operations can be developed in regard to at least one important aspect of highway programs; namely, legislative matters.

In a very general division of this subject, it may be suggested that counsel for highway agencies are directly concerned with legislation on three occasions: when laws are being prepared and enacted, when laws must be interpreted, and when laws must be revised.

PREPARATION AND ENACTMENT OF LEGISLATION

The comment of Commissioner MacDonald just quoted gave research credit for a substantial contribution toward "assuring" the passage of legislation. He meant, of course, that by means of research legislators were brought to see the essentiality of taking action now rather than putting off doing something about highways. This use of research is important, but it is not all. Every great and complex program is made up of a great mass of details. When and if programs are implemented by law, these details affect each other, and they affect other parts of the general body of law. The

highway lawyer is expected to know and explain these relationships to legislative leaders and committees as part of the advocacy of enactment. And, quite probably, he will be expected to present the highway agency's position on legislative proposals which it opposes. In short, the highway counsel's function in the preparation and enactment of legislation is that of an advocate.

Advocacy in the legislative arena is as real and significant in its results as advocacy in the courtroom, but its precepts and practices have only recently begun to be studied by lawyers.[2] The rise of interest in legislative advocacy has, to a significant extent, been the result of curiosity about how a governmental agency should conduct itself and its business before legislative bodies.[3] The setting of this problem deserves particular attention before going further.

Ethics and Advocacy

The Anglo-American tradition in law leads us to rely predominantly on what may be called "adversary inquiry" to determine the facts on which legal decisions are based. In this process it is expected that counsel, by vigorously presenting all facts and arguments favorable to his clients' position, will build a factual record and a balanced perspective for the decision-makers to do their work. As we rely on adverse examination of witnesses and partisan argument to disclose fully and interpret the facts of a law suit, so we also expect our legislatures to proceed in the same way through hearings, investigations, and debates to discover and interpret the facts and various other considerations on which statutes are based. From time to time, abuse has been leveled at this form of partisan advocacy, but no other or better system appears ready to replace it.

But how can counsel for a public highway agency effectively participate in this partisan process? How can he be as vigorously partisan for his client's position as lobbyists for other interest groups who do not have the public official's obligation of service to the legislature? The highway department may strongly oppose a piece of proposed legislation, but it cannot ethically adopt the attitude that it will do everything possible to defeat this bill in the legislature and, if it fails in this, will continue its opposition for the avowed purpose of scuttling its administration. With respect to the legislation it does not like, the public position of a public agency must be: we respectfully believe that the proposed bill is a bad one for the following reasons, but if in its collective wisdom the legislature sees fit to enact it we urge that the following changes or additions be made in order to make the legislative intent clear and the provisions of the law capable of effective enforcement.

By comparison to the positions that outright lobbyists sometimes take, this may seem greatly restrained. But it is by no means a powerless position. The same obligation of commitment to and service of whatever is duly enacted as law can become the key element of an extremely effective legislative advocacy based on the image of candor and accuracy of advice.

A moment's reflection will reveal the sources of strategic strength in

[2] Of this fact it has been said: "The bar seems to have been less aggressive in this field than in its more familiar background of the courts. Lawyers in our system by training and tradition long regarded the legislative process as alien to the true body of the law; they seem, therefore, not to have been alert to the possibilities of practice before legislative committees, and not as vigilant there as in court to assert the claims of clients. Moreover, legislative inquiry often was armored against successful legal attack: the committee commanded publicity, the adverse effects of which might overweigh even a successful legal challenge to the committee's probing; events too, might move too fast in a legislative inquiry to permit practical relief by court action against unauthorized or unfair tactics" (HURST, J. W., THE GROWTH OF AMERICAN LAW: THE LAW MAKERS. Boston, p. 34, 1950).

[3] For example, Weeks, O. D., "Initiation of Legislation by Administrative Agencies." 9, Brooklyn L. Rev. 117 (1940); Moneypenny P., "A Code of Ethics for Public Administration." 21 Geo. Wash. L. Rev. 423 (1953).

this approach. What makes a legislative advocate successful in his work? Not the overstatements, threats of reprisal at the polls, cajolery, and bribery that were the trademarks of some of the notorious unbridled lobbyists of the 19th century. Procedural reforms in Congress and the State legislatures commencing in the 1910's have completely changed the atmosphere of legislative business. Equally important, the degree to which interest groups have become organized—statewide, regionally, and nationally—has meant that on any major or controversial issue the balance of outside pressures bearing on the legislature will be more even than it was when, in the 19th century, only a relatively small group of interests enjoyed direct access to the attention of the lawmakers and the media of public information.[4] In this setting of competing claims and statements the busy legislator must and does place a high premium on the candor of the advice he receives. Thus his respect goes to the counsellor who he knows will tell him the truth, the whole truth, and nothing but the truth. And, conversely, the counsellor who has a legislator's respect and credence holds the key to influence with that legislator.

Some years ago, an official in charge of Congressional liaison for a major department of the Federal government spoke candidly to a group of Washington lobbyists. He reminded them that what made them valuable to their clients was the confidence that Congress and the Federal executive agencies reposed in them. This confidence was not an attribute acquired en masse or by reason of the prestige of their clients. To the extent that it existed it was individually bestowed by reason of demonstrated reliability over long periods of contact. Momentarily it might seem otherwise; the influence peddler and the high-pressure campaigner might occasionally have his day. But in the long run, confidence in the candor and thoroughness of the lobbyist's advice—be it pleasant or not—was the strongest basis of influence with the legislature.[5]

Confidence is one foothold for the legislative advocate. Information is the other. Here, counsel for a State highway agency enjoys a real advantage. Through his State's highway department he has access to knowledge of all phases of highway programs and their impact on the community at large. By drawing on the research which has been and is being done by his State highway department, by universities, by the U.S. Bureau of Public Roads, by the Congress, and by others, counsel can provide comprehensive, analyzed information on literally every controversial issue involved in the preparation and enactment of modern highway laws.

The potential advantage of access to this source of knowledge should not be underestimated. Today, research on the scale that is necessary to really discover and interpret the facts regarding highway transportation problems is too expensive, too time-consuming and too complex to be within the reach of any but the major organized groups. This has been recognized by many special interest groups throughout the country and has led them to organize and finance research on matters of common interest, and then, most important, to make this information

[4] Insight into the changes that have occurred in the techniques of legislative advocacy during the twentieth century may be gathered from HURST, J. W., THE GROWTH OF AMERICAN LAW: THE LAW MAKERS (Boston, 1950); SCHRIFTGIESSER, K., THE LOBBYISTS (Boston, 1951); and HORACK, F. E., JR., CASES AND MATERIALS ON LEGISLATION (Chicago, 1954, Ch. 5).

[5] Documentation of such a sensitive proposition is naturally difficult. However, to cite a personal experience, in the course of a decade of legislative counseling the writer had many dealings with the offices of Members of Congress, and particularly the Members' legislative assistants. On one occasion, when a Senator's assistant was about to leave his position for other employment, he introduced his successor to the writer, and said to the successor, "You can always rely on what this fellow tells you. He will never throw you a curve." The writer regards this as one of the highest compliments he ever received as a lobbyist.

available to their members for use in their operations.

Anyone who has watched the legislative activities of the States recently can cite examples of this phenomenon. One might be the activity of the utility industry in connection with legislation to liberalize State laws relating to reimbursement for the cost of relocating utility facilities due to highway construction. The coincidence of the language of the bills that were introduced, and the arguments and factual data presented in support of these bills, are too striking for one not to see in their background a single central source of research and inspiration.

With respect to almost any major highway policy issue of the present or future, it is possible to detect signs that affected interest groups are organizing for the purpose of making their interest known to legislatures, and that one of the principal aspects of their organized activity will be research.

More and more, also, legislatures are turning to interim study committees and other public agencies available to them to make studies of the facts regarding important questions and recommend the best manner of proceeding. On a national scale the studies called for by Congress under §210 of the Federal-Aid Highway Act of 1956 may stand as a classic example.[6] These studies, which were completed by the publication of the results of the AASHO Road Test, were for the avowed purpose of providing a factual basis for revision of the legislative policy and statutory provisions relating to financing the national highway program. Probably, also, they will influence State and Federal vehicle-size and weight laws. Possibly, they will have an impact on other aspects of the law related to highways.

The pertinence of research to legislative advocacy should not have to be documented further. We ask our elected representatives at all levels of government to determine public policy on questions that are beyond the capabilities of even a Solomon. We ask them to work under pressures of cruel proportions as part of the price of continuing to operate the republican form of government guaranteed in the Constitution. Is it any wonder, then, that the two things legislators want most of all are advisors who are candid and thoughtful in their consultation and who can give them accurate and complete knowledge of the facts as they exist?

This brings up the matter of technique. How does counsel for the State highway agency establish and make use of his sources of strength as an advocate?

Technique of Liaison

At the AASHO meeting in 1961, Robert May, Assistant General Counsel of the Bureau of Public Roads, spoke with great insight about the importance of legislative liaison. He stressed the fact that effective liaison involved more than appearances at legislative committee hearings. It has to be a day-to-day matter. He said:

> The day-to-day coordination which I have in mind consists of having a representative of the state highway department constantly in contact with the appropriate committees of the state legislature so as to keep fully informed as to legislative proposals being considered by the committees, plans they may have for hearings and other actions with respect to such proposals, and to be available at all times to offer technical assistance upon request in the preparation of draft bills, furnishing needed information, and related matters.[7]

The details of organization within highway counsel's staff and the pre-

[6] Public Law 627 (84th Cong.), June 29, 1956 (70 Stat. 374) §210. See also the following reports on the study of highway cost allocation: First progress report, 1957, House Doc. 106 (85th Cong. 1st Sess.); Second progress report, 1958, House Doc. 344 (85th Cong. 2d Sess.); Third progress report, 1959, House Doc. 91 (86th Cong. 1st Sess.); Fourth progress report, 1960, House Doc. 355 (86th Cong. 2d Sess.); Final report, 1961, House Docs. 54 (Jan. 16, 1961) and 72 (Jan. 23, 1961) (87th Cong. 1st Sess.).

[7] May, R. L. "The Importance of Legislative Liaison." PROC., AASHO, p. 85 (1961).

cise methods established to carry on liaison will, of course, vary. But it need not be a massive or complicated system, designed to penetrate subtle or mysterious walls of resistance. It is surprising how often the obstacles to legislation are simple and easily overcome.

Recently an experienced State highway counsel told a story that illustrates this. At a meeting with his staff this counsel asked why a certain highway bill which the department was interested in appeared to be buried in a legislative committee. No one could say. The counsel knew the chairman of this committee well enough to call him and ask him bluntly what was troubling the committee about this bill. The chairman was just as blunt in his answer. "None of us understand this bill," he said, "and nobody has explained it to us." Counsel then asked if the chairman would arrange an executive session of the committee so that counsel and some of the highway department staff might go over the bill to explain its background, its basis, and its terms. The chairman was glad to oblige. The meeting was held and the bill was reported favorably out of the committee.

Not all highway bills can be moved through the legislative process this easily, but many problems with the legislature can be avoided or eased if day-to-day liaison, backed up by sound legislative research, is practiced. Possibly the little day-to-day victories over fuzzy language, incomplete expressions of legislative intent, inconsistency of statutory construction, and legislative oversight will not seem like very much of an accomplishment to the lawyer who performs this liaison. If so, he should reflect on the time, the frustration, and the man-hours that are called for to correct the consequences of these oversights once they have passed unnoticed into an enacted bill. Let him also be reassured that there is no better or firmer way of building up the legislative advocate's sources of strength—confidence and knowledge —than in this type of day-to-day liaison with legislative leaders.

INTERPRETATION OF LEGISLATION

If, as has been suggested, the State's highway counsel is becoming a key man in the process of preparation and enactment of legislation, it is even truer that he is an indispensable party to the process of interpreting the meaning of the law once it has been enacted. As legal advisor to the chief administrator of the State highway department he is the first recourse for advice on the meaning of the law. He has the lawyer's time-honored privilege of occasionally saying, "I am sorry; I do not make the law, I merely tell you what the legislature says, and in this case they just do not make sense." All of us have fled to this refuge at one time or another. But this is an answer that counsel should use sparingly. Used too often, it looks bad to the outsider. More than that, it is not necessary if a proper foundation of legislative research underlies the statute in question.

Building a Legislative History

Building legislative history into the record of a statute is the key to subsequent interpretation of the law. This is not a responsibility that counsel can rely on the legislative committees or the State's legislative reference service to assume. It is true that these bodies are the sources of valuable extrinsic aids to statutory construction, but more often than not their products fall short of what is needed later to develop administrative doctrine for the law. Often legislative reference services have time only to draft bills, and committees can do no more than record their votes on the bills they consider. If counsel for the highway department cannot rely on these sources to explain legislative intent, he must turn elsewhere.

The debates of the legislative assembly may offer aid since they are more thoroughly reported and pre-

served in permanent records. Here, statements of sponsors of highway bills or legislative leaders who manage these bills in debate can serve as an authoritative explanation of the intent and meaning of various key provisions.

But none of these devices is likely to be volunteered by legislators. They know (or think they know) what the bill before them says and how it will accomplish its purpose. This is enough for them. It is up to counsel for highway department to look out for his own future needs. This he can often do by preparing statements of the probable administrative interpretation of the provisions of the bill, and arranging with legislative leaders to see that they become part of the permanent record of the debate.[8] Sometimes a prearranged series of questions and answers by legislators during debate will serve the same purpose if it is faithfully reported in the permanent record of the assembly.[9] Such explanatory statements, planted in the record of the legislative proceedings, may ultimately grow into valuable aids for interpretation. And they can be arranged easily and naturally by the counsel that enjoys good day-to-day liaison with legislative leaders.

Reference Points Outside the Statute

What are counsel's other resources for the interpretation of legislation? One, which has grown to significance in modern times, arises from the increasing use of the delegation of power as a technique of legislation.

Like many other fields of activity, highway programs have become so vast, so varied, and so technical that no legislative body attempts to specify all of the necessary details in statutory form. Large areas of authority are delegated to highway administrators, and statutes attempt to control the exercise of administrative discretion by setting forth standards. The Federal-Aid Highway Acts provide numerous examples of this: geometric design standards[10], apportionment of funds[11], contracting practices[12], and roadside advertising[13]. These provisions direct counsel to sources outside the language of the statute to fill in the details of its

[8] Administrative interpretations have, of course, been referred to by courts in the construction of statutory language; see U.S. v. American Trucking Assns, Inc., 310 U S. 534 (1940); Motor Carrier Act; Dobson v. Commissioner of Internal Revenue, 320 U.S. 489 (1943), taxation; Mayes v. Paul Jones & Co., 270 Fed. 121 (1921), taxation. Also, generally: Nathanson, N., "Administrative Discretion in the Interpretation of Statutes." 3 Vand. L. Rev. 470 (1950); Note, "Weight to Be Given Administrative Construction of State Statutes." 36 Minn. L. Rev. 100 (1951); Notes, 39 Geo. L. J 244 (1951) and 33 Iowa L. Rev. 544 (1948).

[9] Illustrations of this are, of course too familiar to expand here. The writer's favorite incident occurred in the debates of the U.S. Senate on an agricultural bill. The day following the vote that approved this bill its sponsor inserted in the record a statement regarding a question asked by another Senator in the previous day's debate. The matter involved a technical point which the sponsor had not been able to answer. His subsequent statement assured the questioner that following the vote he had telephoned the Department of Agriculture and been told that the language of the bill would be interpreted in a certain way. This apparently cleared up the meaning of the language the Senate had approved the previous day.

[10] Title 23, U.S. Code, "Highways" §109, (b), "The geometric and construction standards to be adopted for the Interstate System shall be those approved by the Secretary [of Commerce] in cooperation with the state highway departments. Such standards shall be adequate to accommodate the types and volumes of traffic forecast for the year 1975."

[11] *Ibid.*, §104, providing apportionment according to highway construction needs as determined by a series of studies and reevaluations of construction progress over a 13-year period.

[12] *Ibid.*, §112, (a), "In all cases where construction is to be performed by the state highway department or under its supervision, a request for submission of bids shall be made by advertisement *unless some other method is approved by the Secretary*" [italics added]; and §113, insuring that labor employed by contractors or subcontractors on Interstate System projects shall receive "wages at rates not less than those prevailing on the same type of work in the immediate locality as determined by the Secretary of Labor. . . ."

[13] *Ibid.*, §131, referring to the national standards to be promulgated by the Secretary of Commerce.

meaning. And, he may find that these directions lead him ultimately to sources outside the official family of governmental agencies. For example, the geometric design and construction standards involved in the Federal-aid act just mentioned actually turn out to be those formulated by the American Association of State Highway Officials in consultation with the U.S. Bureau of Public Roads Thus counsel's legislative research may be aided by an excellent series of explanatory statements contained in the official policy pamphlets of AASHO, and indirectly by the discussions of these matters in the meetings of AASHO and its committees.

Examples of this type of extrinsic aid could be multiplied[14], but enough has been said to make the point that counsel has certain reference points outside the statute as well as within its four corners, and that these must be relied on by him in the interpretive process just as they were relied on by the legislature in the process of formulation.

Counsel must, of course, be wary of certain constitutional pitfalls which threaten the use of outside references in the delegation of standards. In theory, legislative power cannot lawfully be delegated to others. In practice, however, the courts have treated the various possible situations with caution. Where a public official is independently responsible for final promulgation of standards or regulations, the fact that these standards may have been prepared originally by outside groups generally will not invalidate the law.[15] But the character of the regulation is also important. In the regulation of economic relationships between private parties the courts seem more sensitive about the use of the non-governmental origin of standards than where public health and safety or engineering techniques are involved.[16] Other pitfalls may be present in prospective adoption of standards as they may be amended or added to in the future. These, however, are beyond the scope of the present discussion, and, in addition, may be considered as the penalty of inadequate review and liaison with the legislature during the laws formative period.

The Common Law of Legislation

One other source of aid to counsel in his role as interpreter of the law should be mentioned. This has been described by the late Professor Frank Horack (who was one of the pioneers in bringing the study of legislation into the law schools) as the "common law" of legislation. He has commented:

> The function of precedent in judge-made law has been discussed elaborately; its similar function in legislation has been ignored. Nevertheless, legislation, like judge-made law, follows precedent. Save for formal differences of structure, legislation and adjudication spring from similar patterns of human conduct. . . . [The] law of statutory precedents must be looked for, not in the courts, but in the legislative acts. . . .
>
> Statutory precedent grows as case-precedent grows. First, someone bolder than the rest marks a new course. If the course appears satisfactory, others follow. Legal science calls this the doctrine of *stare decisis*. The legislative process is similar.[17]

The significance of this trait in our legislative behavior should not be overlooked by highway counsel. In their field this process has been stimulated by the fact that the Federal-aid program is based on a premise of adherence to uniform minimum

[14] Some other fields may also be cited. For example, the Uniform Vehicle Code, which is widely used as a model for State traffic and motor vehicle equipment laws, adopts standards of such groups as the Society of Automotive Engineers, American Association of State Highway Officials, National Commission on Safety Education, Interstate Commerce Commission, and Bureau of Explosives.

[15] 1 SUTHERLAND STATUTORY CONSTRUCTION (3d ed.), §S309 and citations: 1954 Wis. L. Rev. 500.

[16] In this respect the shadow of Schecter v. U.S., 295 U.S. 495 (1935), and the NRA industry codes of fair conduct may still be seen.

[17] Horack, F. E., Jr., "The Common Law of Legislation." 23 Iowa L. Rev. 41, 42 (1937).

standards, and that in regard to certain aspects of the program, such as control of access, model laws have been drafted for guidance in preparing State legislation.[18] State laws governing construction of highways show some remarkably clear lines of common ancestry. There is no reason why this fact should not be made to work for achieving similar interpretation of their terms by the courts.[19]

Tools of Interpretation

From the fruits of legislative research counsel can assemble a sizeable kit of tools for the interpretation of statutes. Within his easy reach he may have a detailed annotation of his own State's highway laws and the pertinent Federal laws and regulations that are related to highways.

Hopefully this annotation would include references to the origin of the legislation, and, section-by-section, references to cases, Attorney General's opinions, his own opinions to the highway administrator, pertinent administrative rulings and proceedings under the law, and technical manuals or similar documents used by engineers and administrative officers. Hopefully, also, this source book would include some reference to pertinent writings in the fields of engineering, planning, economics, and law which bear on the subject of the statute. It will not be going beyond his calling for counsel to include such non-legal references in his index or annotation; nor will he find that it is only used in the preparation of an occasional "Brandeis Brief" in an unusual appellate case. He will find that this material, combined with sound research of the law, is the material that makes his opinions not only correct but persuasive to the reader.

In this brief review of the tools of legislative interpretation, passing reference should also be made to the writings on highway law which appear in legal periodical literature. The law reviews have an established place among the sources of information recognized and used by the courts. Some have literally changed the course of legal history by their influence on the bench.[20] In the field of highway law, several may be cited (because of their repeated appearance in judicial opinions) as having made a significant contribution to the development of current judicial acceptance of the controlled-access highway principle.[21] Significantly the writings on access control that have appeared in legal periodicals have come almost entirely from counsel for State highway departments. This is a good thing insofar as it indicates the active interest of highway counsel in building legal doctrine on the problems that press them most urgently. One might wish, however, that more recruits could be persuaded

[18] For example, "Model Controlled-Access Highway Act," in LEVIN, D. R., PUBLIC CONTROL OF HIGHWAY ACCESS AND ROADSIDE DEVELOPMENT, Public Roads Administration, 1947.

[19] Pertinent to this is the further comment of Professor Horack: "The significant point is that in adopting these statutes legislatures have followed a system remarkably similar to that of judicial precedent. It may be objected that the legislature, not having to explain its result, need not feel bound by the statutes of other states. This is, indeed, true. But the statute tells but half the story. If the committee reports, the hearings, and the debates accompanied every statute, the procedure would be apparent. Important present-day legislation is no longer of 'wild and sporadic growth'. Scientific legislative services have made great strides, national associations follow proposed state and federal legislation with careful scrutiny, and the conflicting interests represented in every committee room make it as dangerous for proponent or committee-man to be unfamiliar with existing legislation as it is for judge or counsel to argue without 'authorities'." ("The Common Law of Legislation." 23 Iowa L. Rev. 41, 44 (1937).

[20] For example, Erie v. Tompkins, 304 U.S. 64 (1938), reversing the doctrine of Swift v. Tyson, 16 Pet. (U.S.) 1 (1842), in which the court frankly acknowledged a law review article as the persuasive factor in showing the error of this 96-year old rule.

[21] For example, the Note in 3 Stan L. Rev. 298 (1951); Cunnyngham, W., "The Limited Access Highway from a Lawyer's Viewpoint." 13 Mo. L. Rev. 19 (1948); Duhaime, W. E., "Limiting Access to Highways." 33 Ore. L. Rev. 16 (1953); Bowie, "Limiting Highway Access." 4 Md. L. Rev. 219 (1940).

to work on highway law research for there are more than enough problems to go round.

In this connection reference should be made to the series of highway law studies begun in 1957 by the Highway Research Board and the Bureau of Public Roads. A score of monographs have been published in the last five years as a result of this program, and their value as references on the comparative law of the States has been demonstrated in their continued use.

A catalog of the highway lawyer's tools for interpretation of the law could be continued at length, but enough has already been said to suggest the possibilities that exist. Essentially the point here is an old and familiar one: "With characteristic hardheadedness Chief Justice Marshall struck at the core of the matter with the observation [that] 'where the mind labours to discover the design of the legislators, it seizes everything from which aid can be derived.' "[22]

STATUTORY REVISION

The third role of highway counsel that should be noted concerns his responsibilities when highway laws must be revised. The mechanics of law revision are discussed in some detail at a later session of this workshop, and by speakers more competent and experienced than I am. It may, however, be useful at this time to look briefly at some of the underlying elements of a law revision project and thus establish a measure of perspective for the discussion of mechanics.

Aim of Revisor

When one is first asked to take charge of or assist in the revision of a body of law, his natural response is likely to be, "Why? We've been getting along fairly well with what we have." It is, of course, true that a "muddling through" process can go on for many years. But the process of piecemeal amendments and the addition of successive layers of law becomes increasingly costly. As long ago as 1923 the establishment of the American Law Institute marked a recognition of the unwisdom in continuing without a systematic program for re-examination and revision of the law in the light of changing times. At this time it was said:

> The two chief defects in American law are its uncertainty and its complexity. These defects cause useless litigation, prevent resort to the courts to enforce just rights, make it often impossible to advise persons of their rights, and when litigation is begun, create delay and expense.
>
> When the law is doubtful most persons are inclined to adopt the view most favorable to their own interests; and many are willing if necessary to test the matter in court while those willing to overreach their neighbors are encouraged to delay performing their obligations until some court has passed on all the novel legal theories which skilled ingenuity can invent to show they need not be performed . . . .
>
> The same bad effects, though in a less degree, result from the law's complexity. . . . [Complex] law tends to make the administration of justice a game in which knowledge and skill are more important for obtaining victory than a just cause.[23]

In addition to seeking simplifications and greater clarity, revision of the statute law provides an opportunity for systematic changes in substance. So the courts have said:

> The object of a revision of the statutes is that there may be such changes made in them as the changes in political and social matters may demand . . .[24]

All this, however, is apt to sound too general to the layman or the legislator. The case for highway law revision can be put in much sharper focus, as Louis Morony, of the Auto-

[22] Frankfurter, F., "Some Reflections on the Reading of Statutes." 47 Colum. L. Rev. 527 (1947), quoting Marshall's remark in U.S. v. Fisher, 2 Cranch (U.S.) 358, 386 (1805).

[23] American Law Institute, PROC., v. 1, p. 6-11 (1923).

[24] *In re* Hall, 50 Conn. 131 (1882).

motive Safety Foundation, has stated it:

> Well before the enactment of the Federal-Aid Highway Act of 1956, many states were hampered by outmoded statutory provisions which did not grant the highway departments the authority to construct and improve the highways in accordance with the demands of modern traffic. When the pressure of the accelerated Federal-aid construction program arose, many legal problems that had often been considered the merest nuisance suddenly assumed the proportions of major legal barriers to a proper implementation of the highway improvement program. This was true not only in projecting long-range plans and projects but also in attempts to reorganize for more efficient operation.[35]

And, with equally keen insight, Commissioner of Public Roads MacDonald as long ago as 1949 warned:

> The tempo of growth in highway service demands has been so rapid that legislation is lagging far behind both in range and content. Highway officials, no matter how well qualified, may act only within the legal authority delegated by legislative action. The deficiency of first magnitude is legislative sanction to the state highway departments to reorganize to meet new duties, to use new methods, to extend their operations to new fields ....[36]

Thus the broad objectives of highway law revision may be listed as clarification, simplification and modernization. And within the scope of each of these broad objectives the law revisor must be prepared to pinpoint in detail the specific aspects which administrative and operating experience shows are in need of attention. Identification of problems, followed by analysis and comparison of the alternative solutions, will be necessary before any recommendations for statutory change may be made.

This formulation of aims will obviously call for legislative research oriented to the particular situation of the State involved. There is no nationally recommended model highway code being offered as a device for achieving uniform legislation in all States. Probably there is not the need for nationwide uniformity here as there is in connection with commercial transactions, motor vehicle travel, and similar activities which have grown up as part of the great and easy mobility of American society.

But if the aim of the law revisor is not to achieve uniformity for its own sake, it should at least be to promote the widest possible adoption of those concepts and procedures which have demonstrated themselves to be best. Wholly aside from the question of whether there should or should not be a system of uniform highway laws for the States, the law revisor should ask: Does the language of my State's law reflect the best that a careful legislative draftsman can do? Do the procedures called for by my State laws reflect the best possible accommodation of administrative needs with liberty and property? Do these procedures offer the best organization of authority among State, county and municipal agencies that is possible under the political structure of the State? As these inescapable questions are faced, it will make eminently good sense to borrow from the laws and experience of other States where research shows that better answers have been found.

This should be the law revisor's aim, and he should be prepared to study his own State's past, present, and future in order to find his answers. Only the most general advice can be given to him in advance concerning the places he should concentrate. One of these areas which counsel should note has to do with the organization of authority and responsibility. This was stressed in the comments of both MacDonald and Morony quoted earlier. This may seem somewhat out of the customary scope of counsel's competence, but actually it is not. Throughout American history, lawyers have functioned as architects for the organization of legal power. They now have a chal-

[35] Morony, L. R., "The Legislative Responsibility for Future Highway Uses." 38 Neb. L. Rev. 525, 527 (1959).

[36] MacDonald, T. H., "The Inadequacies of Our Present Transportation Facilities." Conference, American Road Builders Association, Washington, D.C., Nov. 1949.

lenge to meet in the organization of highway administration and intergovernmental relations that is every bit as important as the ones that they successfully met in the 18th century when State governments were first organized or in the 19th century when their talents were turned to the problems of corporation law and organization.

Other areas in which the body of highway law is everywhere feeling the pains of growth are more readily accepted as within the scope of lawyers' competence. These involve the speed and efficiency with which legal processes can be made to function in order to give engineers and administrators sufficient "lead time" for their work. They also involve appropriate provision in the legal process to receive and use new types of evidence in valuation, new concepts of the balance of public and private interests in the use of police powers, and new forms of action to test issues that were unknown a century ago when our codes of procedures were established.

Resources of Law Revision

All this, merely to bring into focus the aims of a project of highway law revision, may sound like an impossible requirement. Where will the research resources be found to make a study so deep as this? Where are the resources that will permit the revisor to take the next step of evaluating the experience of other States and formulating recommendations for improvement of the law?

Some of the information he needs will have to be compiled by the revisor himself for it can be found only in his own State. He will have to look for it in the history of his State highway program; some will be in the collective wisdom of administrators, engineers, planners, and legislative leaders at local levels of government. The mechanical problem of how to secure the active interest and assistance of these people can be solved in a variety of ways, but the information and advice that these resources can give are essential.

Another resource which the revisor must have is a set of sound and acceptable legislative guides to use in his evaluation of the information he acquires through research. This has been notably lacking, and it still is an area where a massive amount of research should be done [27], but a start is being made toward the systematic study of highway laws and the relationship of the highway transportation system to the total economy.

A list of documents which might be regarded as basic resources for comparative study of State law or State and local law on selected aspects of highway law would include the Highway Research Board's series of special reports, commenced in 1957 and now numbering 15 so far published on highway law. These reports are the results of a systematic pro-

[27] As to this matter generally the following comment in a study of one State's laws is pertinent:

"Why is it that so many highway statutes have been 'poorly conceived'; that the law has failed to keep pace over the years with fiscal and engineering progress? . . . [T]wo basic factors are primarily responsible:

"First, a lack of coordination within the states among highway officials, and particularly between the highway engineer and the highway lawyer.

"Second, the lack of sound and acceptable legislative guides for the country as a whole.

"With reference to coordination, it is apparent that the proper inter-relationship does not exist. It is customary for engineering, administrative and fiscal programs to be carried forward to the point of submission to legislators with little or no consideration of the legal problems involved. Frequently, the lawyer finds himself in the position of a legislative draftsman, with no knowledge of the problems or objectives of the highway department. . . .

"[As to] the second basic deficiency—the lack of sound and acceptable legislative guides. There are many elements in highway law that are common to the powers and functions of highway administrators in all states. A study of the laws of the several states to determine the best principles and practices now in effect can form the basis for the development of legal standards that will best meet present and future needs." A STUDY OF THE STATE HIGHWAY LAWS OF NORTH DAKOTA, N. Dak. Legislative Research Committee, Bismarck, p. 8-10 (1953).

gram of research planned to collect and analyze the laws of the States on all the major phases of highway programs. At present this project is continuing.

Also, the U.S. Bureau of Public Roads has contributed several studies in which compilation and analysis of State laws on current major problems have appeared. Some that have been extremely significant are David Levin's studies *Public Control of Highway Access and Roadside Development* (1947) and *Legal Aspects of Access Control* (1945). Others which have most recently been published and promise to be of importance are Sidney Goldstein's study of *The Use of Economic Evidence in Condemnation Cases,*[28] and the studies by Stanhagen and Mullins of *Highway Transportation Criteria in Zoning Law* and *Police Power and Planning Controls for Arterial Streets.*

Others which should be mentioned are the American Automobile Association's *Parking Manual,* the reports of the National Highway User's Conference, the monographs on city ordinances by the National Institute of Municipal Law Officers, and the publications of the Automotive Safety Foundation which has consulted closely with numerous States on law revision projects.

As these research resources continue to grow, and as new ones are added to the list, the law revisor's feeling of loneliness will be eased. He will be able to respond more quickly and more confidently to the question, "What is the law in the rest of the States on this point?" His "revisor's notes" for his own State's code will, in turn, become part of the growing body of collected and analyzed research, and will be of aid to others elsewhere.

[28] Originally prepared as a paper for the 1962 meeting of the Highway Research Board, a shorter version has been published in 50 Geo. L. J. 205 (1961).

SUMMARY

In many respects this approach to legislation and legislative research is like Red Skelton's definition of an "adult western movie." An adult western is a western movie with a plot that is over 21 years old. So it is with legislation. As highway counsel faces each new biennial session he prepares himself for a series of variations on a theme he has heard before. In the preparation and enactment of legislation his ancient enemies are procrastination, pressure, and perfunctory understanding. In the interpretation of laws his harassment comes from inconsistency, inadequacy of the legislative history, and insufficient coordination of practice and precept. In the revision of the law he must overcome the handicaps of too late a start, too little liaison, and the tremendous loneliness of sifting and weighing the merits of a mass of laws.

If the foregoing comments have not been able to alter or improve on this theme (and it is difficult to alter the nature of the legislative process that much), at least they may help suggest some ways to make it more harmonious.

Essentially all of this has concerned the process of decision-making in a context that has become immensely complex in the past score of years. If the highway lawyer would help himself, he may find he can do it only by helping others—the legislator, the administrator, the planner, and the engineer. As he does a better job in establishing and maintaining an informal liaison with these other professionals he may well discover that their decision-making becomes easier and surer. Legislative and administrative decisions depend for their soundness on information thoroughly collected and carefully analyzed. Highway counsel must provide this on a scale greater than ever before.

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 compensattion 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.

[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.

Trial Aids in Condemnation Cases

LEONARD I. LINDAS, *Chief Counsel, Oregon State Highway Commission*

• Experience has taught me that if the average condemnation jury really comprehends the problem that has been placed before them for solution, they will, in the vast majority of cases, arrive at the right answer. We may not like the answer, but sober reflection generally convinces it was the right one.

Adverse and inexplicable verdicts usually stem from the failure of one litigant or the other to present their side of the problem in a simplified, clear and illustrative manner. All of you are quite well aware that the ordinary condemnation action is simply a value finding affair. Questions involving necessity, public use, negotiations and the like are most often waived, or if contested, are heard only by the judge. Many times the proponents are only half-hearted in their efforts. The landowner wants his money, which is usually an amount considerably above what the State has offered. The attorney wants his fee. The judge wants to get rid of the case. The plausible and logical reason one judge advanced was that he wanted to go fishing. In another case, the judge wanted to see the season's opening ball game.

In this value finding affair, the condemning authority generally presents as witnesses, an engineer and one or two appraisers. The owner comes fortified with his own ideas of value, together with those of his appraisers, and in some instances, those of his neighbors. A map depicting the larger tract and the taking is ordinarily introduced into evidence, supplemented by photographs of the property involved. On occasion, construction plans find their way into court. The appraisers on both sides, together with the owner, testify as to their opinions of value, after which are arguments by counsel and jury instructions. We find that this comprises the normal efforts of counsel in the presentation of evidence and their use of trial aids to sway a jury into finding that the amount of just compensation is the amount their client has alleged to be the proper sum.

When the time comes for the jury to deliberate, they find they are to be aided in this by a map, some photographs, the usual wide variation of opinions concerning the value of the property upon which they are to place a price tag, and, in some instances, a set of construction plans which completely befuddle the lay mind. Add to this the spontaneous and turbulent burst of oratory by counsel and you can well understand the predicament in which the jurors find themselves.

Juries most often reflect a cross-section of the citizenry of the county in which they reside. Most prospective jurors with a high degree of business sense, intellectual and political stature have already talked their way out of serving, so what we have left can be denominated the rank and file.

In the individual case, the voir dire examination consists of the efforts of one side or the other further to eliminate from the panel anyone who has the faintest idea or knowledge of appraising, real estate values, or related matters. Frequently, therefore, you have to deal with a jury absolutely unacquainted with the subject with which they have to deal. It is vitally important then that the picture you paint for them is clear and concise, and that the evidence presented and the trial aids employed are understandable and helpful.

Particularly must the witnesses

speak the language of the multitude. I am quite convinced that engineering jargon completely escapes a jury's awareness. You talk about Lambert projections, and PI's, and PI's on an L line, and mass diagrams, and topographic photogrammetric series and that sort of thing, and they are lost. And then in the field of appraising, reference to market data, severance, capitalization rates, and functional obsolescence, and diminishing returns further adds to the confusion of the jury.

In Oregon, either before or after opening statements, the jury views the property involved. For the most part they do not spend more than 30 minutes doing this in the ordinary case. We, of course, expect them to remember everything they observed.

They then hear value testimony, which is conflicting to say the least. This from appraisers, all of whom have a good background and reputation in the field of appraising. They find this testimony replete with phrases and explanations which are most often confusing and foreign to them. Following this is counsel's argument, which normally tends to muddy the waters somewhat.

Assuming the average condemnation jury trial takes two days to present, we expect the jury in this short space of time, with no special training or background, to absorb and comprehend the testimony before them. We expect them, during the trial which has lasted 10 to 12 actual hours, to understand and resolve the differences of opinions as to value. We expect them to grasp and understand the court's instructions, given in a period of 30 to 45 minutes, and then determine the right answer to the problem before them. The least we can do to help them is to develop and present trial aids which have the effect of clearing away the fog of conflicting facts and testimony.

There is beauty in simplicity. The simple explanation is easily grasped. The unadorned recital of facts and opinion make sense to the untrained. I am, therefore, persuaded that every case of this type must be reduced to the lowest common denominator, that the truth may be found. In endeavoring to do this, our trial staff has found there are many aids to which they can resort and bring before a jury which will be of valuable assistance to them in arriving at a proper verdict.

In the course of the past few years we have used maps, photos, motion pictures, aerials, models, hydrographs, artist conceptions, precipitation charts and engineering type overlays to mention several, in the trial of our cases. We have even resorted to liberally sprinkling trial briefs with illustrative photos and charts. This, we feel, has more than paid dividends in the greater majority of cases. As one example, we have found that during our coastal wet rainy season nothing looks too good. One of the most horrible of spectacles is the partially excavated roadbed with goo and muck everywhere. Try as you will, your ability at oral persuasion can never quite paint a picture of what the finished product will look like. The demoralizing effects of mud, rain, rocks, and unfinished cuts and fills are never quite erased from the minds of a jury.

Our efforts to overcome this troublesome handicap are through the use of models or an artist's conception of the finished product. The models are easily introduced into evidence. The artist's drawing has given us trouble.

DESCRIPTIVE BRIEFS

While juries do not see the briefs that are filed in a condemnation case, judges do, and it is important that counsel use every device he has to increase the impact that his brief and argument have upon the court. Recently our attorneys in Oregon prepared what I think is a particularly interesting brief that used more than merely the printed word and the mental image to tell their story.

This brief was prepared to support a demurrer to dismiss an inverse condemnation action brought by a landowner who claimed that the highway

commission had taken his access rights. The setting of the case was as follows: The plaintiff owned a corner lot at the intersection of an arterial highway and a secondary crossroad. A number of years ago the highway commission improved the arterial highway, made it a four-lane divided highway, and acquired the access rights along the right-of-way. The landowner still had access at grade to the secondary road, about 250 feet from its intersection with the arterial. He prospered under this arrangement, and built a shopping center on this corner. Later, however, the traffic count rose to the point that the highway commission was compelled to redesign the intersection. This resulted in barricading the secondary road at its intersection with the expressway, and constructing a new set of entry and exit ramps, including an overcrossing of the expressway by the secondary road.

The landowner claimed that this improvement left him on a cul-de-sac with his access rights impaired. This raised the issue of whether, in this suburban area, the rule originated by *Bacich v. Board of Control*[1] in California should apply. If it did, the highway commission had to compensate for access impairment. We argued that the rule did not apply.

To make our argument easier to visualize we made liberal use of photographs and diagrams. On page 2 of the brief we started out with before-and-after aerial photographs of the situation on the ground, giving an over-all view of the access that this property had in relation to all other streets and highways in the vicinity. We cited and argued all the other cul-de-sac cases we could find, including for each one that needed it a diagram of the situation on the ground. We had 24 line drawings scattered throughout the brief. Obviously we had to deal with and distinguish the Bacich case, and we spent almost a month searching for a set of before-and-after photographs of this case. Our friends in the California Department of Public Works finally found a set and we included it. When it came to comparing the physical features of construction and access situation of our case with another Oregon case we worked out a table to show the main features of these two situations in parallel columns. Thus, point by point, for each of 14 types of traffic movements in and out of the property to the adjacent streets, we set out the analogy that existed between the before-and-after situations of these two cases.

When we were finished we thought we had a fine brief. It was comprehensive, easy to follow, and, with this illustrative material, easy to grasp the situations we talked about. The only trouble was that the trial judge did not believe it and ruled against us. When the case was eventually tried on its merits, however, the jury held in our favor and did not allow the landowner a cent.

TABLE MODELS OF CONSTRUCTION PROJECTS

Naturally we felt good about this result that we got when the case was tried before a jury. And we think that the tabletop models we used in the trial went a long way in convincing the jury that the landowner was not actually damaged as he claimed. After we introduced this model into evidence we kept it on display before the jury in the courtroom, referring to it at various times during the testimony to support our theory that there was no destruction of access but merely a diversion of traffic and circuity of travel, and that the plaintiff was in the same position as anyone else using this secondary road.

This particular model, and the others that we have used from time to time, were constructed by professional pattern makers. The Oregon highway department employs three full-time pattern makers to work with its engineers. They start making one of these models by laying a set of the construction plans on a sheet of plywood, and then build up the terrain and structures right on

[1] 23 Cal.2d 343, 144 P.2d 818 (1943).

the plans themselves. Balsa wood is usually the material used for this work since it can easily be shaped and painted, and it is inexpensive. This particular model (Fig. 1) is built to a scale of 1 inch for each 30 feet, and is sufficient to allow the jury to see the features clearly. The entire model is portable, and can easily be packed and shipped.

As to the problems that have to be anticipated when a model such as this is offered into evidence, counsel for the landowner is almost certain to object, because he does not want the jury to sit and look at anything as nice as this during the trial. When this model (Fig. 1) was offered there was objection, but the judge overruled it. When there is an objection we take the same position that Wigmore has on this point:

> It would be folly to deny ourselves on the witness-stand those effective media of communication commonly employed at other times as a superior substitute for words. If a simple line plan of a house is more satisfactory than a mass of alphabetical letters arranged in words, as a mode of communicating the relative position of the house-rooms as observed by us, then this method of communication is equally proper to be resorted to in a witness' communication to a jury.[2]

But, as Wigmore points out, there are certain precautions that should be taken to qualify this form of nontestimonial evidence for admission.

> The use of maps, models, diagrams and photographs as testimony to the objects represented rests fundamentally on the theory that they are the pictorial communication of a qualified witness who uses this method of communication instead of or in addition to some other method. It follows, then, that the map or photograph must first, to be admissible, be *made a part of some qualified person's testimony.* Some one must stand forth as a qualified sponsor; in other words, it *must be verified.*
>
> There is nothing anomolous or exceptional in this requirement of verification; it is simply the exaction of those testimonial qualities which are required equally for all witnesses; the application merely takes a different form. A witness must have had observation of the data in question, must recollect his observations, and must have correctly expressed his observations and recollection. . . . [I]n brief, it must appear that there is a *witness who has competent knowledge,* and that the picture [or model] is *affirmed by him* to represent it.[3]

Accordingly when we offer one of our models we first have our engineer identify a set of the plans for the project and qualify it as a fair and accurate representation. Then we follow with the pattern maker who identifies the plans, and he testifies that he made the model from the plans and that it is a fair and accurate representation of the plans. Thus we have a basis for saying that the model shows how the plans call for the highway and the property in question to look after the construction is completed.

The pattern maker is, of course, subject to cross-examination, as is the engineer who identifies the plans, but the range of this cross-examination is limited to their qualifications and their verification of the evidence. The evidence itself—the model and the plans it is made from—takes the place of testimony as to the substance and features of the plan, and cross-examination on the credibility of these matters must be gone into at another time and with other witnesses.

So, in Oregon, we believe that use of tabletop models of highway construction projects can serve as a valuable aid to counsel in the trial of condemnation cases or in defending against claims of inverse condemnation. And we have found that their construction and use involves relatively little cost or additional effort in the preparation of the case.

MAPS AND DIAGRAMS

Of course, a table model is merely a more realistic, three-dimensional presentation of a map or diagram. Maps and diagrams may be received in evidence, and they are admissible on the same basis and for the same purposes as models. They must be relevant and relate to the oral testi-

[2] 3 WIGMORE, EVIDENCE, §790.

[3] *Ibid.*, §793.

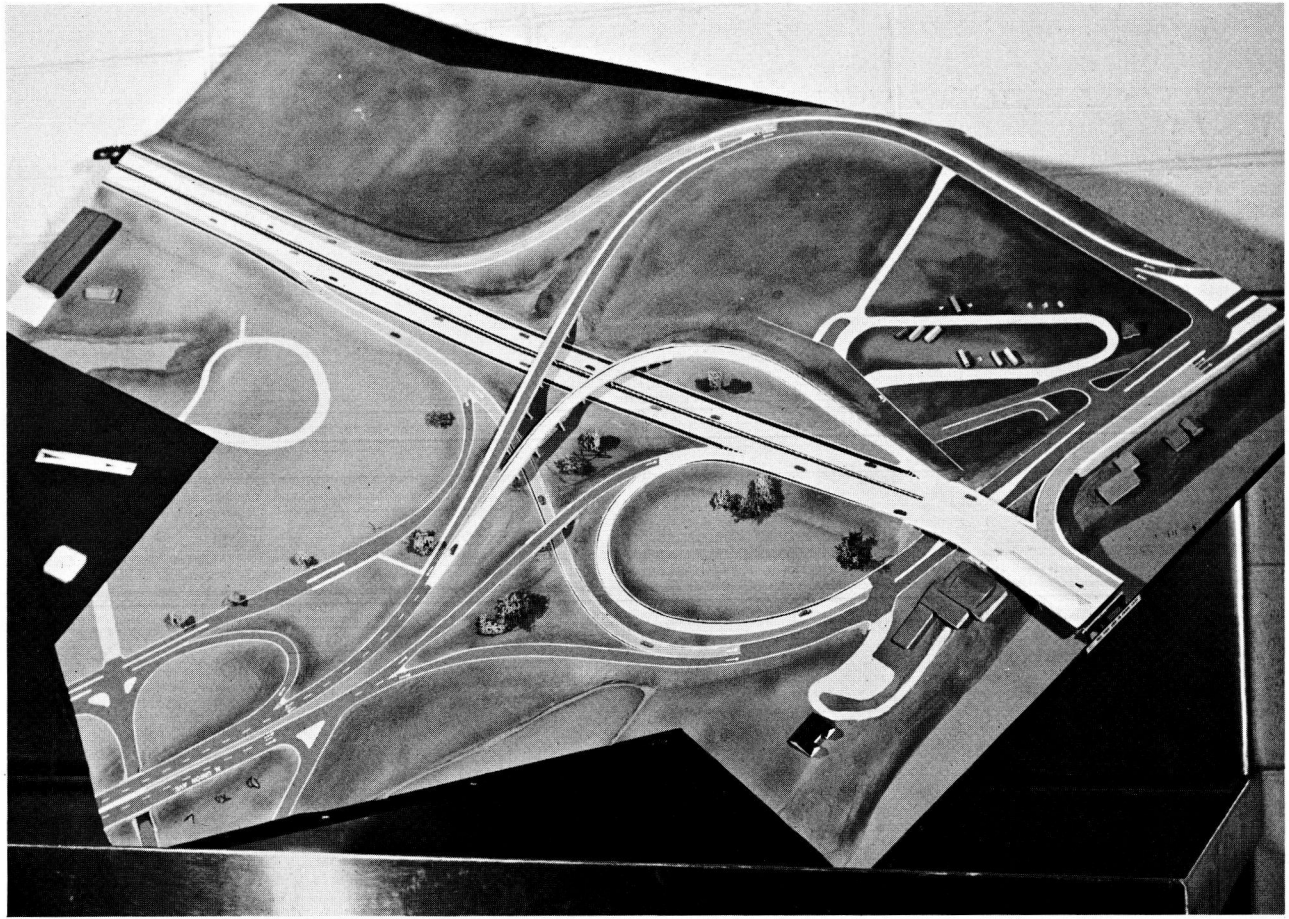


Figure 1. Tabletop model of highway improvement showing access to adjacent land after reconstruction of an interchange. Model used in *Village Shops, Inc. v. State Highway Commission*, No. 22, 162, Cir. Ct. of Washington County, Ore., 1961. Plaintiff's land and barricaded road in upper right-hand corner.

mony that has or will be given by witnesses.[4] They must be verified by the maker or come within the accepted category of public records or reports. And any markings, legends or extraneous matter on the map must be explained.

It has been our experience that once these matters are disposed of, opposing counsel is generally willing to stipulate the map or diagram into evidence.

The usefulness of maps and diagrams is greatly enhanced when they are either specially marked or specially drawn to show particular aspects of the case. For example, the traffic-flow pattern of an interchange is always a difficult thing to present by oral testimony, so we often use diagrams prepared from the engineering maps. Similarly, the physical relationship of the property in question to an adjacent interchange can be presented much more effectively when oral testimony is supplemented by map or diagram.

Illustrations of the type of diagrams we have used are shown in Figures 2 and 3. These both relate to the same case which involved the partial taking of a farm for construc-

[4] Department of Public Works v. Chicago Title & Trust Co., 408 Ill. 41, 95 N.E 2d 903, *cert. denied* 341 U.S. 931 (1950); Iowa Development Co. v. Iowa State Highway Commission, 252 Iowa 978, 108 N.W.2d 487 (1961); Loumparoff v. Housing Authority, 261 S.W.2d 224 (Tex. Civ. App, 1953).

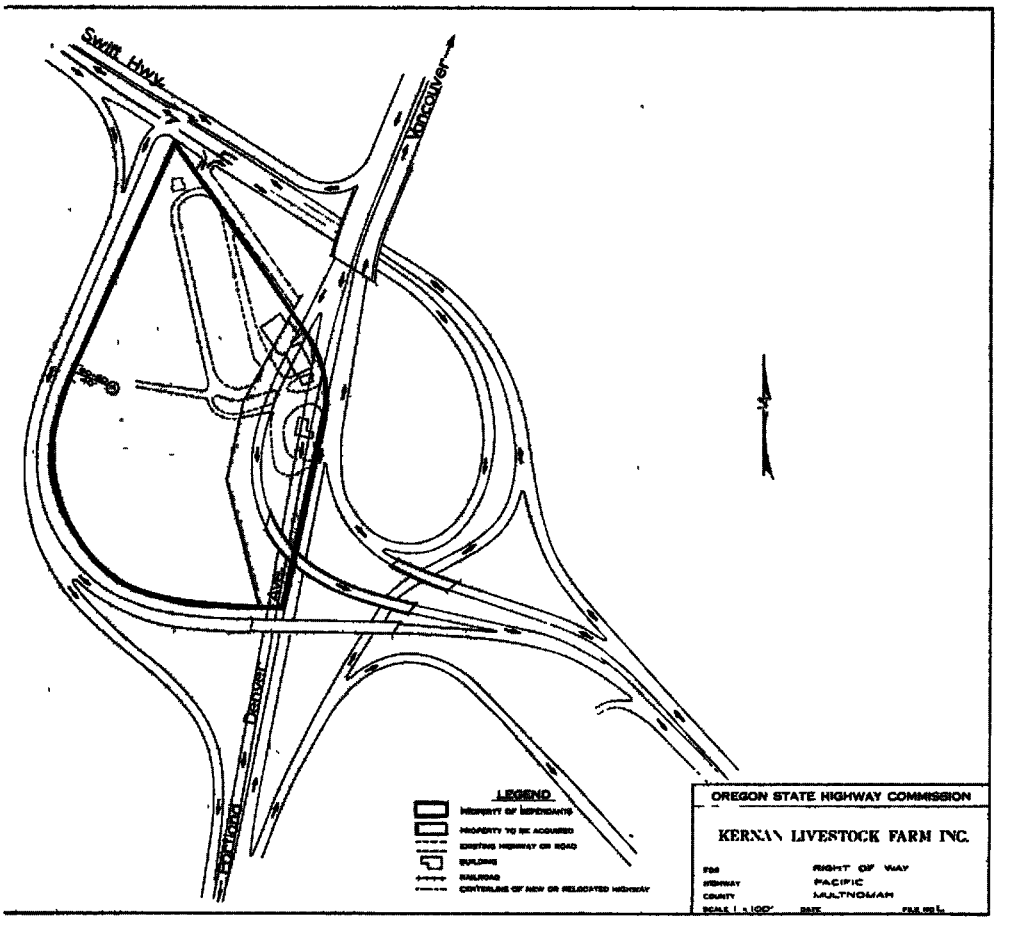


Figure 2. Map of Kernan Livestock Farm, Inc. (bright colors used to mark areas in original).

tion of an interchange. A simplified line drawing of the interchange was made from the engineering plans. On this diagram the traffic pattern was shown by arrows, and the property taken and remaining was outlined in contrasting colors. From this the jury was able to visually follow the oral testimony from the witness stand.

The coloring and redrawing of a map or diagram does not make it inadmissible so long as the basic design is not distorted, so, wherever possible, we use colors to aid in identifying the important parts of these drawings. And here an interesting aspect of psychology enters into the process. Figure 2 is a simple line drawing, black ink on white background, the property taken and the property remaining was outlined in bold, bright colors—red and green, respectively. In Figure 3, on the other hand, the colors were pale pastels, the property in question outlined in shades of green, and the interchange colored solidly a pale orange.

Assuming counsel for the other side is willing to stipulate a diagram of this type into evidence, which one would you select? Both present the same basic information, but notice the difference that color makes. Where the property in question is outlined in bold, bright colors, the extent of the taking is emphasized above everything else. If you use this

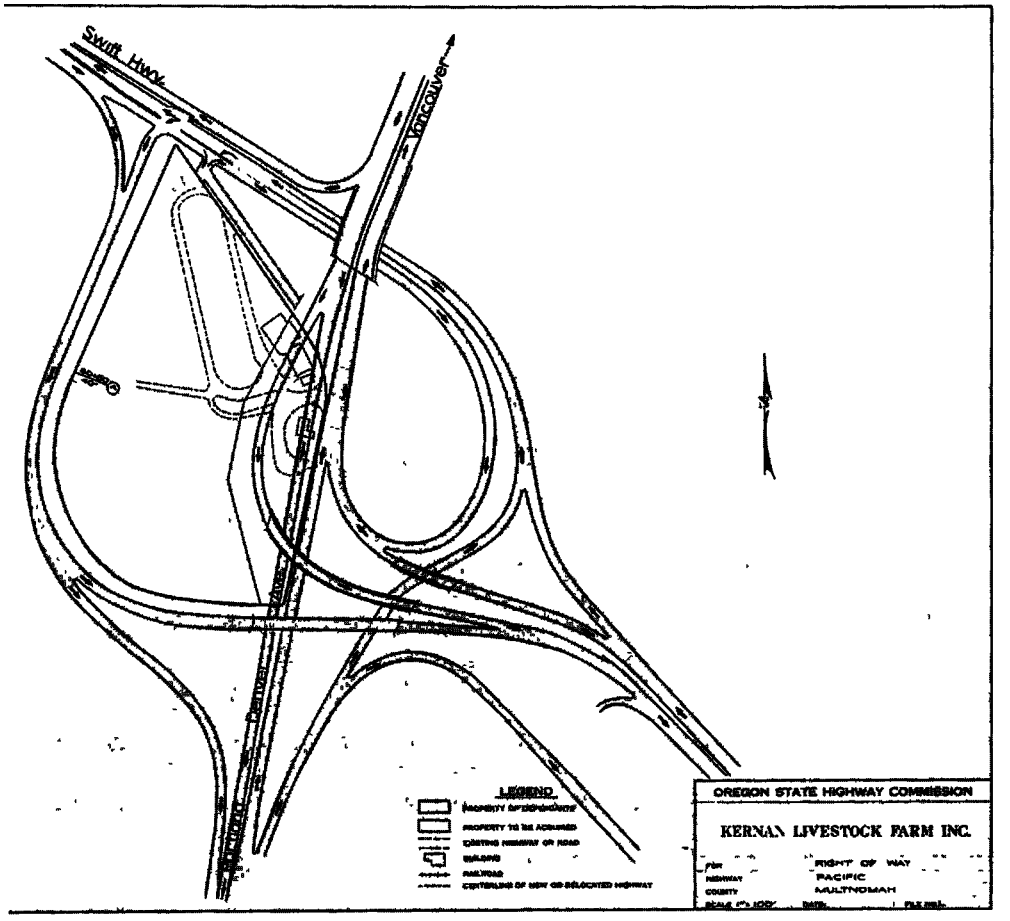


Figure 3. Map of Kernan Livestock Farm, Inc. (pastel colors used to mark areas in original).

one the jury will sit all through the trial with this foremost in their mind whenever they look at it. In contrast, the diagram using pastel colors emphasizes the features of the interchange and its pattern of traffic flow. The property in question is easily seen, but it is not the foremost feature. Subtly, perhaps, it appears that the contemplated relationship of the interchange and its adjacent land after completion of the project is a more natural one, and the extent of the taking does not appear so great as it does where the property outlines are in sharp contrast.

You may say that these are tricks that the eye plays on the mind, but they are, nevertheless, part of the psychological effect that this type of evidence has on the condemnation jury, and thus have to be considered by trial counsel.

Charts and diagrams can be very effective aids to making comparisons when overlays are used. In one recent case the City of Portland claimed that the Oregon State Highway Commission's plans and designs were responsible for injuries suffered by some municipally-owned property abutting the highway. It became desirable in this case for the jury to compare several sets of design plans that had been proposed for the project in question. This was done by drawing the series of plans on transparent sheets of plastic which were then attached as overlays to the basic map of the area. As each new proposal was explained in testimony, it was graphically displayed on the overlay and was easy to compare with previous proposals. No unusual problems were encountered in the admission of this evidence.

ENGINEERING PLANS

The construction and right-of-way plans drawn for the highway department are, of course, available to trial counsel. For some types of information these may be the best and preferable form in which to offer evidence. For others, however, they may not, and the disadvantage that militates against the use of engineering plans as exhibits may be chiefly psychological. Consider, for example, the problem that a condemnation jury would have in comprehending the situation presented in Figure 4. Consider, also, the difficulty trial counsel would have in eliciting from his witness a clear and simple explanation of this set of right-of-way plans. Consider, finally, the potential for confusion and distraction that these plans have if placed in evidence where a theatrically inclined attorney for the other side can use them as a target for cross-examination or argument.

Generally, therefore, we avoid using the actual construction or right-of-way plans to illustrate the structural or design features of a highway project. Simplified diagrams or maps derived from these plans are much easier for jurors to grasp, and, where these are not available, it is always possible to fall back on oral testimony of the engineers themselves. This last approach has its handicaps but they are not likely to be as dangerous as the use of an exhibit that only one or two people in the courtroom can understand.

ARTISTS' AND ARCHITECTS' SKETCHES

Sketches of highway construction or roadside features are an attractive alternative to oral testimony, but are not as easily introduced into evidence as are maps and diagrams. Whereas maps and diagrams are drawn from the precise data collected by surveyors working on the site of the project, artists' sketches are more likely to be open to the objection that they are merely a personal and speculative conception of what a completed improvement may look like.

An example of the problem presented to trial counsel in this respect is provided by the use of graphic material to show how a roadside will look after it has been lanscaped by the highway department. One type of document available to counsel is the landscape engineer's plot of the roadside. An example of such a plot is

shown as Figure 5. I am sure this is a fine plot for the landscape engineers, but I question whether many of the jurors we get in our condemnation cases would be enlightened very much by it. I do not know what *Cotoneaster Glaucophylla serotina* is and I am sure I could not explain it to a jury without the help of a botanist.

As between the landscape engineer's plot and an artist's sketch, there is no question but that the latter gives the jury a better picture of how a particular set of roadside plantings would look. Figure 6 shows such a sketch.

Figures 5 and 6 both relate to a case in which an issue arose regarding possible damage to a hospital because of noise, dust, and other annoyances resulting from proximity to the highway. Evidence of the highway department's proposed landscaping of the roadside was relevant to the question of whether the landscaping of the completed project would serve as an effective screen to eliminate or reduce this damage to the abutting land. There was, however, strenuous objection by counsel for the hospital to the use of this sketch. It was, he argued merely the artist's conception of a proposed plan and not a graphic expression of something already in being. Technically, of course, he was correct. The sketch is the artist's conception of something he has never seen. It does not, therefore, portray an actual situation that would appear the same to all observers. On the other hand, the sketch does support and illustrate the testimony of the landscape engineer, and as such should be admissible for what it may be worth. The judge may go either way in his ruling. Within my memory we have tried to get artists' sketches into evidence on two occasions in Oregon; once we succeeded, and once we did not.

PHOTOGRAPHS

I expect that most trial counsel make regular use of photographs to show the location and condition of property in condemnation cases. They are certainly not a novel form of evidence, and Wigmore has said:

> A photograph, like a map or diagram, is a witness' pictured impression of the data observed by his and therein communicated to the tribunal more accurately than by words. Its use for this purpose is sanctioned beyond question.[5]

Therefore, once the relevancy and materiality of a photograph is established, the chief problems of admissibility relate to the identification and authentication of the photograph.

Identity and authenticity are most easily shown by the testimony of the photographer who took the picture. His presence at the trial is not, however, essential. Anyone who is familiar with the scene shown is competent to say that it is a fair and accurate representation of the property in question. Similarly such witnesses can also deal with any question raised concerning the accuracy or fairness of the enlargement of the photograph for purposes of display in the courtroom.

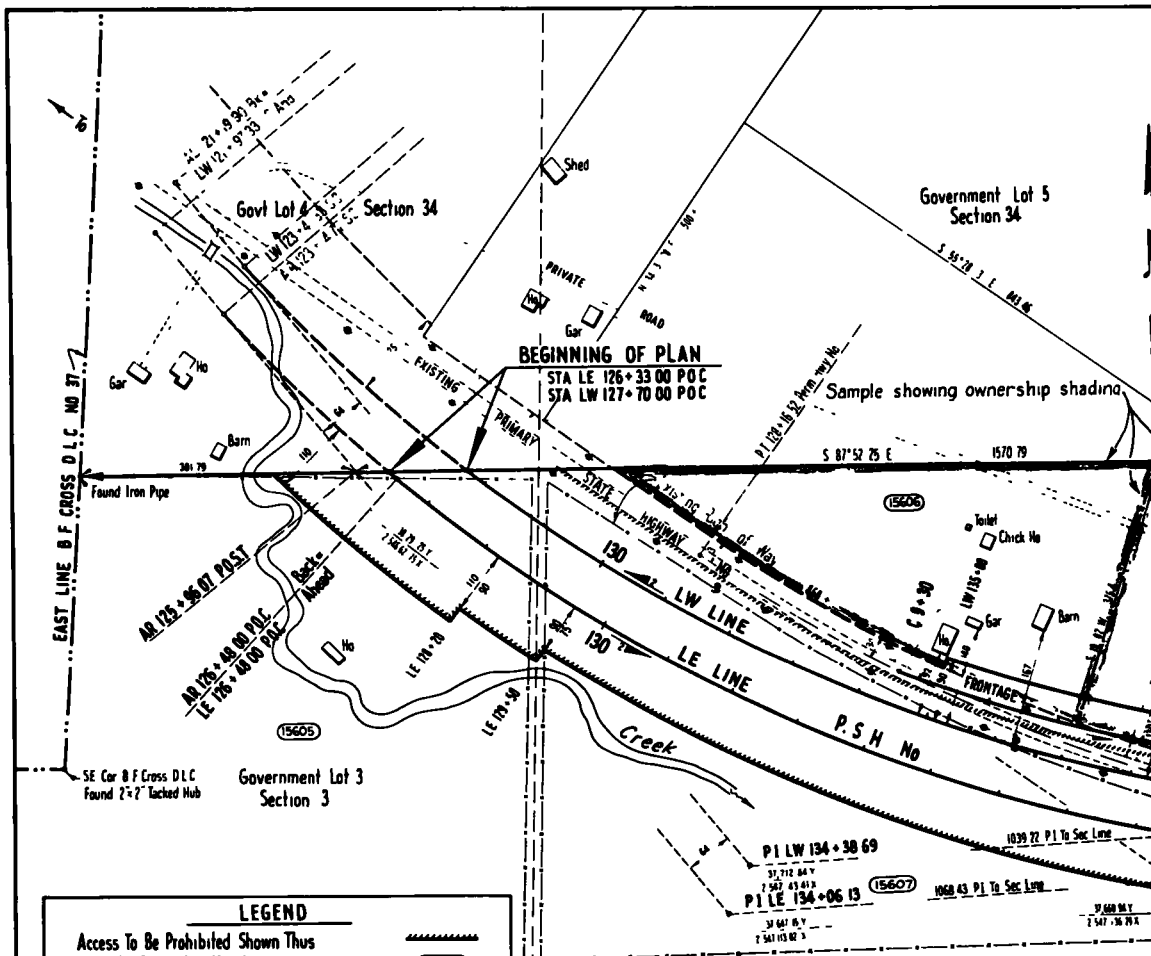
Since photographs are likely to be relied on to show changes in the condition of property, the time when the photograph was taken may be an important aspect of the foundation laid for admission of a picture.[6] The witness verifying the photograph should be familiar with the condition of the property or the highway at the time the photograph was taken, although he need not be familiar with changes that may have occurred subsequent to that time. These are rules based on common sense and form the basis of the rules on admissibility in most states.[7]

The uses of photographic evidence are equally familiar. Photographs of property and highway construction can be of great aid to witnesses testifying as to the before and after con-

[5] WIGMORE, EVIDENCE, §792.

[6] State *ex rel.* State Highway Commission v. Cone, 338 S.W.2d 22 (Mo. 1960).

[7] Department of Highway v. Williams, 317 S.W.2d 482 (Ky. 1958); Hance v. State Roads Commission, 221 Md. 164, 156 A.2d 644 (1959); Carney v. Mississippi State Highway Commission, 233 Miss. 598, 103 So.2d 413 (1958).



LEGEND

Access To Be Prohibited Shown Thus
Property Ownership Numbers (15607)
Property Lines

Coordinate System Used: Lambert North Zone

OWNERSHIPS

PARCEL NO.	NAME	TOTAL AREA	TAKE	LT REMAINDER	RT
15605	JONES	32 84 Ac	1 17 Ac		31 67 Ac
15606	SMITH	5 44 Ac	0 14 Ac	3 40 Ac	
15607	GREEN	9 48 Ac	4 67 Ac		4 81 Ac
15608	BURKE	3 13 Ac	0 34 Ac	1 79 Ac	
15609	MILLS	3 28 Ac	0 96 Ac	2 28 Ac	
15610	SHAW	58 64 Ac	0 14 Ac		58 50 Ac
15611	WELLS	50 86 Ac	0 53 Ac		50 33 Ac
15612	SNIDER	7 46 Ac	2 21 Ac	5 25 Ac	
15613	CROSS	1 01 Ac	0 20 Ac		0 81 Ac
15614	EBEY	6 68 Ac	2 64 Ac	4 04 Ac	
15615	MURPHY	21 67 Ac	0 68 Ac		20 99 Ac

ROAD APPROACH SCHEDULE

SPECIFIED USER	STATION	ON	ROADWAY	TYPE
Owner	126+55	TO	128+75 RT	B
County Drainage Dist	129+50 RT.	Drainage Ditch		C 5 *
Owner	147+50	TO	149+50 RT.	A
	150+75 LT			C 7
	150+00 RT	Enter R/W	152+00	B
Puget Sound Pow & Lt Co	153+50 RT	Power Line		C 5

CURVE DATA

PI STATION	Δ	CA	D	R	T	L
LW 134+38 69	53°56'	50°11'	2°30'	2292 00	1241 36	2087 33
LE 134+06 13						
(CPH 6) 120+71 67	38°48'		2°30'	-	807 15	1552 00

SPIRALS BACK AND AHEAD

a	DE	Le
1½	1°52' 30"	15
1½	1°52' 30"	15

ACCESS NOTES

Traffic movement will be permitted under the highway structure at Box Culvert Station 153+35

Type A approach is an Off and On approach in legal manner, not to exceed 14 feet in width, for sole purpose of serving a single family residence It may be reserved by abutting owner for specified use at a point satisfactory to the state at or between designated highway stations

Type B approach is an Off and On approach in legal manner, not to exceed 20 feet in width, for use necessary to the normal operation of a farm but not for retail marketing It may be reserved by abutting owner for specified use at a point satisfactory to the state at or between designated highway stations

Type C approach is an Off and On approach in legal manner for special purpose a width to be agreed upon It may be reserved with the width and for the us at a point satisfactory to the state at or between designated highway stations

No 1
This approach is to be used to travel on right of way and enter property as specified

No 5
This approach is to be used only for the operation, maintenance and repa of the existing utility specified The approach shall not exceed 20 feet in width and shall be gated and locked when not in use

No 7
This approach is to be used only for the operation of a tree farm or tree farms, including the removal of raw forest products therefrom This approach may not be used for retail marketing The approach shall not exceed 30 feet in width and shall be gated and locked when not in use

* This approach may be increased to 30 feet in width

J. E. KIRK

Figure 4. Example of poor organi

way plans shall be prepared on standard linen tracing cloth (22"× 36"), in india ink to a scale of one inch equals 100 feet

d all supporting details shall be in conformance with this pical plan and the standard plan for symbols and conventions

hall be prepared with the stationing running from left to right

t of way and alignment that affects the proposed "taking" uately tied and indicated on the plan Right of Way widths shall ed with arrowed lines as indicated Existing topography shall side and outside of right of way lines, and the distance to all utside of and within 100 feet of the proposed right of way shown

arge drainage structures and bridges and all proposed large drainage nd bridges shall be shown

ites of all control points shall be shown It is preferable nbert System be used

ntrol features shall be included as shown hereon if access be obtained

The required notes for access control shall be placed as indicated and shall follow the standard form of notes for use on access control as provided for on Standard Plan H-19

Along frontage roads the access control hatching shall be offset from the center line the width of a lane

Directional traffic flow arrows shall be placed parallel to lines of travel with appropriate lane numeral appended when more than one lane is to be indicated

Traffic flow arrows shall be used to indicate all traffic movements including frontage roads, ramps, etc

Ownerships, road approach data and complete alignment data shall be placed conveniently in tabular form, preferably in the lower left hand corner in the manner indicated

Each ownership affected by the proposed right of way shall be shown complete If the property is so large that it cannot be entirely shown on the sheet, an insert shall be prepared on a smaller scale and in the manner shown If there is insufficient space on the sheet for any such inserts, they may be placed on a separate tracing

All distances and bearings must be shown to conform with the title reports Each parcel shall be numbered as indicated and shall correspond to the parcel number as used on the title report

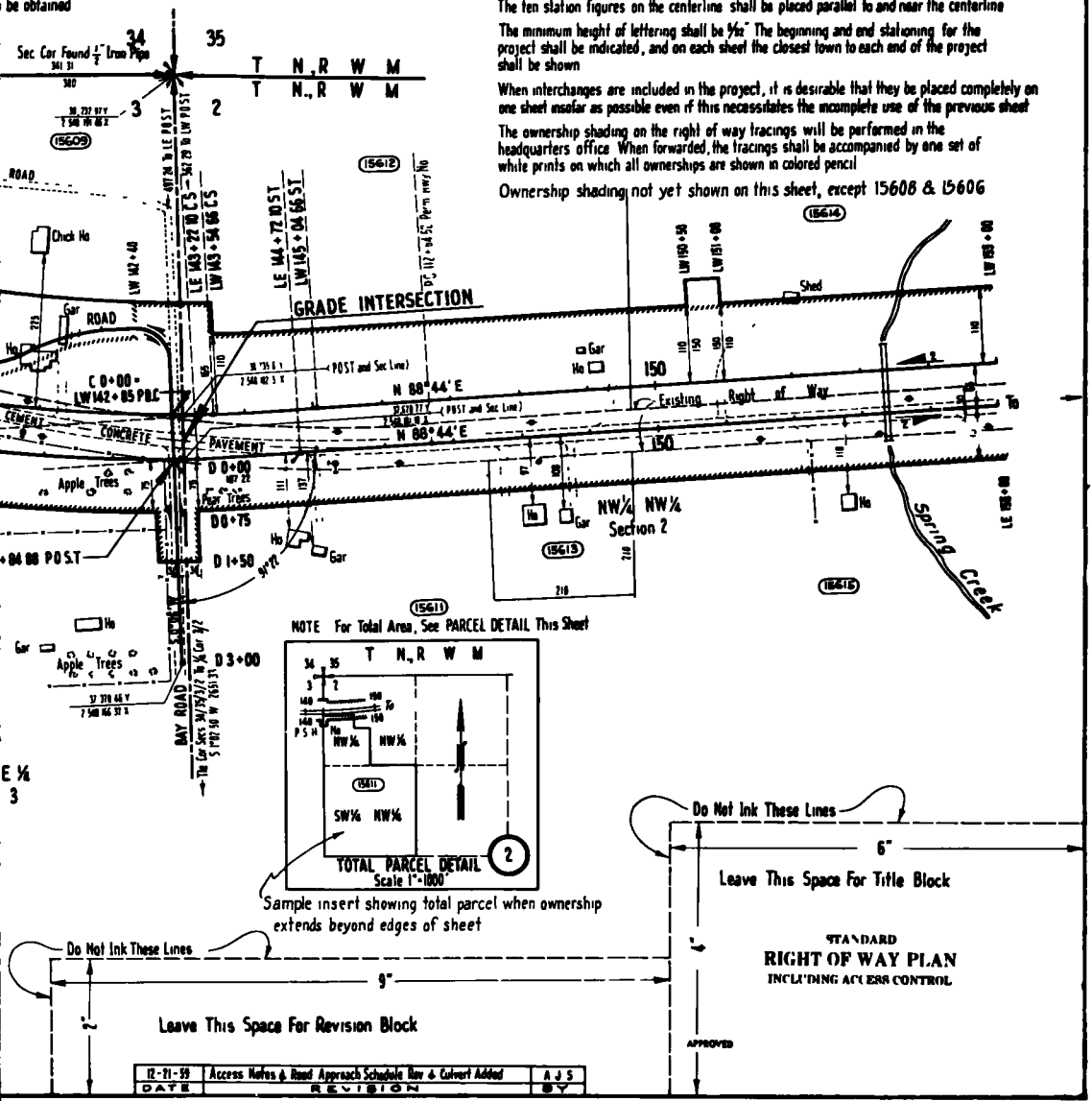
The ten station figures on the centerline shall be placed parallel to and near the centerline

The minimum height of lettering shall be 1/8" The beginning and end stationing for the project shall be indicated, and on each sheet the closest town to each end of the project shall be shown

When interchanges are included in the project, it is desirable that they be placed completely on one sheet insofar as possible even if this necessitates the incomplete use of the previous sheet

The ownership shading on the right of way tracings will be performed in the headquarters office When forwarded, the tracings shall be accompanied by one set of white prints on which all ownerships are shown in colored pencil

Ownership shading not yet shown on this sheet, except 15608 & 15606



Sample insert showing total parcel when ownership extends beyond edges of sheet

Do Not Ink These Lines

6"

Leave This Space For Title Block

STANDARD
RIGHT OF WAY PLAN
INCLUDING ACCESS CONTROL

APPROVED

Do Not Ink These Lines

9"

Leave This Space For Revision Block

DATE	REVISION	BY
12-21-59	Access Notes & Road Approach Schedule Rev & Culvert Added	A J S

resentation of right-of-way information.

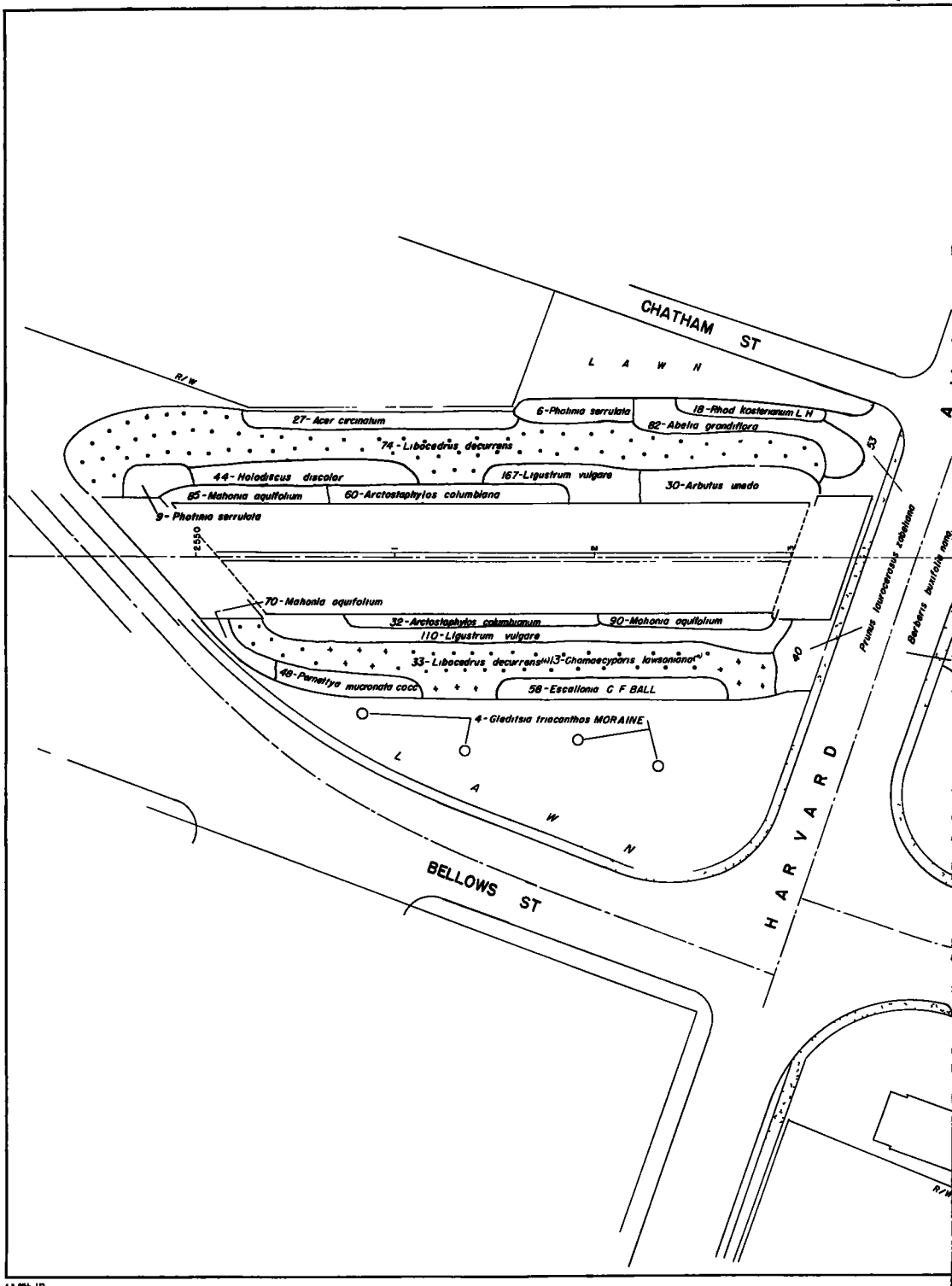
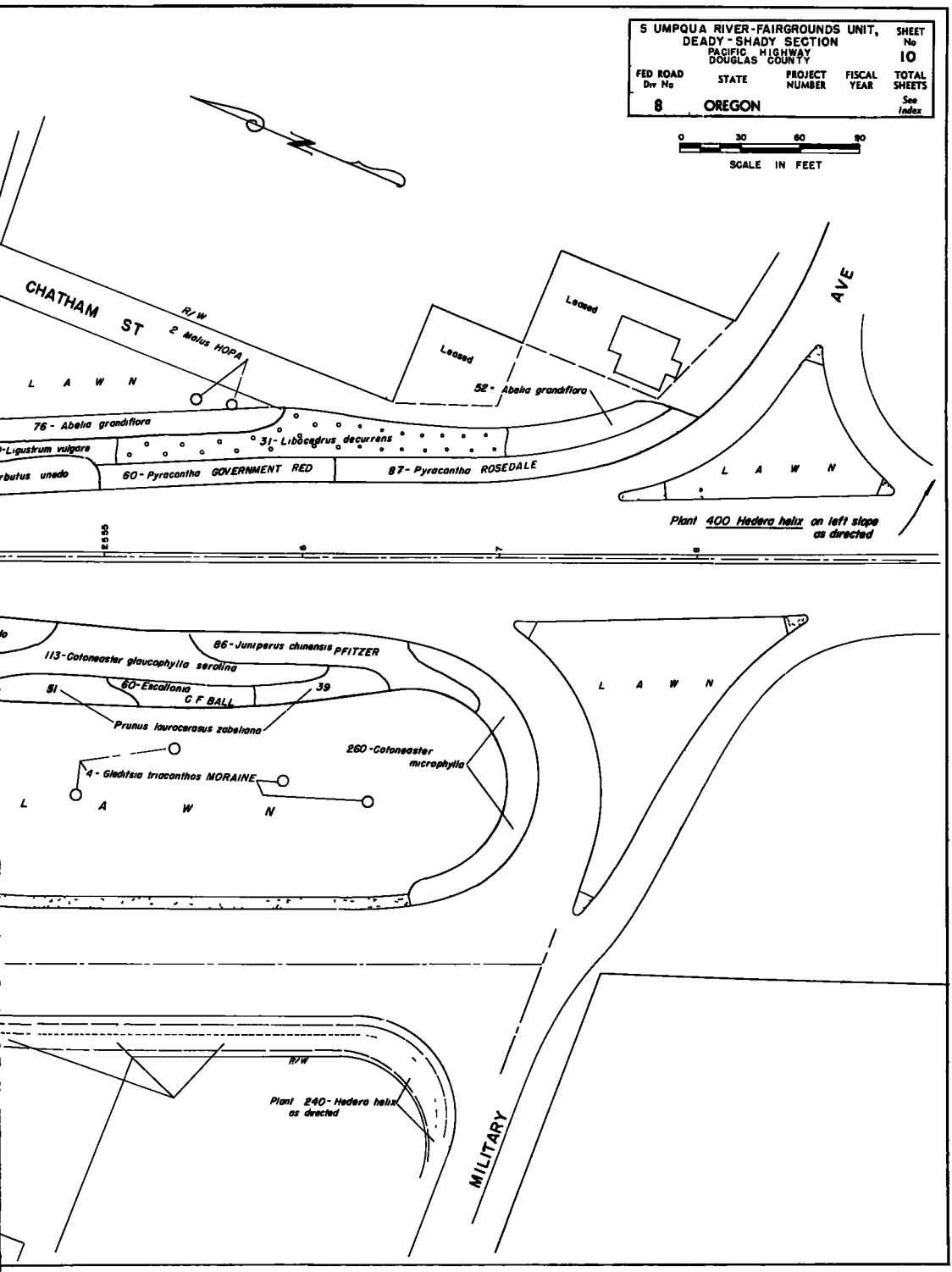


Figure 5. Landscaping diagram u



v. Douglas Community Hospital.

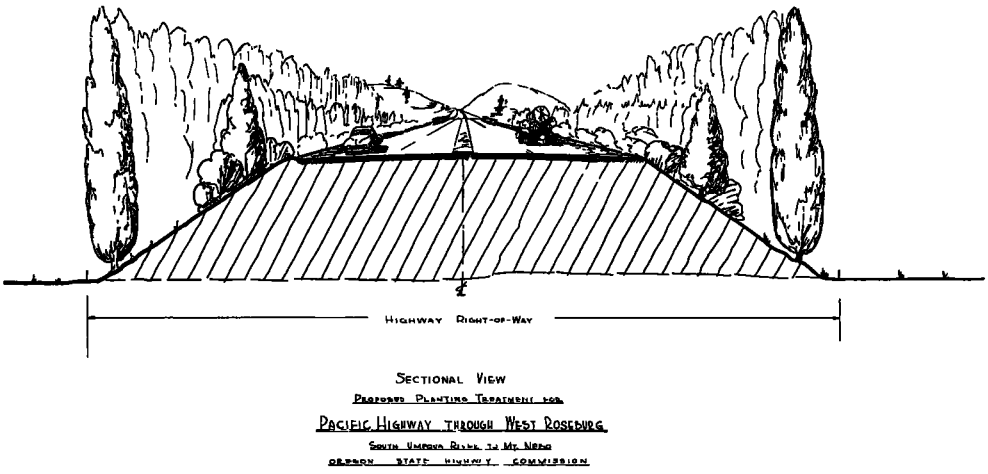


Figure 6. Artist's sketch used in *State v. Douglas Community Hospital.*

dition of property, or the condition of property at various stages of construction. Aerial photographs are excellent devices for showing the location and relative sizes and shapes of physical features covering relatively large areas. An example of such a photograph is shown in Figure 7. This was used in the trial of an inverse condemnation claim following a landslide on a highway embankment which impaired the support for adjacent land. In the trial of this case, the State also made extensive use of photographs to show details of the terrain before and after the landslide.

MOTION PICTURES

Occasionally motion pictures have been used where we have wanted to show the operation of certain types of highway structures or roadside features. For example, in trying the issue of how much severance damage should be allowed for the effects of constructing a controlled-access highway, we found ourselves faced with the necessity of convincing the jury that the landowner's cattle could and would use a 72-in. pipe laid through the highway embankment. The farmer said his cows could not and would not use it. We thought the farmer could use this pipe to move his cows back and forth between his two parcels of land. We took motion pictures of the herd actually going through the pipe and showed them at the trial. That ended any further argument on the point.

Movies of events such as this was, which are taken at the time and on the spot where the event occurs, go into evidence as easily as any other photograph of the property in question.

It might have been more difficult if we had tried to prove this point by artificially reconstructing a 72-in. pipe and using specially recruited actors. Pictures taken in artificially reconstructed settings and attempts at re-enactment of events, frequently are objected to and held inadmissible. But in our case we went to the scene of the project and waited till the landowner's own cows voluntarily went through the pipe, so we had no problem of admissibility.

CHARTS AND TABLES

Physical scientific data may be important in accounting for injuries involved in inverse condemnation cases. It may therefore become desirable to give the jury comparative data on such natural phenomena as rainfall and water levels in streams. In Ore-

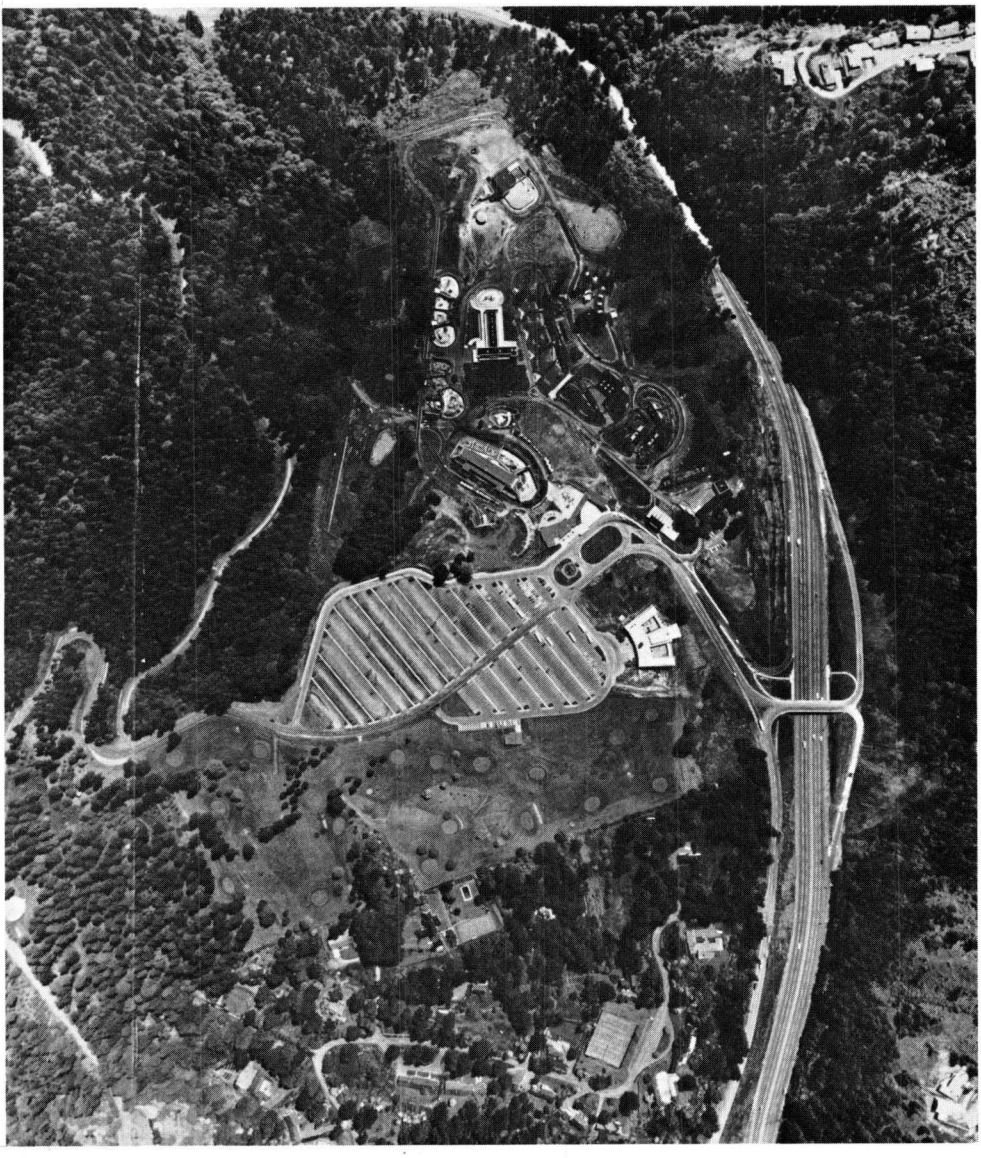


Figure 7. Aerial photograph used in *Portland v. State Highway Commission.*

gon we have had occasion to use these types of data and have been successful in introducing them into evidence in graphic form.

A hydrographic chart, giving the monthly range between maximum and minimum water elevations in the Williamette River, is shown in Figure 8. Two charts showing the shifts in location of the right and left bank of the Santiem River over a period of twenty years, are shown in Figures 9 and 10.

In the case of the hydrograph, the information used to prepare it came from the U.S. Army Corps of Engineers and U.S. Weather Bureau. The chart of the river banks was based wholly on Corps of Engineers' data. In both cases the charts were made by others, but this did not cause any difficulty in securing their admission

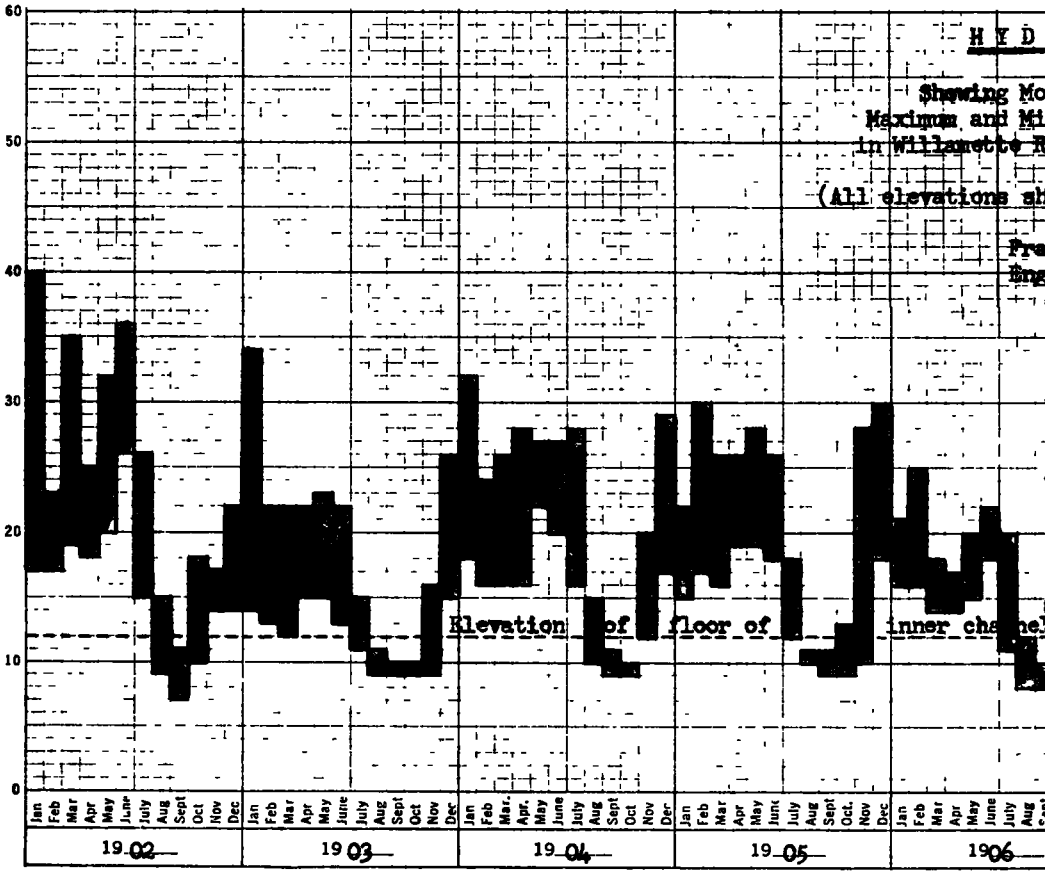
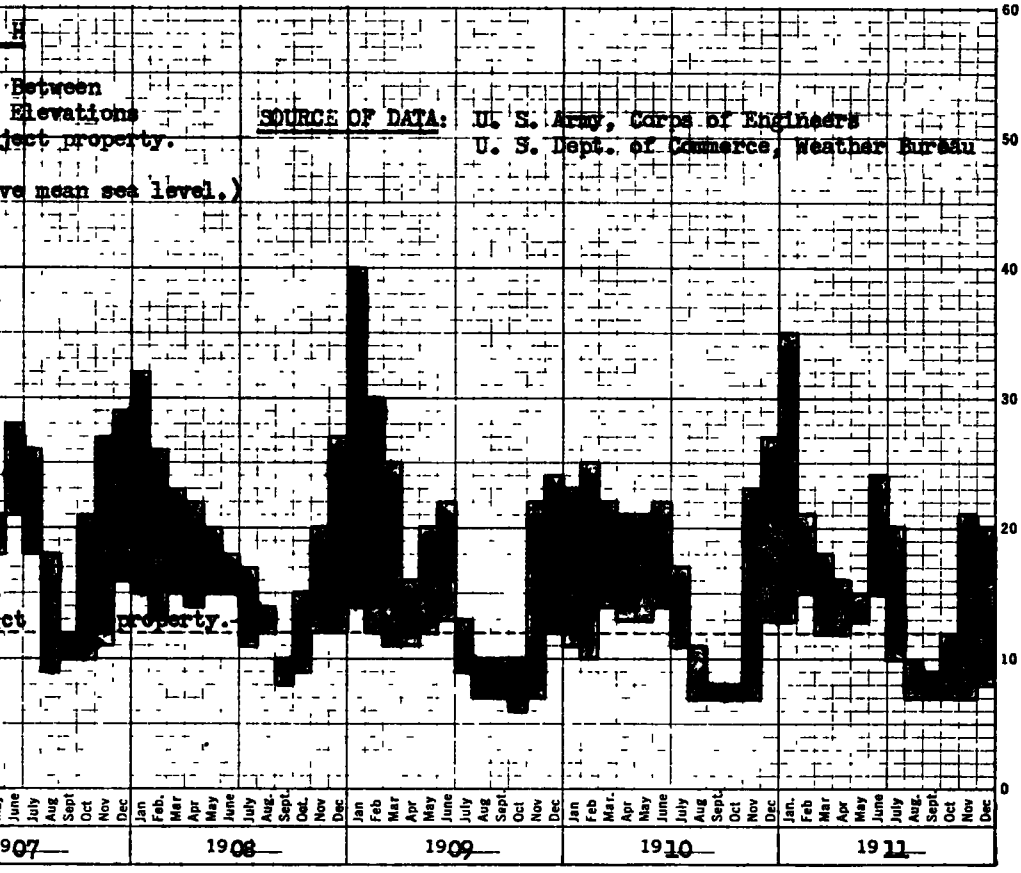


Figure 8. Hydrogr

into evidence. Weather reports and records compiled by Federal or State agencies in their official activities are admissible under the rule that allows proof of weather by official records. Corps of Engineers' data on natural phenomena are admissible on the same basis. No objection is normally raised to an authenticated copy of this type of record.

CONCLUSION

This completes my discussion of the visual aids. There is, of course, more that could be said about each one of these, and many more devices that could be shown. These exhibits do, I think include the major types of trial aids that are readily available to counsel in condemnation cases, and I hope will stimulate your imagination.



Williamette River.

I said earlier that there is beauty in simplicity and that trial counsel should constantly strive to reduce the facts of his case to as clear and straightforward a description as possible. I believe this. And I am interested in any device or aid that will help our trial attorneys present the facts of their cases to juries with more clarity and impact. That is why we have experimented with the types of visual aids that I have been describing here today. I think every State highway counsel should become familiar with the use of these devices, and I hope their imagination will lead them to develop new ones. Good visual aids, skillfully used, are literally worth their weight in gold in condemnation trial work.

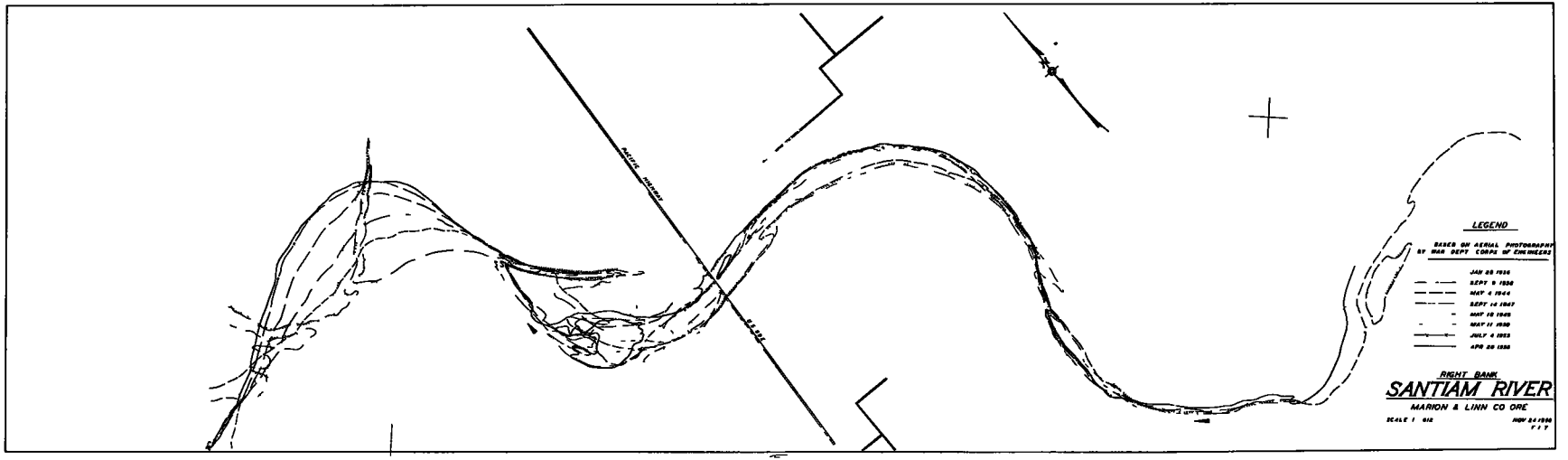


Figure 9. Location shifts in right bank, Santiam River, 1936-56.

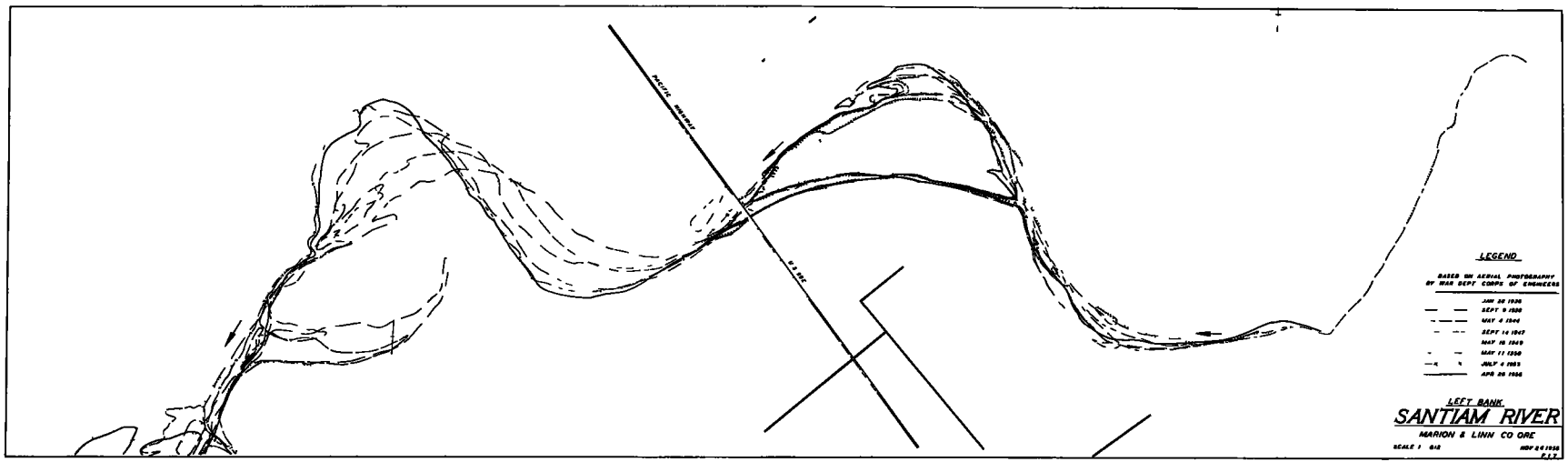


Figure 10. Location shifts in left bank, Santiam River, 1936-56

The Champion Brick Case: A Study in the Proof of Value

CARL H. LEHMANN, JR., *Special Attorney, Maryland State Roads Commission*

• In December 1959, the Maryland State Roads Commission acquired 55 acres owned by the Champion Brick Company to be used in connection with construction of an interchange on the Baltimore County Beltway and Northeastern Expressway. The value of this land and consequential damages to the brick company's nearby manufacturing plant were disputed, and led to a trial which, before it was completed, tested to the extreme the skill and ingenuity of counsel for both sides in the preparation and presentation of highly unusual and technical evidence. In many respects the Champion Brick case is a "once-in-a-lifetime" case, for rarely is there a combination of facts and issues that make such demands as did this one. In another sense, however, the experience of trying such a case as this is reassuring, for it demonstrates that the process of proof in condemnation cases is capable of reducing extremely lengthy and complex masses of facts to understandable proportions and presenting them to juries of laymen so that they can pass judgment in an intelligent matter.

ISSUES OF THE CASE

The brick company's land consisted of 172 acres, and was the site of subsurface clay deposits which were mined and used to make red face building bricks in the company's manufactory located 2½ miles away. The State's acquisition of 55 acres of this tract for right-of-way purposes (Fig. 1) was carried out under Maryland's quick-taking law and was accompanied by the deposit of $178,000 as the estimated just compensation for this land. The company rejected this offer and asked instead for $3,500,000 on the ground that the taking destroyed the utility of the entire brickmaking business. This claim was later reduced to $1,500,000 in the opening statements made at the trial.

The company contended that its compensation should include damages resulting from the reduced amount and availability of its clay supply. It estimated that the plant had a life expectancy of 23 years from the date of the taking (December 1959), whereas after the taking the plant could continue operations for only five years before the clay supply in its remaining property was depleted. After five years, the company contended, equipment and remaining land would have no market value as a brick manufactory, and would have to be valued as disorganized land and buildings.

The question of prime importance was, therefore, can a landowner be compensated for damages to a parcel of land as a result of a taking from another parcel owned by him, and which, although not contiguous, is connected inseparably in the use of the former parcel?

The trial court held that the question of consequential damages should go to the jury, relying in its holding on *Baetjer v. United States*, 243 F.2d 391 (1944), *cert. denied* 323 U.S. 772. In substance the court's ruling in the Baetjer case was that damages could be awarded where it was proved that integrated use of the land existed, that the parcels were inseparable and not susceptible of being replaced, and

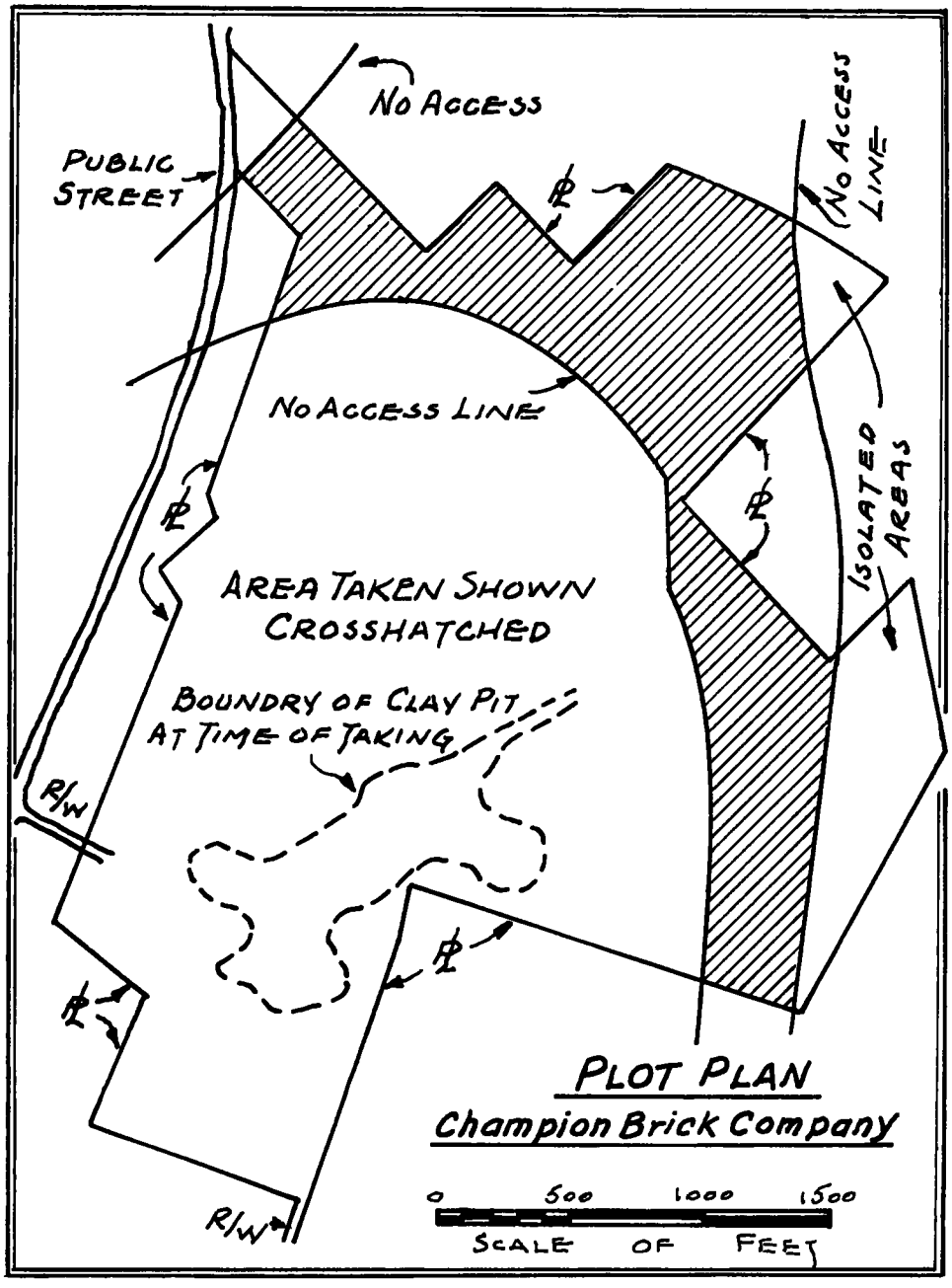


Figure 1.

that damage to one must necessarily damage the other. This involved proving unity of use, nonavailability of other suitable clay within an area capable of being used economically, and the diminution of the company's existing supply of clay below the 23-year period of the brick plant's life expectancy. This appears to be the first time in the history of Maryland's eminent domain law that the burden of proof of value has been placed on either party in a condemnation proceedings.

Proof of these elements of the case called for extremely comprehensive and technical testimony regarding the artistry and history of brickmaking, the technical aspects of the brickmaking process, the geology or the area and site, the techniques of subsurface exploration, and interpretation of subsurface data.

Clay Technology

As a basis for the jury's understanding of the technical testimony on brickmaking, some historical background testimony was considered desirable. Briefly the uses of clay and ceramic manufacturing processes were reviewed from the history of ancient Egypt, Europe, and Central America. The difference between "fat" (pure and highly plastic) clays and "lean" (less plastic due to mixture with sand, mica, and other non-plastic materials) clays was described, and its significance in terms of strength, shrinkage, and porosity was explained.

Testimony was also prepared to describe how modern clay technologists select particular types of clay for particular uses according to chemical composition and crystal structure of the minerals in the clay. Finally, counsel prepared to show how plasticity determines the extent to which clay may be molded into bricks which retain their shape and strength after being dried and fired. The contrast between the processes of drying and firing various types of clay according to their molecular structures was a foundation for testimony relating directly to the company's operations.

Geologic Factors

To show the effect of the taking on the company's business a lengthy chain of evidence was constructed. Testimony was prepared on the particular geologic factors involved in the property taken. The nature, origin, and distribution of the clay deposits on the company's land were set forth in considerable detail.

It was shown that the property in question was located on the coastal plain of Chesapeake Bay, a sedimentary formation (sand, gravel, clay, marl and diatomaceous earth) deposited on pre-existing strata of crystal-like rock. In this sedimentary layer of the coastal plain deposits of clay were exposed or near the surface in many places. Testimony from the Maryland Geological Survey and U. S. Geological Survey was prepared to show how the company's clay deposits were arranged in three distinct and continuous formations, created as a result of the cycles of deposition and uplift of the plain throughout its history. Thus the important fact was brought out that the clay deposits in question were of differing composition, color, and structure, and were neither uniformly accessible nor available for all types of ceramic use.

Expert testimony on the geology of the area and site was extremely important in the valuation of the property in question. Geologic survey data for this part of Maryland had been compiled for more than a century, and had constantly improved in its coverage and quality. Some difficulty was experienced in this case because of the initial employment of certain early geologic survey data which turned out to be misleading as to the amount of clay suitable for brickmaking that was left in the company's remaining land after taking.

Subsurface Exploration

The validity of much of the foregoing geological data depended on the methods used to acquire it. For example, samples of earth brought to the surface by borings made with an auger drill inevitably picked up loose soil from the walls of the test hole as they were pushed to the surface, and thus were to some degree contaminated before analysis. A more accurate method, the State found, was to use an open cylinder which, when driven into the earth and withdrawn, secured a sample of earth free from

any mixture with other soil. By sampling the property in question through a system of such test borings geologists employed by the condemnor were able accurately to determine the character and location of the usable clay deposits on the company's land.

Brickmaking Methods

In the valuation of alleged injury to the company's business, its manufacturing methods and plant had to be carefully analyzed. The Champion Brick Company's growth reflected the major advances made by the brick industry during the past half-century. In 1953 the company had commenced a program of replacing its old "skove" kilns with more efficient "tunnel" driers and kilns, and considerable testimony was prepared by the company to show how the plant and equipment had been selected to utilize the types of clay found on the property in question. This adaptation of plant to materials also included such matters as the types of mixers installed, the horsepower of electric motors, the number, and design and capacity of burners.

This testimony had a bearing on the transferability of the company's property and premises to other uses or to continued brickmaking with the available deposits of clay. When viewed in conjunction with the geologic data regarding clay reserves in the vicinity of the property, it provided an important part of the proof presented on the value assigned to the consequential injury claimed to have been suffered by the company.

Testing Standards and Procedures

As with the collection of geologic data, the validity of conclusions regarding the effects of various types of materials in the company's manufacturing process hinged on the accuracy of the methods used to test the differences in the types of clay. This analysis was carried on by processing a series of samples of clay from all parts of the company's property. Altogether 250 samples from forty-two borings were classified, compared, and correlated for all stages of the company's brickmaking process. In the exchange of information prior to the trial, the importance of agreement on a standard system of soil classification was revealed. After some argument, the geological experts agreed to use the AASHO classification, although the relatively narrow subclasses provided for in this system were found to be restrictive in certain cases. The danger of distortion of the test results from this cause turned out to be slight, however, since any error was on the conservative side by assuming that the material was of poorer quality than in fact it was.

The results of testing these samples formed an important part of the proof of the value of the clay reserves on the company's land, and this approach to the effect of the taking on the company's industrial operations was considered much more accurate than the usual method of relying solely on the subjective opinion of expert witnesses. Although practical considerations ruled out the possibility of testing these samples in full-size bricks, a body of objective evidence was assembled on the physical property of all types of clay on the company's property and available for future operations. With a minimum of speculation, the geologic witnesses were able to plot the location and gross volume of these usable materials for presentation to the jury.

The next step in quantity analysis required an estimate of what portion of the total amount of usable clay would be economically recoverable in the company's operations. For this analysis, the following premises were adopted: (a) grades affording gravity drainage would determine the lowest point of excavation of any individual clay deposit, and (b) the maximum economic limit of overburden removal would be at points where the thickness of unusable material exceeded two times the thickness of suitable material.

To apply these criteria extensive drainage studies were made and a series of drainage ditches were projected in locations that would afford maximum recovery of suitable clay. The engineer-geologist who made this projection and later testified at the trial consulted current technical and trade literature, and considered various economic factors such as the cost of excavation and hauling. Thus at the trial it was possible to estimate with reasonable accuracy both the volume of the reserve supply of clay suitable for brick manufacture, and the portion thereof that was economically recoverable by the company for its operations.

TRIAL TACTICS

The trial opened with a jury view of the company's tract, followed by the normal presentation of the condemnor's description of the portion taken and the valuation placed on the land by the State's appraisal witnesses. The condemnor's theory of value was that the highest, best, and most profitable use of the tract directly involved was for residential purposes, and two independent appraisals based on sales of comparable subdivision land were used by the State in its valuation. The condemnor then closed its principal case, giving notice, however, that in the event of a claim of consequential damages to the brick plant there would be rebuttal testimony on that point.

The company's first witness was its president and principal owner. He was a strong witness, having an intimate knowledge of all phases of the company's operations, having supervised the sampling and testing of the clay obtained in the pre-trial subsurface exploration, and having conceived the strategy of the claim of consequential damages. The president first described in detail the history of the plant since 1946, including unsuccessful attempts to locate other suitable clay deposits within the five-mile limit alleged to be the greatest distance that clay could be hauled for economical use of the company's plant. Condemnor filed a continuing objection to all testimony of this witness relating to the alleged unity of use of the plant and the property being condemned. The witness also described the properties of the clay on the land being taken which made it particularly suitable for the company's needs. Here again, however, objection was filed against testimony that there was a unity of use because of the "tailoring" of the manufacturing equipment and process to the specific clay found on the condemned parcel.

Regarding the after value of plant equipment, this witness testified that 300 kiln cars, valued at $150,000 prior to the taking, were reduced to junk by the taking. This was rebutted, however, on cross-examination by the condemnor's introduction of a chattel mortgage on the same kiln cars for $98,000 dated one year after the taking.

Turning to the matter of materials, the witness testified that as a result of the taking the best available deposits of clay would be denied to the company so that there would remain a "theoretical" five-year supply. The term "theoretical" was applied because it was alleged that the taking also interfered with access to the deposits on the company's remaining land. The company cited the difficulties of using a road that had newly been opened up for use instead of its previous access road (which remained undisturbed by the taking), but on cross-examination condemnor countered with engineering testimony that several other routes which were shorter and had lazier grades were available to the company's trucks.

The processes of obtaining and testing the samples of clay obtained from the geological survey of the property in question were carefully described to the jury by an engineer witness for the company. In this step, a peg model and a series of charts were used to supplement the oral testimony. This witness also tes-

tified on the extremely important matter of the rate of depletion of the available clay deposits on the company's land. Here selection of the proper use factor was vital to the testimony of both sides. The company's witnesses contended that 3 cu yd of clay was needed to make 1,000 bricks; the condemnor contended the correct factor was 2.1 cu yd. The issue was resolved by measuring a sample green brick introduced earlier in the trial and having the witness compute the use factor for the jury. This computation revealed a factor of 1.83 cu yd.

Cross-examination followed in an attempt to reconcile or explain this discrepancy relating to the use factor of the company's clay deposits, and the jury received extensive testimony regarding the density of samples caused by forcing the green clay into the brick molds, the shrinkage factor involved in drying and firing, and the rate of wastage in hauling and processing.

In cross-examination of the company's president aerial photographs correlated with topographic maps were used to verify the locations alleged to be available for future clay mining operations. With an aerial mosaic as a base map, transparent overlays were used to direct the attention of the witness and the jury to particular facets of earlier testimony such as the location of test borings.

The problem of cross-examining testimony that the company's manufacturing operations were tailored specifically to the type of clay on this site was also aided by a thorough search of technical writings on brick manufacture. The company's valuation testimony stressed the inseparable relationship of the plant and its supply, and was offered by two ceramic engineers engaged professionally in the design and construction of brick plants. This appraisal was based on replacement cost less depreciation as of the date of taking, using the premise that the plant was rendered useless for brickmaking by the taking. In cross-examination of this testimony condemnor's counsel relied chiefly on the apparently contradictory statements which one of these witnesses had made in articles appearing in ceramic trade journals. In his writings this witness had positively denied that the type of kilns being used by the company were "tailor-made" to process any specific type of clay.

Local real estate appraisers were called by the company to relate expert testimony on the value of the manufacturing plant to the value of the land itself. These witnesses adopted the unusual approach of filing a joint appraisal report instead of separate and independent appraisals. Therefore, the condemnor moved for, and was granted, a ruling to exclude one of these appraisers from the courtroom while the other was testifying. In the separate cross-examination of these witnesses counsel for the condemnor were able to disclose a $300,000 discrepancy between the two appraisers when each was questioned on the details of the appraisal.

This testimony concluded the company's case for consequential damages to its brick manufacturing process as a result of the taking. On its conclusion the court ruled that a prima facie case had been made, and that the jury should be permitted to view the plant and premises.

Following the jury view the condemnor offered rebuttal evidence. The theory of the rebuttal was that the company's plant had suffered no damage since the clay supplies still available would permit continued operations substantially as before. A ceramic expert who had exhaustively studied the geologic data and manufacturing processes involved was called to testify that operations could be carried by the company for a period ranging from approximately 20 to 80 years with the supplies available in the remaining land.

This testimony was reinforced by another engineer-geologist witness who testified specifically and in more

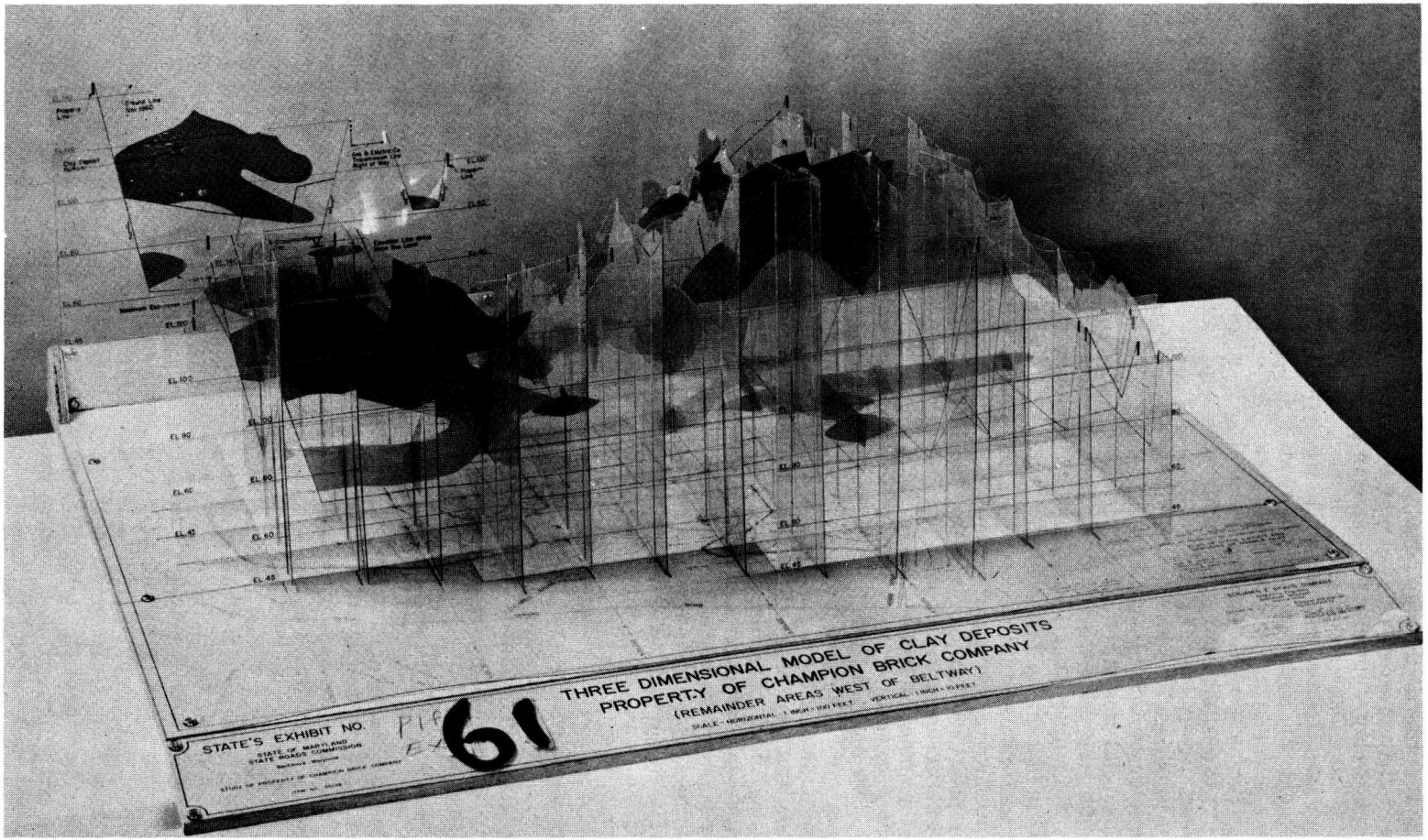


Figure 2. Three-dimensional model used as trial exhibit.

detail regarding the volume and recoverability of the clay deposits involved. To aid this testimony a three-dimensional cross-section of the site was constructed and displayed to the jury (Fig. 2). By use of clear plastic panels set on a base map of the site both the surface contours and subsurface deposits were made to appear in their proper sizes, shapes, and relationships. Color codes and symbols were used to show characteristics of the clay and special features.

From the standpoint of trial technique, comparisons between this model and the peg-board model used by the company's expert witness are of interest. The peg board purported to show the location and character of the subsurface clay deposits by an array of colored dowel sticks of differing lengths. Even when accompanied by the testimony and demonstration of an expert engineer witness this exhibit tended to be confusing to laymen on the jury. By contrast, the model constructed of plastic panels fitted together in egg-crate fashion, permitted the jury to follow the testimony regarding subsurface features with a three-dimensional view such as an X-ray of the land would have allowed.

CONCLUSION

The jury's award to the Champion Brick Case was $247,752. From the viewpoint of the condemnor, the effort spent in ten weeks of arduous trial and approximately two years of painstaking preparation of this case was well justified. If conclusions can be drawn from this case and applied generally to right-of-way condemnation work, the writer believes they may be the following. This case emphasizes the value of expertly prepared visual aids, particularly to present technical data which might otherwise be unintelligible to lay persons.

Further, the case illustrates that no condemnation situation is too complicated or technical to be entrusted to a jury, and that if a jury retires to deliberate confused by technical gobbledegook or overwhelmed by complicated scientific data, it is the fault of counsel. The presentation of the evidence is a responsibility that trial counsel alone must assume. Thus, adequate preparation with emphasis on an orderly presentation and lucid demonstration of the facts will always be the best insurance that counsel can have of a correct and fair verdict.

Pre-Trial Discovery Tactics

J. D. BUSCHER, *Special Assistant Attorney General, Maryland*

• Pre-trial discovery is something that has saved the State Roads Commission in the State of Maryland a considerable amount of money. I will preface my remarks by saying that a few years ago some of the attorneys for the property owners began requesting us to furnish them the appraisers' reports prior to trial. We, of course, resisted. They became more persistent. We then developed the position that if they would give us their report we would give them ours. That worked for a while, but eventually they got tired of that and applied formal interrogatories upon us to require that we furnish them the data that our experts had compiled for us.

We found out in the lower courts that they could do this. We did not take it to the Appellate Court because we became convinced it was a two-edged sword. If they could obtain from us information that we thought was our prerogative to keep, since we had paid for it in the service, then we could obtain theirs from them. As a result of the experience, it appears that it works to the disadvantage of the property owner rather than to the disadvantage of the State to be required to exchange this information either through interrogatories or depositions.

Now, we have even gone a step further in Maryland. In large cases and particularly in some of the counties where we know we are going to run into very heavy and strong opposition by property owners' attorneys, even if they do not demand copies of our appraisals and engineering reports through interrogatories, we demand it of them. We have drawn up a set of interrogatories which is rather inclusive and which we have used to our distinct advantage on a number of occasions.

There have been exceptions taken to these interrogatories in the law courts, but the courts have upheld them. We now make it a general practice in large cases to file this kind of interrogatory and demand that it be answered.

In Maryland, under rules of court established by the court of appeals, Federal court rules on discovery are generally followed. I assume that most of you are more or less familiar with the rules of the Federal jurisdiction on discovery tactics, but in this we have gone even further than the Federal courts allow. In fact, I am working on a case now in Federal court where the Federal judge is probably about to deny interrogatories such as this; that is to say, they do not have to be answered by the property owner. That is in the balance right now in a Federal case in Baltimore.

When we receive the information called for in our interrogatories we know fairly well the property owner's theory of the case and what he is going to rely on. And, often, in large cases when we receive answers to these interrogatories, we then determine whether it is advisable to take an oral deposition. In Maryland we have the right to take pre-trial depositions by giving five days notice, so we get the expert in the attorney's office, in my office, or somewhere else, and take his deposition and delve into matters not covered in the interrogatory I have just read.

In Maryland we have found the interrogatory a very helpful and useful tool and we think it is part of the trial preparation of a case. The form is as follows:

STATE ROADS COMMISSION OF MARYLAND, acting for and on behalf of the STATE OF MARYLAND.	:	IN THE
	:	CIRCUIT COURT
	:	FOR
vs.	:	BALTIMORE COUNTY

INTERROGATORIES

To:

From: State Roads Commission of Maryland

You are requested to answer the following Interrogatories:

a. These Interrogatories are continuing in character, so as to require you to file supplementary answers if you obtain further or different information before trial.

b. Where the name or identity of person is requested, please state full name, home address, and also business address, if known.

c. Unless otnerwise indicated, these Interrogatories refer to the time, place and circumstances of the occurrence mentioned or complained of in the pleadings.

d. Where knowledge or information in possession of a party is requested, such request includes knowledge of the party's agents, representatives and, unless privileged, his attorneys. When answer is made by a corporate defendant, state the name, address and title of the person applying tne information, and making tne affidavit, and the source of his information.

e. The pronoun "you" refers to the party to whom these Interrogatories are addressed, and the persons mentioned in clause (d).

1. State the Defendant's contention as to the exact amount of acreage in the whole of tne property involved in these condemnation proceedings.

2. State the names and addresses of all witnesses intended to be offered as expert appraisers to testify in this case as to valuation and as to the just compensation to be paid to the property owners.

3. State the names and addresses of all witnesses intended to be offered as engineering experts.

4. State the names and addresses of all witnesses intended to be offered as expert opinion witnesses in any field of specialization, and indicate his (or their) fields of specialization.

5. Have you received any written appraisal from any expert appraiser intended to be called as a witness in this case? If so, attach the same to the answers hereto.

6. If the answer of Interrogatory Number Five is "no," ascertain and supply the following information for each of the intended expert valuation witnesses:

A. State the total damages assessed by reason of the taking and consequential damages.

B. Itemize the estimated before value and indicate the method or process used to determine the before value and the reasons therefor.

C. Itemize the estimated after value.

D. Itemize the estimated consequential damages, if any, and the reason for each item of such consequential damage.

E. State the opinion of the witness as to the highest, best and most profitable use to which the subject property is adapted or to which it is adaptable in the reasonably foreseeable future, and his reasons for such opinion.

7. As to each and every of the expert valuation witnesses intended to be called to testify in this case and whose written report is not attached hereto, (or such report being attached but lacking the particulars demanded in this interrogatory), and if he has used the "comparable sales approach," state with particularity each and every item of market data intended to be used by such appraiser to substantiate his "before and after value."

8. As to each and every of the expert valuation witnesses intended to be called to testify in this case and whose written report is not attached hereto, (or such report being attached but lacking the particulars demanded in this interrogatory), and if he has used the "summation method":

A. State with particularity his volumetric computations of all improvements, if any.

B. State with particularity the depreciation factor or factors used by him in determining "replacement cost less depreciation."

C. State with particularity the authorities, including appraisal handbooks and market data relied upon by him for his determination as to the proper depreciation factor.

D. State with particularity the authorities, including but not limited to, appraisal handbooks and market reports and data relied upon by him for his determination as to the proper cubic footage and square footage factor.

9. As to each and every of the expert valuation witnesses intended to be called to testify in this case and whose written report is not attached hereto, (or such report being attached but lacking the particulars demanded in this interrogatory), and if he has used a "capitalization approach," state with particularity the type of capitalization approach used and all of the facts he considered in determining his "before and after values."

10. State the name of any witness intended to be called to testify relative to the probability of a change in the zoning of the subject property.

11. Does the defendant or his attorneys have in their possession any subdivision plat or plans of the subject property, either recorded or unrecorded; if "yes," attach copies of such plat or plans hereto.

12. Does the defendant contend that there are any gas, oil or mineral rights in and adding to the value of the land taken?

13. Has there been a survey of the entire property of the defendant? If so, give the date of such survey and the name and address of the surveyor.

14. State the names and addresses of any tenant who has occupied the subject property within the past five (5) years.

15. Was there, during the past five (5) years, a lease or leases in effect, whether recorded or non-recorded? If so, attach a copy of such lease to the answers to these interrogatories.

16. Have you received any written reports from experts other than appraisers, intended to be called to testify in this case? If so, attach copies of such report to the answers hereto.

Thomas B. Finan - Attorney General

Joseph D. Buscher
Special Assistant Attorney General

Special Attorney

Preparation of Appraisal Testimony

JULIUS CAGE, JR., *Assistant General and Chief Counsel, Alabama State Highway Department*

• Experience in Alabama bears out the suggestion made earlier in this workshop that the chief issue in most eminent domain cases is valuation. The key to successful trial of condemnation actions is good preparation of appraisal testimony.

Of course, appraisal testimony does not stand on its own feet; a factual foundation must be provided for the jury to evaluate the evidence of value, and frequently this foundation requires the presentation of extensive and complex engineering data. It is our practice to open cases of condemnation by calling to the witness stand a State highway department engineer who explains in simple language the extent and character of the land being taken, the highway department's proposed plans and intentions regarding construction, and the location of this project with respect to the remainder, if any, of the landowner's tract. We have the engineers testify as to the topography of the land in question even though the jury later views the property; we want this factual foundation in the trial record.

This testimony of the engineers is relatively easy to prepare and present. The engineer witness is a qualified professional expert, experienced in dealing with scientific data and ideas. Once he starts his systematic description of the property in question, the sequence of the evidence, and the introduction of exhibits, if any, requires a minimum of supervision and guidance by counsel. Often, counsel's chief problem will be to emphasize by his questions the important features of maps, exhibits, or testimonal data so that the engineer's testimony will leave a series of simple, hard-hitting facts and explanations with the jury. This is the foundation for the appraisal testimony that follows.

Appraisal witnesses are a different breed than engineer witnesses. Both are qualified professional experts, but the appraisers do not deal with the explicit factual detail that the engineer does. Appraisals are essentially matters of opinion, and as such their validity and credibility depend on the correctness of the appraiser's underlying data and the accuracy of his analysis. The primary job of counsel is to be sure that when an appraisal witness goes into court his testimony will pass the test of credibility.

The first step in the preparation of appraisal testimony involves preparation of the attorney who will examine the witness. He cannot examine an expert witness before the jury unless he has some idea of what that expert is talking about, what research he has done, and how his conclusions should be evaluated. The first step for the lawyer, therefore, is to acquire as thorough an understanding as possible of the appraiser's report, including a familiarity with the comparables that the appraiser cites.

Once the trail attorney is familiar with the report, he should see how well the appraiser is prepared to present it. Here numerous details must be checked. Is the description of the property accurate? Is the testimony based on the latest plan of the highway department or some preliminary engineering plan? Are the data regarding improvements on the property completely up to date? If more than one appraisal and variations exist, how can they be explained?

When testimony relating to the property being condemned has been

checked, he should turn to the testimony regarding comparable sales. Practice in Alabama is to have the appraiser and trial counsel inspect these properties together whenever possible. We also have them work together to prepare a property ownership map and a map of comparables.

We prepare appraisal testimony as if we had the burden of proof at every step of the way. We say to the appraiser, "This is your opinion; if you cannot prove to the jury that it is a good sound opinion, you had better go back and do some more work." So the appraiser tells us of each comparable, where it is, what its condition is, and what allowances he has made in comparing it to the property being taken.

After returning from inspection of these properties, we have a conference to go over the basis of the appraisal. Has he included any personal property in his appraisal of the land? Has he eliminated any items of real property on the assumption they were personalty? Alabama law on valuation is simple and direct; we use straight before-and-after value. We can offset enhancement against the whole taking so that awards of no damages are possible, and occasionally are achieved. Thus we need to know the elements of value on which an appraisal is based.

In some instances, of course, counsel cannot put his finger on factual support for everything his appraisal witness says. This occurs most often in connection with severance damages. In these cases the opinion must be made persuasive by reference to the method that is used. So we go over the appraiser's method with him; we have him explain it to us as he will explain it to the jury; we strive to make it as understandable as possible in all of its steps.

These, briefly, are the major phases of the practice in preparing valuation testimony for right-of-way condemnations. In some respects the over-all problem is simpler than in other States because Alabama's eminent domain law is not very complex, and the administrative law and procedure are not as extensive as in some of the larger, more urbanized States. But certain problems exist wherever eminent domain is involved, which, accordingly, condemnors everywhere encounter.

One of these is the problem that arises when two competent appraisers have been used and one turns out to be much higher than the other. The condemnee knows the condemnor has had two appraisals because he has seen both visit the property. He probably has talked to both and may even have an impression of their opinions. At this point trial counsel must make an important decision. Should he put both appraisers on the witness stand, and risk the danger that the jury will take the high figure or compromise the difference between the two? Or should he leave the high appraisal out of the testimony and risk the danger that counsel for the condemnee will somehow pry this information out on cross-examination in an embarrassing light? We have concluded in Alabama that generally the best course is to leave out appraisal testimony that we think is unrealistic, and present only what is in our judgment a reasonable and fair valuation.

A second recurring problem is that of how much appraisal testimony to introduce at the Commissioners' preliminary hearing. When we know we are going to court later, we like to offer as little as possible in order to give the least advance notice to the other side regarding the details of our case.

Third, there is the problem of supplemental appraisals. These are sometimes called for because of changes in the condition of the property or highway plans. Sometimes, however, they are dictated by the desire to have a different witness carry the weight of proof in a condemnation case. Some appraisers are qualified but will not make good witnesses; some who will be good witnesses may not be qualified to testify unless they make an appraisal. Possibly, also, the original appraiser has made some remarks to the property owner which

would be improper in the record of his testimony. An illustration of why we are sensitive to this matter occurred recently in a condemnation involving a junk yard. We relied on an appraiser whom we had hired to visit and appraise this land. The case was a long one, but for all practical purposes ended abruptly for the condemnor when counsel for the landowner called this appraiser to the stand for cross-examination and said, "Now, Mr. X, is it not true that you told the property owner on such and such a date that the State's offer was ridiculous?" Ever since that case I have personally gone over the testimony of the appraiser who is going to appear for the State with him, and ascertained exactly what was said during his visit to the property in question, what elements he has considered, and any other incidental facts, many of which I am sure seemed trivial to him at the time. Sometimes, however, this type of advance investigation will lead counsel to the conclusion that he must order a supplemental appraisal.

I think all condemnors must also encounter situations in which they find that their appraisals are just too unrealistic to be used. When these appraisals come in and are considered in the preparation for trial, counsel may be convinced that his appraisers are too far out of line to be credible. He may reach this conclusion by talking to other property owners in the area, or to people who deal in real estate. Whatever his sources, trial counsel may become convinced that it is futile to try to use these professional experts on the witness stand. Such cases may arise in rural areas where outsiders are customarily distrusted, or in other areas where land speculation is occurring and where sales and sales attitudes are inflated because of high-pressure advertising. Where such situations occur we prefer to leave the professional appraisers alone and hire local real estate people who have bought and sold land in the area over a long period. We think they are generally reliable in their sense of what the true value of the local land is. Our experience with these people has been very good. There is another advantage using local people, and this is their credibility. Particularly in rural areas the mail carrier, the probate commissioner, a real estate man, or a farmer well known in his neighborhood may be more persuasive than an outside appraiser. This cannot be ignored in the preparation of the case.

These are some of the problems that arise in the preparation of appraisal testimony. Some of them can be solved simply by greater diligence of trial counsel and his appraisal witnesses in the preparation of their case. Others may have to wait on the development of new fact-finding techniques in the valuation process. For the present, however, we may conclude that all of them deserve attention whenever right-of-way is to be acquired through condemnation proceedings.

Use of Economic Evidence in Condemnation Cases

ROBERT F. CARLSON, *Attorney, Division of Contracts and Rights of Way, California Department of Public Works*

• The use of economic data opens up several new possibilities in the proof of value in condemnation cases. In California we have found two types of studies pertinent to our right-of-way acquisition activities: (a) studies of the rate of absorption of property within a developing area, and (b) studies of the sales of remainders after land for right-of-way purposes has been severed.

Our interest in the rates of absorption of property is linked to experience with freeway construction. Whenever we start to acquire right-of-way for a freeway, invariably everyone thinks his property is ideally suited for subdivisions, bowling alleys, motels, service stations, and the like. They approach negotiations accordingly, and, more often than we like, we find our differences must be taken to the courts for settlement.

Of course, not every piece of property through which we lay out a freeway is suitable for these types of premium uses. And, not even all the suitable land will eventually be put to these uses. The question is, how can this be proved to a jury?

In an effort to deal more successfully with this problem of proof we have developed what we call "rate of absorption studies" consisting of information relating to the actual growth and pattern of land use that has developed in some of our freeway communities. The use of this type of evidence in court has been approved by the California Appellate Court in *People v. Murray,* 172 Cal. App.2d 219, 342 P.2d 485 (1959).

The other type of economic study we have used deals with the experience that has been recorded when severed remainders have been resold on the market following construction of a highway improvement. Earlier in this workshop Mr. Levin mentioned a plan to create a "bank" of data regarding remainders to be drawn from cases reported from all over the country. We have created such a bank in California and now have on file data relating to approximately 1,000 parcels of land.

These data are potentially very useful, but to date we have had some difficulty educating our ninety attorneys who do right-of-way work for the Division of Highways as to how this material can be used in trial work. We have made it a point to have a set of these remainder sales studies in each one of our offices, and have the attorneys review this material periodically.

I suspect that most participants at this workshop have had problems getting outside appraisers to testify to benefits. Generally these appraisers will admit that there are benefits, and that they are desirable for the property, but rarely do they feel that they are able to place a dollar value on this item. Appraisers hate to guess, and naturally they want some concrete facts that will help them arrive at a justifiable "after value" figure for the remainder. We feel that the use of severance damage studies may be helpful in overcoming this obstacle to appraisals. We have printed up our studies and mailed them out to our appraisers. When preparing for a condemnation trial we go over the appraisal testimony that will be given, and see where the data we have available may help the appraisers arrive at some definite figure for the benefits that the land will receive.

The use of this type of datum in a condemnation trial is to a great extent dependent on each State's law of evidence. Rules of relevancy and rules relating to hearsay are, however, fairly generally settled. Most States, I think, are like California, and would not allow these economic data to come into the case as direct evidence of value. They would, however, treat it as admissible to support a witness' testimony as to his opinion of the value of land. In California we have the rule that our appraisal witnesses may testify regarding these severance damage studies and use them as reasons for their opinion of the "after value" of property.

In California we have published several compilations of data on remainder sales. When we use them we try to select data pertaining to land in the same county as that in which the land being condemned is located. This is important to the weight given to this evidence. Because of this factor, remainder studies may be best when they are conducted with a local scope, and, perhaps, organized county by county.

Returning to the problems of admissibility, I might mention a recent article on the use of economic evidence written by Sidney Goldstein.[1] It is an excellent article summarizing the law relating to admissibility of economic evidence in right-of-way acquisition cases, and discussing at length the problems of relevancy and hearsay that must be considered here. Harrison Lewis, Assistant Attorney General for the State of North Carolina, has also written an excellent paper on the practical uses of economic evidence in right-of-way litigation.[2] In California we use the State highway division's magazine, published every two months, to publicize the studies we make. This not only has an educational value, but it performs a public relations function for us.

What has been done and what has been written to date clearly indicates that there are certain situations in which trial counsel may use economic data with advantage. They never will, of course, take the place of a good appraiser testifying on the witness stand; but they may help the appraiser witness give good testimony when he takes the stand. Therefore, if we are to find out the full potential of these various types of studies we should settle the rules of evidence relating to what is admissible and what is not. In some cases this may be a situation that should be clarified by legislation.

[1] Goldstein, S., "Economic Evidence in Right-of-Way Litigation." 50 Geo. L. J. 205 (1961), based on a paper of the same title in HRB Bull. 343 (1962).

[2] Lewis, H., "Practical Uses of Economic Studies in a Condemnation Trial." Paper presented at American Right-of-Way Association, 8th Annual National Seminar (May 21, 1962).

Acquisition Through Administrative Procedures

ROBERT W. CUNLIFFE, *Assistant Attorney General, Pennsylvania*

• This discussion is concerned with the acquisition of right-of-way through administrative procedures. The methods of condemnation are divided into two broad types: the administrative method and the judicial method. The administrative method may be described as a means of condemnation whereby title and/or the right to possession rests on the filing of certain designated papers with a legally constituted condemnation authority which may be an administrative agency or may be a court acting in an administrative role. The judicial method involves formal court proceedings, terminating in a judgment and award of compensation.

Probably one of the most significant differences between these two methods relates to the vesting of right to possession of the condemned land. When the judicial method is used, the right to possession cannot vest in the condemnor, in theory at least, until the proceedings are concluded. In practice, however, the statutes of most States have modified this technical rule, but have left a variety of rules in its place regarding the precise point in the proceedings when the condemnor's right is perfected.

It is clear that delay in vesting the right of possession may seriously affect the interests of the landowner, the condemnor, and the public. From the standpoint of the condemnor and the public, construction of urgently needed facilities may be delayed. The public must wait a longer time before a new and improved highway becomes available. Delay in possession also has financial consequences. The cost of the new facility may become prohibitive through the rising costs of building and labor. If the proposed project is to be financed through revenue bonds, the delay in possession may mean that interest will be paid on bonds months before construction can even commence.

Insofar as the landowner is concerned, it cannot be said that he is generally benefited by the delay in the right of possession, although one gets serious argument from most landowners on this point. First of all, once condemnation proceedings are instituted the landowner is deprived of many valuable incidents of ownership during the pendency of the proceedings. The laws of the majority of jurisdictions provide that any improvements made on property subsequent to condemnation or commencement of proceedings are not compensable. The saleability of the property condemned and its rental value may decrease drastically once condemnation is commenced. Also, the landowner's capital is tied up during court proceedings and he may not have the funds required to relocate.

It is, therefore, imperative that the condemnor have the right of immediate possession, at the earliest possible moment. The administrative method takes care of this situation and the majority of States utilizing the judicial method have provisions that allow the condemnor to take possession at some stage during the proceedings. In some States this right is acquired immediately on the filing. Some States must pay compensation before they are allowed to proceed; others must pay or deposit estimated compensation into court; and in other States compensation must be paid or secured in advance of the taking. The Pennsylvania Supreme Court has held that the taxing power of the Commonwealth can secure just compensation and that the highway de-

partment can condemn and take possession prior to payment.

According to Highway Research Board Special Report 33, the States of Connecticut, Maine, Massachusetts, New York, Ohio, Pennsylvania, Rhode Island, and Wisconsin utilize the administrative method in one form or another. I will not attempt at this time to describe the procedures used in each of these States, but I would like to tell you about the procedure in Pennsylvania. Our acquisition procedure is commenced by the preparation of a condemnation plan, which may be for a mile or five miles according to the particular project. This plan is prepared and it shows the right-of-way line of the entire taking. This plan is then signed by the Governor and the date of the taking occurs when the Governor signs the plan. The plan is then recorded in the county in which the land is located. We then conduct title searches, and order appraisals. Following this the district office in the district involved submits these appraisals to the central office in Harrisburg with a recommendation. These are then reviewed by a reviewing appraiser, and he is the one who determines the damage figure.

We have the firm offer system; that is, we make the landowner one offer and unless he can show us some reason that our appraiser is wrong, that there is some deficiency in his appraisal, or something has not been considered, we then notify the landowner that he may petition for a Board of Review, or we can petition for it. For the most part, the Boards are composed of an engineer, a real estate man, and an attorney who acts as chairman. If either party is dissatisfied with the Board's decision they can then appeal to the court for a jury trial. It is an automatic right of appeal for either party.

In Pennsylvania, this system applies chiefly to the highway department in its acquisition of right-of-way. Other condemnors, such as corporations who are invested with the right of eminent domain, condemn by court of resolution. The Turnpike Commission has its own procedure established by statute. As a result of all these different methods, the Joint State Government Commission has been directed by the Legislature to make a study of eminent domain law and procedure and recommend possible revision to achieve more uniformity.

DISCUSSION

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

G. L. Zoellner.—A question for Mr. Buscher regarding the interrogatories: I think he spoke of them as a two-edged sword. Has this ever been thrown back at him by the attorney for the condemnee?

J. D. Buscher.—Oh, yes indeed.

Zoellner.—And you have no objection to that?

Buscher.—We might, but there is nothing we can do about it. We have to answer it.

Canada.—I would like to ask generally of those who have had experience in using discovery tactics prior to trial: what is your experience regarding the additional personnel, if any, required for the work entailed in answering interrogatories, going to discovery hearings, and taking depositions, etc.? Have any had enough experience to be able to give me an idea of how many additional men or what percentage of men you have added to your staff to handle this work?

Buscher.—I am not sure I can give you a precise answer. At present the legal staff of the Maryland State Roads Commission consists of 15

special attorneys now, more or less full-time. We increased it by 4 about 2 years ago when we took on the procedure of handling our own right-of-way closings. Prior to that time we farmed out the closings to local attorneys throughout the State, but, partially at the insistence of the Bureau of Public Roads, and partially because of our own thinking, we decided to put at least one attorney in each of the seven engineering districts throughout the State. That meant dispersing some from the Baltimore office and hiring others in those areas. It was around that time that we got into the discovery tactics.

It does take more work. But even if it costs you three or four more men, it is well worth it. We find it is well worth the dollars.

J. T. Amey.—We have a decision in Arizona holding that the highway department has the right to discover by pre-trial discovery, including depositions, interrogatories, and requests for admissions. We are under the so-called "Federal Rules." We pursued this course because we have a number of property owners' lawyers who have virtually unlimited access to highway department information. They can use our files, because they were successful in the State in convincing the judges that these were not only public records but that they were open to inspection at any reasonable hour.

So we took the position that, fine, this is a double-edged sword. But when we sought to acquire information from counsel for a property owner, he took the position that this was either an attorney-client privilege, or else these were his work files. Now we have this decision, and Florida also has a decision in the Shell case [*State Road Department v. Shell,* 122 So.2d 215 (Fla. 1960), 135 So.2d 857 (Fla. 1962)]. I think these decisions demonstrate a trend on the part of the courts in various jurisdictions to broaden the scope of discovery in the eminent domain field. I predict that other jurisdictions will soon follow whether it is at the insistence of the property owners' attorneys or the State highway department.

I think that the pretrial discovery contemplated under the Federal rules indicates this, and I think the contrary preponderant Federal court determinations in this area are wrong. I think it is evidenced by the Southern District of California Rule 9 (i). This sets up a procedure whereby attorneys have a mandatory pre-trial conference in all eminent domain matters. It sets up a listing of all the items they intend to prove. In this itemized listing, for example, if the parties are going to use the comparable sales approach they must indicate the exact properties they are going to use in evidence. If they are going to use the capitalization approach, they have to state their recap rate and all the other information contained on that. This is all sent forward prior to the time of the pre-trial hearing. Then at the pre-trial hearing the attorneys exchange information. They must also have all of their trial exhibits prepared.

This, I submit, goes a great deal further in pre-trial proceedings than is anticipated by the Federal rules, but it does indicate that at least one district court feels that pre-trial discovery in the eminent domain field of the appraiser's work product is not regarded as the attorney's work product under the rule of *Hickman v. Taylor.*

Netherton.—That is an extremely interesting description of the extent of discovery. I am glad you detailed it like that, because I have been wondering whether we could say that discovery is limited to the appraiser witnesses' end-product—a finished product of his appraisal conclusions —or whether we are being pushed back into the working steps taken in the formulation of the appraiser's conclusion. His notes, his estimates, the things which were rough-cut in their written form as notes but subsequently polished up later in the light of further work. My curiosity about this point was first aroused by

a recent case in Wisconsin and I hope someone from Wisconsin will tell us about it.

Price (Office of County Attorney, Milwaukee, Wis.)—The case you referred to occurred last November.[1] The attorney for the property owner brought an action against two appraisers for the State. One was an employee who formerly worked for the American Appraisal Company, and left them, and the other was a fee appraiser. The Attorney General's Office moved to suppress the evidence of the discovery examination, but was unsuccessful. The Attorney General then went to the Supreme Court on a writ of prohibition against the circuit judge. Oral and written arguments were submitted, and the Supreme Court quashed the writ and held that the discovery was admissible. The Supreme Court based its decision on the fact that Wisconsin in 1961 had enacted a discovery statute that had been on the books for about 30 years. And this discovery statute was just about parallel to the Federal discovery rules.

R. F. Carlson.—We have the same problem, and to show you the trend in California, we adopted the Federal rules and then got a decision last year holding that not even the "work-product rule" helps us anymore. In fact we do not even have the privilege rule applying to the opinion of our witnesses. The courts have held so far that the actual report itself is privileged, but you can take a deposition from the expert witness and get his opinon on highest and best use, comparable sales and value. It has resulted in this problem: when we sign a contract with fee appraisers now they have put a clause in the contract calling for not just their witness fee, but if they give a deposition to the other side they want $100 a day for their deposition.

Netherton.—What, if anything, has this development prompted in other States? This appears to be getting over into what Mr. Cage (Alabama) was talking about when he said that because of the trend of pre-trial discovery we were having to readjust the way in which we prepare our appraisal witnesses for the trial.

Carlson.—In line with the practice in Maryland, we are using interrogatories extensively and taking depositions of property owners. We have found that very advantageous in finding out their theories, the past history of the property, and their contentions. So far we have not made it a practice to take depositions of their appraisers, because we still have a few hip-pocket points we are saving and keeping that report out of their hands. We are trying to work for a rule that will have a simultaneous exchange of comparable sales data and appraisal reports so that the other side does not get a free ride.

C. H. Lehmann.—À propos the last remarks, we have a ruling from the Circuit Court of Baltimore County that where we furnish or the other side furnishes a complete written report you can take a deposition of the other side's expert witness. But in such an instance, the party calling him must pay him, and that is about $100 a day; that discourages the property-owners from imposing on the appraiser's time.

The advantage of our interrogatories is that it is implemented by the rulings of the court; if the property owner does not have an appraisal (and this is usual), then in a reasonable time before trial he must give us all this information, otherwise he is in trouble when he gets to trial because he will not be able to prove this.

Canada.—The rule in Florida, as stated in the Shell case, is that the property-owner may discover of the condemnor, but it very carefully avoids any mention of whether the condemnor may discover from the property owner. The extent of discovery goes not only to work papers

[1] State *ex rel.* Reynolds v. Circuit Court of Waukesha County, 15 Wis.2d 311, 113 N.W.2d 537 (1962).

but to correspondence and everything back to preliminary engineering sketches.

The day we contact our appraiser or an engineer to build a highway, or the idea is generated, from that day forward everything that happens is subject to discovery, including the end product. Our statute is an exact paraphrase of the Federal rules. We have no work-product rule, we have no attorney-client privilege as far as condemnation is concerned.

P. J. Doerner.—I would like to ask a State that has had experience with this discovery procedure whether this has actually led to the settlement of these cases, or whether it has led to more expeditious trial of cases. It seems to me that the underlying assumption of these cases is that both sides have the same basic data, but have arrived at widely divergent conclusions of value. In effect, however, they force the parties to pre-try the whole case by the lawyers without a judge or jury, then a few months later they go through the same thing before a jury. Has this sort of pre-trial practice led to the settlement of more cases which otherwise probably would have been tried? Has it really served to expedite the trial?

Carlson.—As far as California is concerned it has seemed that after the property owner has sunk that much more money into the case it is just that much harder to settle. In my opinion it is really a waste of money because they could get that very same data if they would get their own appraisers out there instead of going for a free ride. All the data of comparable sales, highest and best use, assess value, cost of reproduction of improvements is all equally available to the property owner. It is just that he wants the condemnor's information. In addition, I think we should be concerned lest the addition of these discovery porcedures make the cost of litigation so great that proper trial of a condemnation case becomes prohibitive both to the condemnor and condemnee. We seem to be heading in that direction.

J. E. Thomson.—Just a comment on the use of oral depositions of the landowners. I have found them very helpful for the reason that we, as the defendant, put on the rebuttal and are in an initial position of uncertainty as to what we are going to have to meet. No matter how much we go out and look at the property we can never completely anticipate everything that the landowner will complain about. We feel that oral deposition helps nail down the complaint and get the history of the property. We like it as a pre-trial run-through which takes much of strain off the attorney who during the trial might otherwise have to run out and look at the property again or round up some last minute witnesses.

Buscher.—I disagree somewhat with Mr. Carlson, I know of cases where by pre-trial discovery we have gone into the property owner's case, and I have become convinced that the theory used by the State was wrong. I do not take the position that the State right-of-way department is infallible, and cases come to me sometimes where I would like to tell them that we do not want to try their case unless they get another appraisal. I think there are times when you may want to take another look at the theory of your own case after you find out the theory of the property owner. And where reasonable attorneys are representing the property owners, I think that the same thing could happen and does happen when they learn the theory of our case.

I do not think that it makes the trial of a case any easier, but it may save the time and patience of the judge in ruling on evidence. In some cases depositions and interrogatories cannot do any good because the parties are just too far apart, but in many cases I find that if you do understand the property owner's case you might want to change your mind.

R. E. Robinson.—As yet we have not used depositions or preliminary examinations to any great extent. From these people who have used them I would like to get their reaction. Do landowners make so much use of this procedure that it becomes burdensome? We have not started it in our work, and it is our fear that if we start it we are going to start getting hit. I wonder if this has been true where it has been used.

Amey.—I think you will find that people who represent property owners, and particularly people who specialize in it, are going to come across these cases, and it is simply going to be a question of time before someone sends your office a set of interrogatories or summons your witnesses for deposition. I think this is part of the problem that Florida had. They took the position that they were not going to let these people have any information contained in their records, and as a result their Supreme Court has ripped them wide open and the language in that case is most unfortunate. If you have occasion to get a problem like this, read that decision and compare it with the Arizona decision. Our decision is unclear in some respects. For example, our court did not hold that I could take pre-trial discovery of every individual contacted in the appraisal report of the other side. They did say I could take depositions from and address interrogatories to the property owner relative to the valuation opinion of individuals he intended to call as witnesses.

As the people from Maryland have said, pre-trial discovery is a two-edged sword. We make our interrogatories in a continuing form so that immediately the case is filed and assigned to an attorney one of the first things he does is to submit these continuing interrogatories and takes a deposition of the property owner.

I can illustrate some of the possible advantages of this by reference to one of our recent cases. In connection with taking a small piece of farm land I asked the owner, on deposition, what he thought his property was worth. He said: "I don't know, I don't have the faintest idea." This answer contrasted with a case we had about a year ago where the property owner took the stand and you could not distinguish his testimony from those of his expert appraisers. He began to define highest and best use, fair market value, and all of the other terms of art. Under this most recent deposition, as our procedures are now, we ask the property owner whether he has any understanding of the term "highest and best use." He said: "No, would you tell me what it is?" I said, "Well, if you do not, say so. We are not trying to trap you. If you know tell us what your concept of it is." This information is invaluable if at some later time these people take the stand and begin to sound like they have been appraising all their lives.

Netherton. — This is interesting in terms of the old axiom that whoever has the power to define terms has the power to guide the thinking that follows. I wonder if you feel there is an advantage in getting your definition of some of these key terms, like "fair market value" agreed on in the record in advance. Does this put you where you want to be strategically in the proceedings that follow?

Amey. — It does particularly if at some later time the property owner or appraiser then gives a definition on the witness stand that is different from what he gave in response to an interrogatory or deposition.

Canada. — I can tell you something of the reaction of the property owners' lawyers in Florida. The decision in the Shell case came out on Friday; it was mailed to us so that we got it Monday morning. On that Monday morning in question our chief trial counsel came into my office with three sets of interrogatories. Neither of us knew what these were all about. At 10:00 A.M. the Shell decision came in the mail, and by 4:00 P.M. we had 27 sets of interrogatories. This gives an idea of how closely the property

owners' lawyers were watching the outcome of this case. We now get on the average of about 15 a week.

Thomson. — I have been interested in this comparison of pre-trial discovery to a two-edged sword. It seems to be that it is a two-edged matter especially in the urban areas where expert witnesses are employed by both sides. By expert witnesses I mean professional appraisers or near-professional appraisers. However, when you get out in the rural areas, I wonder if this is true. In the rural areas the witnesses for the landowner generally consist of one real estate man and some friends and neighbors. Chances are that you never know who they are unless you get a pre-trial conference and force the other side to disclose who it is going to use.

If you were to go into a pre-trial discovery proceeding immediately, chances are that the landowner would not know who he was going to use. In the end he may fall back on friends and neighbors, other farmers whose chief merit is that they are from the area and are insiders who know the area in a way that the outside appraiser does not no matter how extensive his written appraisal is.

Netherton. — How much of this squeeze that the trial attorney feels can be relieved by the use of economic evidence? Can this burden of having to rely so much on the appraisal witness, whoever he may be, be spread out over other forms of evidence? It is about the only direction that we have mentioned today in which we can move to relieve this problem.

A. J. Allen. — We have a problem in connection with the use of economic studies. Most of the attorneys who have spoken on the use of these studies have a situation in which they are allowed to offset benefits. In Iowa, however, the constitution prohibits us from considering benefits to the landowner resulting from the improvement. We have thought that this pretty well knocked out the use of most of these economic studies in our case. I am wondering whether any other States have a similar rule which does not allow them to or limits what they can consider in the way of benefits.

Carlson. — Well, I have seen some economic studies and I can understand why they are not used in evidence. They were not very good economic studies. They were made too much from the viewpoint of the highway department. If we could get a good objective study perhaps it would really be of some benefits as evidence.

W. H. Donham. — We provide for interrogatory discovery in Arkansas, but I have found that the other attorneys sometimes switch doctors before the trial. Now thinking of this in terms of appraisers, if this happens, all we can do is plead surprise and get a continuance. It is hard enough to get a condemnation case accepted in Arkansas as it is without giving the landowner a chance to take a non-suit on you. How are these admissions regarded in other States? Do they have the status of pleadings and answers? Are the parties stuck with them? Or can they come in at the trial and use another witness?

Buscher. — We have ours as continuing interrogatories, and if the other side changes witnesses they have to notify us. If they come into court with a new appraiser, the judge will consider it as a surprise and will not consider it in evidence.

Donham. — Well, that is the only way that the rule would have any effect. The practice as it is in our State, where the trial court merely gives a continuance, has no effect.

Amey.—We have had similar rules in the trial courts in Arizona. The rule is that if we have not had sufficient time to submit interrogatories or take the deposition of the valuation witness he may not be introduced at the trial.

The Continuing Evolution of Inverse Condemnation

RICHARD BARRETT, *Assistant Attorney General, Wisconsin*

• In Wisconsin we are getting into inverse condemnation more and more, due to the fact that there are now a number of items of damage which are compensable under our statute which never were compensable before. When we changed the law last fall, instead of combining those items with the usual fair market value items, they were listed separately to be put in as claims. Those new items are change of grade where there is no taking, moving costs, rearrangement of property on the same site, costs of refinancing, and costs of building plans that are no longer usable because of the taking.

Of these five items, the moving costs ordinarily cause no particular difficulty. The rearrangement of property, on the other hand, can sometimes cause a considerable amount of difficulty because very complicated fact situations and refinancing costs are involved. But of course, the big problem concerns compensation for the change of grade where there is no taking. Under our new law the landowner makes a claim, and if it is denied or not allowed within 60 days, he may follow this with what amounts to an inverse condemnation action in the courts.

We have had other forms of inverse condemnation on our books for some time. Where property is taken by the condemnor, a property owner has always had his right to pursue the condemnor for damages. Traditionally the issue in such cases has been a difference between what you or I may think is his damage, and what the property owner may think. That has caused us and will cause us more and more difficulty as we go along, because there certainly is room for dispute over this element of damages in many situations. For example, I have one case where the property is a night club located on the Wisconsin River. The Highway Department changed the grade by moving the highway back higher on the bluff, but leaving the old road intact so that the night club owner could use it for parking instead of having his customers park along the highway as they always had before. Notwithstanding this the property owner claimed he was damaged. It has caused us some difficulty to determine how the benefits and damages balance out in this set of circumstances.

Outside of these five items provided for in the new statute we find that we are now involved with a law recently passed to take care of water damage but which amounts to an inverse condemnation law. According to its provisions the highway commission has to furnish sufficient ditches and culverts or other outlets to allow the free and unobstructed flow or percolation of water from adjacent lands onto the highway right-of-way itself or other places designed to receive and absorb water and to prevent the lowlands from being flooded and so on. Technically, of course, it is an engineering impossibility to build a highway that does not interfere to some degree at least with the percolation of water and the flow of water. Just the impact or weight of the highway itself — the fill, the concrete, and the structures — on a piece of property, the engineers say, is enough to stop the percolation because it compresses the soil to such an extent that you do not get free flow and percolation

that existed before. So we are vulnerable to a new form of inverse condemnation which from a practical standpoint we cannot avoid. We have tried to work this out through the Legislative Counsel, and have put in a suggested bill making this damage noncompensable, but that cannot be acted on until the next session.

We have developed several practical responses to this trend to broaden the scope of inverse condemnation. If we sincerely believe that a property owner has been damaged we do not follow the policy of making that person go to court to collect damages. I think that it is wrong to force him to do that. We use a rule that we have here in Wisconsin which allows us to bring a condemnation action ourselves without following the usual rule of admitting, by initiating the action, that the taking is valid. Most States seem to have a rule that when the State starts condemnation it can no longer contest the title of the person against whom the action is brought and his ownership of the land in question is admitted. However, in Wisconsin [1] the court has held that where, in making the award of damages in condemnation, the State alleges that it does not admit title in the property owner, the matter of ownership or property rights becomes an issue for adjudication. We are thus able to close out the possibility of injunction suits, and in effect condemn their lawsuit, but still reserve our rights to try the case on its merits. And if we can show that the claim is invalid, or fraudulently brought, or can prove the fact that there is no ownership in the person, we are able to close out these things without waiting for them to bring inverse condemnation against us. This happens sometimes where there is a property dispute between various parties.

In Wisconsin we are particularly disturbed by the recent tendency of our court to throw away what we consider to be the law of condemnation, and allow damages on the court's own ideas of what is compensable. This, of course, invites the use of inverse condemnation by the property owner. I think Wisconsin is not alone in this tendency of the courts to enlarge the concept of just compensation. For example, in the Carazalla case[2] there were dicta in the first decision to the effect that damages during construction could be considered as pertaining to the fair market value. Now that was just dicta in the first case, and we wanted to get it straightened out, so when another case came along we took it up again. In the second Carazalla decision, we argued to the court that this item was a matter within the scope of the police power and not pertaining to eminent domain. I think this clearly was a case of the police power, because construction does not relate to eminent domain.

There is a perennial problem regarding the man from whom you do not take anything. He may be inconvenienced as badly during construction as the man from whom property has been taken, but heretofore the courts have said this inconvenience was not compensable. I am afraid we are going to run into more and more of these cases. Recently our court rejected the doctrine of sovereign immunity in a Milwaukee case[3] in which a child was injured while playing on a specially constructed children's playground. Somehow there was a manhole near a bubbler, and the tot caught her hand in the manhole cover. The attorneys who brought the lawsuit did not seek to upset the rule of sovereign immunity, which was firmly established in Wisconsin, but they went in to get a determination of whether this was a proprietary function or a governmental function. The court threw this distinction out, but went on to say that we created sovereign immunity, and now we hereby abolish it!

[1] Perszyk v. Chicago, Milwaukee Electric R.R. & Light Co., 215 Wis. 233, 254 N.W. 753 (1934).

[2] Carazalla v. State, 269 Wis. 593, 70 N.W.2d 276 (1954).

[3] Holytz v. Milwaukee, 17 Wis.2d 26 115 N.W.2d 618 (1962).

I predict that this will mean that once it is settled just how these suits can be started we are going to be busy with them. Our court said that the State can still have a law saying when and where they may be sued, but I frankly do not know what that means. Does it mean that the legislature can re-create sovereign immunity? I do not know how to interpret it.

There is an excellent article in the Virginia Law Review of April 1962 on recovery of consequential damages in eminent domain, and it goes into the evolution of what should be compensable, pointing out the evolution that is taking place in eminent domain now. I would like to quote a portion of this article citing a recent decision of the New Hampshire Supreme Court:

> The vital issue then is, whether the injuries complained of amount to a taking of the plaintiff's property, within the constitutional meaning of those terms ... The constitutional prohibition (which exists in most, or all, of the States) has received, in some quarters, a construction which renders it of comparatively little worth, being interpreted much as if it read,—"No person shall be divested of the formal title to property without compensation, but he may without compensation, be deprived of all that makes the title valuable" To constitute a "taking of property," it seems to have sometimes been held necessary that there should be "an exclusive appropriation," "a total assumption of possession," "a complete ouster," an absolute or total conversion of the entire property, "a taking the property altogether." These views seem to us to be founded on a misconception of the meaning of the term "property," as used in the various State constitutions.[4]

It goes on to explain that property does not have to be an entire entity. Property can be taken when there is a partial deprivation of use, and this article notes the liberalizing trend of supreme courts all over the country and of the U. S. Supreme Court. These matters are bound to be brought up to the courts primarily through actions of inverse condemnation because individual items of damage can be selected and brought up this way. More and more in the future we are going to see efforts to get the courts to change by their decisions the conception of what is compensable. This is a huge field; we are going to see many changes; and I think it will come about primarily through inverse condemnation.

Before I close, I want to call your attention to a recent case in a little different field of highway law. This is *Town of Ashwaubenon v. State,* 17 Wis.2d 120, 116 N.W.2d 498 (1962). This involved laying out a corridor for a highway just south of Green Bay, and it was required by both Federal and State law that a public hearing be held before final decision on the route. This hearing was for both the Federal and State requirement. The Highway Commission held a public hearing and later determined that the route that they had selected was the best on a more or less Statewide basis. This selected route was to serve through traffic, but the town of Ashwaubenon and the City of DePere, which contested the matter, had different ideas which visualized it as a local route which would develop business and industry along the line. These were the basic differences. The Highway Commission in addition to the public hearing went into the field and examined the various routes. They considered several things not brought out at the public hearing. Then they made their determination.

The next thing we knew we were taken into court on the theory that we had not shown by the weight of evidence that the route the commission had selected was the best. In other words, they treated this hearing as a contested case. We have the same situation that most of you have with administrative procedure. We call ours Ch. 227; and we were called in on a Ch. 227 review. This involved the problem of showing by the preponderance of the evidence that our route selection was best. We were faced with the question of what are we doing in these public hear-

[4] Spies, E., and McCoid, Jr., "Recovery of Consequential Damages in Eminent Domain." 48 Va. L. Rev. 437, 443 (1962).

ings. Are we retrying a case? Do we have to disprove the contentions made by landowners at these hearings? We tried to argue that this was legislative hearing of the type the legislature holds when they are considering bills, and the public is invited to express its views pro and con, and that is all it amounted to. We said the only test that the commission was faced with was whether their decision was arbitrary and capricious or made in fraud or something like that. Otherwise the decision of the commission is valid so long as it has any evidence to support it. We lost the case in circuit court, but the supreme court reversed it and said this was a legislative type hearing and following the theory that we had argued. Admittedly this involved a delegation of large powers, but, as the court said, until the legislature feels this is wrong, it must be considered as a legislative hearing and not a contested case.

DISCUSSION

LEONARD I. LINDAS, *Chief Counsel, Oregon State Highway Commission, Presiding*

Lindas.—This matter of inverse condemnation has many ramifications. A recent case in Oregon involving a drainage matter involved the question of what title or property interest the State acquired after it had been ruled that there was a taking. We argued that we were entitled to a flowage easement on the ground that this is what we actually had taken. The supreme court held that wherever it was proved there was a taking we were entitled to the title to the land taken or, if it was matter of drainage damage, we were at least entitled to a flowage easement to allow us to flood it in the future. Of course, the owner could come back to court again if the drainage pattern was changed again in the future.

I wonder whether the type of constitutional provision that the State has—a "taking" as opposed to "taking and damage"—will make a great deal of difference in inverse condemnation?

Thomson.—I believe Iowa and Oregon have much the same constitutional provisions limiting the compensation to taking. As you know, however, the concept of taking has been getting broader. In Iowa, the Liddick[1] case and the Anderlik[2] case considerably broadened the context of taking to include change of grade, interference with rights of air, light and view, and it seems to me that there is a tendency for it to make less and less difference except in the close cases involving a tort-like situation.

Lindas.—In our State we recently had a case where the landowner said that the county took his property because of setting off dynamite blasts in a quarry site where the county jail is. As a result the plaster in his house was cracked, dust settled all over his dishes and flying rocks came onto his property. Our supreme court held that this was not a taking.

Turning to the mention of sovereign immunity, I note that California has recently lost its sovereign immunity.

Carlson.—Yes, in 1960 we lost our sovereign immunity, but the legislature declared a two-year moratorium on lawsuits against us. The first year we had $11 million worth of claims filed against us, and as of June 30 of this year we had $15 million worth of claims against the Highway Department. This moratorium gives us time to organize a defense section and investigate these claims. But in 1963 when the legislature tells us what will have to be proved in order to collect against the State we will have to deal with these claims.

[1] Liddick v. Council Bluffs, 232 Ia. 197, 5 N.W.2d 361 (1942).

[2] Anderlik v. Iowa State Highway Commission, 240 Ia. 919, 38 N.W.2d 605 (1949).

Barrett.—One of the troubles we have arises because we have a State Claims Commission which uses a very informal type of proceedings. When there is a highway accident of some sort the first we know about it is when the Commission tells us a claim has been filed. I think there should be some time limits on these claims, otherwise you never know where you stand.

Lindas.—Our supreme court ruled on it, and said we still have sovereign immunity except where the State or agency has insurance. In the case of a school district which was insured the court said that we had waived our sovereign immunity to the extent of the insurance coverage. And they further said if the enabling act allowing purchase of insurance also stated that the legislature did not by this act waive the sovereign immunity of the State, then the sovereign immunity was not waived.

Barrett.—We had a case here where a doctor was injured on a toboggan slide in a city park. The court said that even though the city had insurance the sovereign immunity was not waived because the city was engaged in a governmental function. We have had other cases just as poorly thought out, and I think that is one reason why the court finally eliminated our sovereign immunity.

C. N. Henson.—For years, Kansas had a defective highway statute, providing that the Highway Department was liable for injuries due to defects in the highway, but they set up certain ground rules that notice must be given to the Highway Department a specified period after the injury, and also that the claim must be filed within a certain time, and this defect must have been known for at least five days. The defense of these actions was normally contributory negligence.

Amey.—We had a peculiar case in our Supreme Court brought within the framework of our inverse eminent domain case law. The problem was with an arroyo, or long trough in the terrain, through which rain waters rush in the rainy season. The one in question was rather wide, and we wanted to construct a road across it instead of bridging it. We therefore built the highway across, and constructed a "dip" to let the water across. It later happened that a motorist was driving down this road following a storm when the arroyo was flowing, did not see the dip, hit a chuck hole, lost control, and was washed down the arroyo. His passenger was killed, and he was injured. His attorney brought action for wrongful death, personal injuries and loss of personal property under this eminent domain statute and inverse condemnation case law. We filed a motion to dismiss, but it is presently on appeal, and we may be faced with what happened in California.

This is one of the most frightening aspects of inverse condemnation. People are talking about personal losses and personal property damage in addition to impairment of the intangible property rights. It is bad enough to try to make the traditional rules of condemnation apply to these intangible property rights. But when we get into personal injuries we do not know what the proof of damages should be, whether the courts will award punitive damages, or whether the torts of contractor who originally built the structure will be imputed to the State or how far it will go.

Lindas.—We had an interesting series of cases arising from building highways in a canyon. A little creek flowed there and normally it is of no consequence, but after one cloudburst it rose up and took out 13 houses. We defended on the grounds that the highway construction was not the cause of the taking. We had a hydrologist expert who gave beautiful testimony on how this would have happened even if the highway was not there, but the judge did not believe it. So we bought 13 houses that were not there and 13 plots of land that are not good for anything. We also found out in this case that when dealing

with personal property claims there is no such thing as fair market value. It is all replacement value of the item new. A price tag on a used commodity is the new price.

Thomson.—As I understand it, in an inverse condemnation proceeding, the judge determines first whether there is any taking, then the matter goes to the jury. Of course you have problems of what you get through inverse condemnation, whether it is a flowage easement, fee title, or something else. What is the situation with respect to the extent of the taking. Assume you have a farm of 160 acres. Does the judge determine the extent of the flowage easement?

Lindas.—In Oregon when landowners file inverse condemnation actions we move to make the matter more definite and certain by requiring them to set out the metes and bounds description of the property affected or "taken." When the court requires them to do this, we have a metes and bounds description of the exact area which our flowage easement covers.

Thomson.—Suppose that the landowner claims that the State has taken, say, 160 acres and the evidence shows that it is only 20 acres. I should think that it would put quite a burden on the court to determine from the evidence just exactly what was taken and where. Of course, it would also put an equally difficult burden on the attorney and witnesses for the plaintiff. It seems to me that the State should have a right to have this matter laid down fairly precisely.

Lindas.—I think that if the evidence showed that the actual taking was less than alleged, there is no question that the judgment would have to conform to the actual taking as proved.

In connection with the Stadium Freeway in Portland (Oregon) we have been notified by the owner of an apartment building near the project that he is going to file an inverse condemnation action against us for noise damage. We immediately sent our men down to California to consult with some sound experts and get ready for this. We are taking our readings now around the apartment, and when the highway is completed we will do it again. Now how they, or we, will relate this noise to land value may be quite a difficult thing in the case of a high-rise apartment, but we are trying to get ready for it. Has anyone else had any experience with noise damage?

R. K. Abrahams.—I can tell you something as to airports which may provide a comparable situation. The Port of New York Authority runs the New York International Airport, and jet planes are going over all the time. In the neighborhood 809 property owners joined to file a single suit against us which they call inverse condemnation.

It seems to me that all you have in this case is a form of tort action for nuisance. They insist that we have taken their property in that they cannot sleep, they cannot do normal things, the value of their property has been decreased. And yet, obviously, there is not any physical invasion of the property itself. In fact the planes do not even fly low over this area. But they claim that with this noise there has been a taking.

I do not know how this is going to come out, but in a similar case involving Newark airport across the river a few years ago the suit was dismissed.

J. Montano.—We have a case now on its way to our Supreme Court in which a highway was constructed, and the property owner filed suit against both the highway contractor and the State claiming that his well which was located just east of the highway went dry. His case consisted of showing that before the construction he had water and after the construction he had no water. We moved for a directed verdict on the ground that he had not sustained his burden of proof, but the court got into the question of riparian rights, that if the source of water were under the highway or within the area

of construction, and we had taken that source of water, it was in fact an inverse condemnation. Our claim was that he had not shown that the source of water to his well was an underground stream rather than percolating water. There is no riparian right to percolating water. Also, it was presumed to be percolating water. The court agreed with this but said although there ordinarily is no riparian right to percolating water, when the State takes it there is one as far as they are concerned, and there is a duty to pay. So this is on its way to our supreme court.

Lindas.—Coming back to problems of drainage again, there are two theories in this country relative to water rights. One is the "common enemy rule" and the other is the "civil law rule." The common enemy rule is that you can do anything you want to keep the water off your place and the other fellow has to watch out for himself; the civil law rule says that you cannot interfere with the water as it comes across. This might make a difference in your inverse condemnation action depending on what rule your State follows.

Carlson.—I suggest that in those States where the courts take away sovereign immunity they start thinking about legislation to give them some protection. When the court overturns sovereign immunity it overturns it completely. You are liable for torts, negligence, intentional torts; you might think about some legislative limitations on liability, types of conditions which will warrant a suit, the measure of defective conditions, modify the "trivial defect rule," and define the time period for claims. All these things you avoid when the Supreme Court overturns sovereign immunity.

D. R. Banister.—In Louisiana the situation is somewhat different than it is in other States. They have the doctrine of sovereign immunity, but our doctrine came from France. I am not at all sure that our courts would say that we can now abandon the doctrine of sovereign immunity. Now one of our appellate courts did do that, but was promptly reversed by the Supreme Court. So our doctrine is still there. However, it does not amount to much because at every session of the legislature there are bills passed to permit suits against the State, parishes, school boards, and cities. These suits may not, however, be tried before a jury, but must be tried before a judge.

We have a lot of fun with this because there is nothing to prevent the legislature from coming in and waiving immunity for injuries that happened some years back. I tried a case once for injuries that were 45 years old.

Barrett.—We may be coming to a system like that the Federal Government uses in its court of claims. One of our problems is going to be to take care of these things all over the State. That is going to be a tremendous problem. I also agree that we should have some legislation on the subject to make sure that we get ourselves organized to deal with this program.

Lindas.—Is California putting in a tort claims act?

Carlson.—Our law revision commission is studying the problem and came up with a study of about 600 pages, and a statute that is about 200 lines long on dangerous and defective conditions. It seems to me that a plaintiff could get into court merely by being injured, and then the burden is on the State to prove that the risk was reasonable, and the plaintiff does not have to show that the risk was unreasonable.

I do not know whether this will pass or not, but if it does it will create a lot of problems for the State. If anybody is interested in this study of the California Law Revision Commission I suggest he write to them. Their study is a good one, covering the law of various other States, they have covered the subject of dangerous and defective conditions, medical and hospital torts, unauthorized

damage, motor vehicle torts, intentional torts, and liability of employees. They are not impressed with the fact that on a construction project where there is an accident the injured party can sue the contractor. They are not impressed with the fact that usually they can sue an employee who is insured. Really there is no sovereign immunity because of these indirect methods of recourse against the State. I think what is happening in California is that we are merely abolishing the State's indirect liability through its employees, and imposing it directly on the State. And I am afraid that when the juries see the State as a defendant, the verdicts will be substantially higher than they were when they were against our highway department employees.

Buscher.—Our sovereign immunity is intact and in Maryland we have not been bothered by inverse condemnation so far. But a couple of years ago it was determined that the highway program needed a certain piece of property, and we prevailed on the county involved not to rezone it to a higher use. The property owner's attorney wanted us to purchase this property but we did not have funds available for that purpose. So the attorney did a rather unique thing. He filed a petition in Federal court claiming that his client was deprived of property under the 14th Amendment, and asking the court to compel the State Roads Commission to start condemnation proceedings. We moved to dismiss, and the case was heard before the judge. He granted the motion to dismiss with leave for the petitioner to amend, but he told us that he did not want us to move to dismiss the amended bill. He wanted it answered completely, he wanted to take evidence and testimony and get the whole of the facts out before the public. He led us to believe he did not like our position in holding up this property owner. So, rather than go through a whole court case, and possibly an adverse court decision, we purchased the property.

Guide Lines for Determining Tort Liability of Highway Agencies and Contractors

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• This discussion assumes the circumstance that sovereign immunity does not apply, for two reasons: (a) for many of us, sovereign immunity has been waived by legislation so that our agency must answer tort claims in the courts of general jurisdiction or in a court of claims; and (b) even if sovereign immunity still protects an agency against direct suits, the contractor is usually not so protected, and his risk of liability is reflected in bid prices.

In addition, this discussion assumes that a public agency, once it is no longer protected by sovereign immunity, will be subject to the same rules of tort liability as if it were a private corporation, because such exceptions and special rules regarding tort liability as do exist in favor of public agencies or their contractors vary widely from State to State and, at least in New Jersey and New York, the jurisdictions governing the Port Authority, will probably become narrower.

In the States of New York and New Jersey, the common law, and even most statutory, rules growing out of practice construction are applied equally to public agencies, with very few exceptions, and therefore this discussion also frequently cites cases involving private construction.

OWNER'S RESPONSIBILITY FOR INDEPENDENT CONTRACTORS' NEGLIGENCE

The familiar rule is that the owner is not responsible for an independent contractor's negligence unless (a) the owner has a nondelegable duty to those whom the contractor might injure or damage or (b) the work to be done is inherently dangerous to others or will be dangerous unless particular precautions are taken.[1] One of the more interesting recent applications of the rule appears in *Majestic Realty Associates, Inc. v. Toti Contracting Co.*, 30 N.J. 425 (1959).

Toti was demolishing buildings in a crowded downtown shopping and business area of the City of Paterson for the City Parking Authority, which planned to construct parking lots. Using a 3,500-lb steel ball swung from a crane, Toti was leveling the buildings when he came to a building just within the boundary of the parking lot site. Just beyond it and next to it was a building not to be demolished and still owned and occupied by the plaintiff. Toti removed the roof of the building to be demolished and the interior partitions and floors and the front and rear walls leaving a free standing sidewall next to Majestic's building and extending 20 ft above Majestic's wall. This was not good demolition practice according to expert testimony at the trial. It seems, however, that no harm might have come had Toti maintained the procedure, which he used at first, of knocking off a few bricks at a time from the top of the wall by swinging the demolition ball in a direction toward the inside of the parking lot site, and thus away from Majestic's building. Toti soon became impatient, however, and swung the steel ball against the bricks 15 ft below the top of the wall so that the physical reaction sent the top of the wall back over against

[1] PROSSER, TORTS, 2nd ed., 357-362.

Majestic's premises, seriously damaging Majestic's roof. When asked by the appalled occupant "What have you done to our building?", Toti gave the honest but unsatisfying reply: "I goofed." Majestic sued Toti and the Parking Authority and obtained a judgment against Toti, but the trial court dismissed the action against the Parking Authority on the ground that the work, while hazardous, was not a "nuisance per se." The Appellate Division reversed (2 to 1) as against the Parking Authority and ordered a new trial on the ground that "Where potential danger exists regardless of reasonable care on the part of the contractor, the landowner cannot, by contractual delegation, immunize himself against liability for negligence of the contractor which causes injury to a member of the public or to an adjoining property owner." The dissenter in the Appellate Division felt that the accident resulted from negligent failure to follow standard procedure, not from inherent danger, and that the owner is therefore not responsible for the independent contractor's negligence. The Supreme Court then proceeded to its own consideration.

The Supreme Court unanimously affirmed ordering a new trial as against the Parking Authority on the reasoning however that demolition work in a busy, built-up section of a city is inherently dangerous unless special precautions are taken and that, in such a situation, the contractee (owner) has a nondelegable duty toward the public to see that such precautions are taken. [The court noted that while the duty was absolute, it does not follow that the liability was. The meaning apparently is, judging from another section of the opinion, that so long as the activity in question is merely "inherently dangerous" and not "ultra hazardous," negligence must still be proved but once it is, the owner is not insulated from liability by the contract. On "ultra hazardous" activity, the court accepts the definition of the Restatement of Torts, Section 520, as one which (a) involves a serious risk of harm which cannot be eliminated by exercise of the utmost care and (b) is not a matter of common usage. Typical of ultra-hazardous activities would be the storage of explosives. The court remarks by dictum that liability is absolute in the case of ultra-hazardous activity.]

The holding relies on precedent cited from New York, Massachusetts, Alabama, Delaware, Louisiana, Missouri and Ohio. The decision impliedly overrules a rule appearing frequently in prior New Jersey decisions which bases the owner's liability or immunity on "nuisance per se" or absence thereof. The opinion examines the concept of nuisance per se and finds it lacking in clarity. The court expressly invites future cases to be tested rather by the "inherently dangerous" and "ultra hazardous" concepts.

Reference is made in the opinion to the argument that it is unfair to hold an owner to responsibility for taking precautions in inherently dangerous work since, by the very nature of such work, it is so specialized that it should not and cannot be performed by the owner himself but must be let out to a contractor, and for the owner to reserve control would be inappropriate and of no avail. The court replies that the rights of the innocent injured party demand protection, however, and that placing an absolute duty on the owner will induce him to be the more careful in selecting a competent contractor.

Thus, inherently dangerous activity is in effect found to be one example of the category of "nondelegable duty." I would venture to guess that the description "nondelegable duty" is really not a helpful term to define an exception to the rule of no responsibility of an owner for negligence of an independent contractor and that the nature of the exception usually given this general description is actually to be found only in specific examples appearing in the case law such as "inherently dangerous" activity and "duty to

passersby on a public way."[2] In other words, the judicial process tends to be first to find that there is a good reason to hold the owner responsible in a particular set of circumstances and then to find that for this reason there is a nondelegable duty, rather than to see if a particular situation fits into a predefined category known as nondelegable duties.

One other interesting point was raised by the court decision, however, being expressly reserved because not necessary to the disposition of the case: is choice of a financially responsible contractor a failure to choose a competent contractor within the exception to the general rule? The opinion explicitly finds that such is not yet the law in New Jersey. Also brought out is the fact that liability insurance can readily be obtained by demolition contractors and could be required by the owner. However, says the court, in any case, the issue would not be important unless and until the contractor were negligent in the first place.

The Majestic opinion logically leads to another common example of inherently dangerous activity—blasting.[3] While blasting in a quarry may be a nuisance and therefore actionable without proof of negligence,[4] temporary blasting to improve property is not a nuisance.[5] It is safe to assume however that blasting is inherently dangerous and that therefore a public agency must be concerned about its contractor's competence and the precautions he takes. As of today, at least, New York and New Jersey follow what I believe is the minority rule that concussion damage from blasting is not actionable, unless negligence be shown.[6] (Trespass occurs however if matter is actually thrown on the plaintiff's land by the blasting and is actionable without proof of negligence.) This rule has had a remarkably hardy existence in spite of much criticism and in spite of the majority view to the contrary, but we in New York and New Jersey can feel the breezes, if not winds, of change. Recently, the New York Court of Appeals, while holding in *Schlansky v. Augustus V. Riegel, Inc.*, 9 N.Y.2d 496 (1961) that a retrial should be had of a dismissed complaint of blasting damage alleging negligence, since a prima facie case of negligence was made out, also took the occasion to observe that for this reason it was not reconsidering the New York rule on concussion damage, in language suggesting that the rule is no longer unquestionably accepted by the court:

> Plaintiffs-appellants press for a "reexamination and reappraisal" of the New York case law which imposes strict liability for blasting damage when there is physical trespass but insists on proof of negligence in the blasting when no flying debris is cast onto a plaintiff's premises. Were the question properly before us we would have to decide whether the present New York rule should be modified so as to conform to the more widely (indeed almost universally) approved doctrine that a blaster is absolutely liable for any damages he causes, with or without trespass. [Citing decisions in Wisconsin, Illinois, Connecticut, Pennsylvania, and the Second Circuit] (pp. 496-7).

Judge Van Voorhis, in a special concurring opinion urged no change in the present New York rule. He felt that imposing absolute liability would have the effect of giving to the first landowner who built on his property in a neighborhood the right to prevent building by others if blasting is necessary. He would however recognize qualifications in the rule (already stated in the leading New York

[2] See Delaney v. Philhern Realty Holding Corp., 280 N.Y. 461, 467 (1939); and Bechefsky v. Newark, 59 N.J. Super. 487, 493 (App. Div. 1960).

[3] The Restatement and a number of jurisdictions, probably the majority, regard blasting as cause for absolute liability and therefore in a category of stricter rules than those applying to "inherently dangerous" activities, but for purposes of this discussion blasting is treated as merely "inherently dangerous."

[4] Dixon v. New York Trap Rock Corp., 293 N.Y. 509 (1944).

[5] Shemin v. City of New York, 6 App. Div 2d 668 (N.Y. 1958).

[6] The leading case is Booth v. Rome, Etc. R.R.Co., 140 N.Y. 267 (1893).

Booth case requiring use of other means than blasting if "practicable, in a business sense . . . although at a somewhat increased cost" or "if less powerful blasts might have been used" which would have avoided or lessened the damage.

It seems to me that absolute liability for blasting concussion damage is too severe and I fear it would wreak havoc with public and private construction costs. Perhaps the answer lies in exceptions such as cited by Judge Van Voorhis, but exceptions such as these and their exact extent are better promulgated by statute than by case law evolution. The rules as to "how much increased cost" a builder is obligated to incur and how much he must "lessen" damage, if they are to be useful guides, must be precise and by their technical nature they should admit of more precision than do most judge-made rules. Moreover, a potentially staggering liability must be risked by a construction agency if it must wait for each individual situation to be decided by an actual damage suit.

Incidentally, the blasting contractor in this case attempted to shield himself from liability for negligent blasting by the simple device of denying under oath that any records of the blasting had been kept. This may have been a factor leading to the holding that a prima facie case on behalf of the plaintiff should be inferred from (a) expert testimony that an inspection of the site showed that more explosive powder was used than was necessary and (b) testimony by the plaintiffs of deafening noises, terrifying blasts, and large cracks in their houses immediately following certain blasts.

Also, in a decision issued a month before the New York trial court applied the exceptions in the Booth rule by holding liable a blasting subcontractor for damage caused to adjacent property, the ground being that alternate means such as "chipping and feathering" could have been used but were not even after the blaster was made aware of damage occurring to the plaintiffs' property.[7] No comment appears in the opinion as to the comparative cost of chipping and feathering. Another application of a Booth rule exception appears in the unusual situation of the State using blasting charges to determine by seismic readings the depth of bed rock after, according to the court, the State had already ascertained the depth by borings. It was therefore concluded that the State "made an unreasonable use of its property under the circumstances herein which constituted a legal wrong for which the claimants have a right to recover. . . ."[8] The opinion does not seem to rely on any showing of negligence.

THIRD PARTY BENEFICIARIES

The blasting cases seem to form the bulk of the third party beneficiary decisions also. The leading case in New York of *Coley v. Cohen,* 289 N.Y. 365 (1942) makes a third party beneficiary clause out of such language as that the contractor shall be "responsible" for claims arising from blasting and for defense of actions arising from such causes. Apparently important to the decision was the fact that the owner was a public agency, the Buffalo Sewer Authority, which might therefore be assumed to desire to protect the public against damage for which ordinarily it would have no recourse under the Booth rule.[9] (The interpretation was also

[7] Ryback v. Godwin Construction Co., 28 Misc 2d 1060 (N.Y. 1961). The court dismissed the action as against the general contractor and the owner who hired him on the ground that "blasting work in and of itself not being inherently dangerous but the danger instead arising from the manner in which it was performed—no duty devolved upon either the owner or general contractor upon which liability could be based." This seems inconsistent with *Majestic* (supra) and I question how closely this theory would be followed in New York.

[8] Scully v. State of New York, 12 Misc.2d 298 (N.Y. Ct. of Claims, 1958).

[9] This policy is assumed again in Weinbaum v. Algonquin Gas Transmission Co., 20 Misc.2d 276 (1954), *affirmed* 285 App. Div. 818, N.Y.

influenced strongly by the fact that other separate clauses of the contract already provided for indemnity from the contractor to the Sewer Authority on account of third party claims generally.)

In New York at least, we therefore have to be on the alert constantly against similar language slipping into our contracts. Engineering specification writers have a habit of inserting in the specifications broad language that the contractor shall be responsible for many things on the general theory that we should make sure that he does a complete job. In addition, I would recommend a provision such as now appears as a separate clause in Port Authority construction contracts that no third party rights are created by the contract unless the specific words "benefit" or "direct right of action" are used. This clause was added, not because of *Coley v. Cohen*, which I thought never applied to our contracts because of the difference in language, but because of a casual conversation I happened to have a few years ago with an insurance broker representing a number of large contractors. The broker advised that attorneys for contractors and their liability insurance companies were often not sure that third party rights could not be founded on many public agency contracts and that liability insurance premiums, included in the bids, were being established on the assumption that such rights might exist, leading to an additional premium cost of $10,000 in one case of a contract we had recently let in the amount of $2,000,000.

While the Coley-Cohen rule and other possible bases for founding third party rights can cause trouble if not kept in mind, an express provision negating such rights or some other indication of no intent to create such rights should be quite effective, notwithstanding a supposed public policy to protect the public against damnum absque injuria.[10] But as an indication of the subtle and unexpected ways in which you may create third party rights without knowing it until the court tells you so, consider *Corbetta Construction Co. v. Consolidated Edison Co. of New York, Inc.*, 227 N.Y. Supp.2d 290 (Sup.Ct. 1962). The contractor constructed a section of the New York State Thruway under specifications reserving to the State Engineer the right to limit blasting charges to less than 10 lb. When the Edison Company warned that blasting in progress would damage its nearby electrical lines and that Edison would sue for such damage, the State Engineer did limit the charges to less than 10 lb, resulting in an additional expense claimed by the contractor to be $158,000. The contractor, after failing to collect in court from the State, sued Edison. In this decision, the court found that, since the contract, as bid, put the contractor on notice that small charges and therefore more cost might be required, its price already reflected this cost and Edison could not be held liable for the same cost but that if the specifications had merely said that charges shall be limited to 10 lb, without mentioning smaller charges, the contractor's "bid and the contract payment would be based on such assumption and any additional limitation would then be chargeable to and payable by the utility protected." (This decision explicity found that the New York Thruway relocation statute requiring reimbursement to utility companies for relocation did not apply here.)

INDEMNITY CLAUSES AND LIABILITY INSURANCE

Because of the uncertainties of the independent contractor rule and because the Port Authority reserves to its engineers such broad powers with regard to supervising the work that

[10] Costa v. Callanan Road Improvement Co., 15 Misc.2d 198 (N.Y. 1958); Fleetash Realty Co., Inc. v. Mount Vernon Contracting Corp., 5 App.Div.2d 687, *affirmed* without opinion, 5 N.Y.2d 854 (1958).

we might not come even within the protection of the basic rule, we in the Port Authority have for many years included in our construction contracts a clause imposing on contractors the obligation to indemnify against third party claims. The usual form of the clauses presently reads as follows:

> The Contractor assumes the following distinct and several risks whether they arise from acts or omissions (whether negligent or not) of the Contractor, of the Authority, or of third persons, or from any other cause, and whether such risks are within or beyond the control of the Contractor, excepting only risks which arise solely from affirmative acts done by the Authority subequent to the openings of Proposals on this Contract with actual and wilful intent to cause the loss, damage and injuries described in subparagraphs (a) through (c) below:
>
> * * *
>
> (b) The risk of claims, just or unjust, by third persons against the Contractor or the Authority on account of injuries (including wrongful death), loss or damage or any kind whatsoever arising or alleged to arise out of or in connection with the performance of the Contract (whether or not actually caused by or resulting from the performance of the Contract) or out of or in connection with the Contractor's operations or presence at or in the vicinity of the construction site or Authority premises, whether such claims are made and whether such injuries, damage and loss are sustained at any time both before and after the rendition of the Certificate of Completion. . . .
>
> * * *
>
> The Contractor shall indemnify the Authority against all claims described in subparagraph (b) above and for all expense incurred by it in the defense, settlement or satisfaction thereof, including expenses of attorneys. If so directed, the Contractor shall at his own expense defend against such claims, in which event he shall not without obtaining express advance permission from the General Counsel of the Authority raise any defense involving in any way jurisdiction of the tribunal, immunity of the Authority, governmental nature of the Authority or the provisions of any statutes respecting suits against the Authority.

From time to time, we receive indignant complaints from contractors that it is outrageous to seek indemnity for one's own negligence, and several years ago we were approached by a delegation from the General Contractors Association in our area asking for a change. We have resisted any substantial change in this aspect of the clause and, we believe, properly so, on the ground that virtually the entire control of the job, insofar as opportunity to prevent injury and damage claims is concerned, rests with the contractor. If the owner is held legally liable for a third party claim on the basis of his "negligence" it is almost always vicarious negligence or negligence consisting merely of failure to observe and have corrected a dangerous condition created by the contractor. The owner's negligence often consists simply of failing to carry out a nondelegable duty to those on a public way. Therefore, while vis-à-vis the third party claimant, the agency and the contractor are joint tort feasors and equally liable to the claimant, as between themselves, the agency is morally less blameworthy than the contractor and therefore ought to receive complete indemnity from the contractor. If, however, the common law rules of contribution between joint tort feasors were allowed to take their course, the agency would have to pay an equal share of the judgment along with the other more culpable tort feasors. (In fact, under the peculiar New York procedure, if the plaintiff chooses to sue only the agency and not the other joint tort feasors, the agency would be stuck with the whole judgment, unless it could demonstrate that it was only "passively" negligent as contrasted with the contractor's "active" negligence.) While it is true that under the common law rules complete indemnity is obtainable by a "passively" negligent tort feasor against an "actively" negligent joint tort feasor, failure to perform a nondelegable duty is not merely passively negligent even though passive in the ordinary sense of the word. For example, one is actively negligent if, as an owner, he fails to observe and have corrected a condition created by the contractor dangerous to passers-

by on a public way. Since the law of contribution among joint tort feasors does not recognize differing degrees of culpability (except when the active-passive negligence rule applies) contribution is usually but a rough form of justice among joint tort feasors.

It therefore seems only fair that the agency should have complete indemnity by contract against its own negligence when the claim arises out of the performance of the contract, and such an express indemnity is necessary if the common law rule on contribution and indemnity is to be varied.[11] The right to contract in this manner is recognized in numerous cases.[12] In the absence of an explicit indication that a contract indemnity is intended to cover the indemnitee's own negligence, the contract gives no more indemnity rights than are already available at common law. Admittedly, circumstances are conceivable under which the agency could be more culpable than the contractor. To provide, in advance, for these circumstances, however, is an impossible task of definition. Such concepts as "sole negligence" or "primary negligence" give little guidance in concrete situations.

The moral question involved in indemnity against one's own negligence is really avoided however when liability insurance is provided for. If the construction contract calls for the contractor to procure liability insurance with a contractual liability endorsement covering the contract indemnity to the agency, the contractor does not bear the risk (except perhaps a comparatively small residue of risk not insurable) and all bidders will include the premium cost in their bids. In other words, the agency has simply purchased a form of insurance for itself. Another way of achieving the same result is for the agency to purchase or to have the contractor purchase insurance with the agency as a name insured.

One additional caution is in order about imposing on the contractor indemnity for third party claims, which however the landlubber States among us need not be concerned with. Under admiralty rules of law and Federal statutes found in 33 U.S.C.A., Ch. 9 and 46 U.S.C.A., Ch. 8, which apply on navigable waters, a vessel owner has the right to limit his tort liability in admiralty for damage caused by the vessel to the value of the vessel after the accident. This right is well protected by law and is considered waived only by a clear expression of intent to waive. In fact, we have felt the only safe interpretation of the cases is that a contractor's assumption of a contract indemnity is not necessarily a sufficiently clear expression of intent to waive limitation of liability under admiralty law, and consequently we use additional provisions of waiver of such rights in our bridge and other contracts involving use of watercraft by the contractor.

TEMPORARY INTERFERENCE WITH ACCESS

The topic of temporary interference with access is fairly uncomplicated, though of importance to any highway agency. No attempt in this discussion to touch on permanent loss of access is made. The rule on temporary interference can be stated, with more assurance than most rules of law, as follows: While a landowner abutting a public street or highway has a permanent easement of access, this easement gives him no right of action for temporary interference with access by authorized construction for highway purposes or, probably, for other legal use of the highway such as installation of public utilities. *Farrell v. Rose,* N.Y. 73 (1930) illustrates the principle well. By reason of a city contractor's work in maintaining a street retaining wall, plaintiff garage owner was blocked from using the street en-

[11] Thompson-Starrett Co. v. Otis Elevator Co., 271 N.Y. 36 (1936).

[12] See *e.g.*, Jordan v. City of New York, 3 App. Div.2d 507, *affirmed* without opinion, 5 N.Y.2d 723 (1958); Cozzi v. Owens Corning Fibre Glass Corp., 63 N.J. Super. 117 (App. Div. 1960).

trance to his garage for a period of 17 months—12 months longer than the time allowed in the contract for performance of the work. The court found that the plaintiff's right to use the street in front of his premises was "subject at all times to the reasonable control and regulation of the municipal authorities, and to work in the street necessary for its repair and maintenance, or for the construction of other public utilities." Exceptions were found to apply only "if the city or a contractor interferes with the highway without authority; or, if acting legally, prolongs the work unnecessarily or unreasonably." While granting a new trial to plaintiff to prove application of the exceptions, the court also reminded him that mere showing of an overrun in contract time was insufficient to show unreasonable delay, and the opinion indicates that unforeseen contingencies had already been found cause by the city for extending the contractor's time.

Several other New York decisions have followed the same rule.[13] Decisions allowing recovery for temporary interference with access are distinguishable on the ground of unreasonable time of two years[14] or on the ground of action in a proprietary, rather than governmental capacity.[15]

Meyers v. District of Columbia, 17 F.R.D. 216 (District of Columbia, 1955) also applies this rule relying on Farrell, as well as on an old U.S. Supreme Court decision.[16] The opinion, however, contains a curious bit of reasoning which might give us pause. The construction involved was an underpass for Connecticut Avenue beneath DuPont Circle in Washington, D.C. While finding no negligence by the contractor in prosecution of the work and therefore dismissing the complaint, the court also remarks that the project is "in a sense a change of grade in the street" and then states that it is well settled in the District of Columbia that damages to abutting land owners for change of grade are not allowable. The latter rule is no doubt well settled in most jurisdictions, except, however, and this is the troublesome point, that special statutes do permit or require change of grade compensation by some agencies. There is, for example, a statute authorizing (not necessarily requiring) The Port of New York Authority to pay change of grade compensation and the reasoning of the court in Meyers might have therefore changed the result in one interesting claim we had several years ago.

The claim arose for temporary interference with access when a cut and cover excavation in 38th Street, Manhattan, for a section of the Lincoln Tunnel Third Tube interfered with use of the 38th Street truck loading bay of a large industrial laundry plant. The laundry's attorney vigorously pressed his claim with us but in view of the law and the fact that no change of grade occurred and the very short period when access was blocked, we felt we had no authority even to settle.

UTILITIES IN HIGHWAYS

Responsibility for cost of relocating utilities on account of highway construction has been definitively covered in the Highway Research Board's Special Report 21 (1955). Although it is the weight of common law authority that the utility owner must bear such expense, statutes have changed this rule in some jurisdictions, and judicial decisions have, in turn, invalidated some of these statutes on constitutional grounds. There is, to say the least, a wide di-

[13] Fries v. City of New York & Harlem Railroad Co., 169 N.Y. 270 (1901); Veronica Realty Corp. v. Cranford-Locher, Inc., 149 Misc. 428 (N.Y. Sup. Ct., 1933); Syracuse Grade Crossing Commission v. Wellin Oil Co., 268 App Div. 627 (N.Y. 1944), *affirmed* without opinion, 295 N.Y. 738 (1946).

[14] Ogden v. City of New York, 141 App. Div. 578 (N.Y. 1910).

[15] Sinsheimer v. Underpinning & Foundation Co., 178 App. Div. 495 (N.Y. 1917), *affirmed* without opinion, 226 N.Y. 646 (1919).

[16] Northern Transportation Co. of Ohio v. Chicago, 99 U.S. 635, 25 L.Ed. 336 (1879).

vergence of treatment of this question among the States and even within a single State. In New York and New Jersey, for example, the New York State Thruway Authority and the New Jersey State Highway Authority, respectively, are required by statute to pay utility relocation costs,[17] while no such statute applies generally so far as I have been able to determine to the New York Department of Public Works or the New Jersey Highway Department or to municipalities.

Two recent decisions[18] (one in New York and one in New Jersey) have reaffirmed the common law rule fully annotated in HRB Special Report 21 to the effect that a utility company which maintains facilities in the public streets and highways, even by virtue of legislation permitting it to do so without charge, has no vested right to maintain its facilities in any specific location in the streets or highways, its right being conditioned on its obligation to remove and relocate the facilities from one place to another at its own expense when the public convenience or necessity requires.

Our practice in the Port Authority was some years ago when we first asserted our right under this rule to execute a no-prejudice agreement with the utility companies by which we assumed the cost in the first instance, reserving our right to sue the company for reimbursement. Now that we have obtained decisions directly establishing application of the common law rule to the Port Authority, we are requesting the utility companies to pay in the first instance and, if they wish, to reserve their right to sue, since appeals may still be prosecuted by the companies.

When utility companies carry the fight to the legislature for statutes requiring that they be reimbursed for relocation expenses, different questions are raised. The utility company's position is ordinarily that, as between the large segment of the public who would pay in the form of increased rates if the utility companies should be charged and the highway users who would pay in the form of tolls or taxes, the highway users should pay because it is for their benefit that the relocation is performed. This argument loses sight, however, of the basic reason for the common law rule—that highways are primarily for highway use, not utilities, and the original permission to locate a utility line in a highway is therefore always to be considered subject in the first place to an obligation to relocate without expense to the highway. The distribution of the cost burden should not depend simply on who constructed first. Nor is the rule made inapplicable by the fact that the highway is supported by tolls rather than taxes.[19] Such statutes in any case raise the further constitutional question of a gift of public funds.

An interesting variant of the relocation problem, on which I have no citations at this time, is the need for temporary protection of utility lines in place during construction when change in location is not required. The utility companies might maintain that they are entitled to protection to the same degree as any adjoining property owner; *i.e.*, that they have a right to lateral support or to sue for blasting damage. But is their position really the same as that of an adjoining owner? If, as the common law rule has established, the utility companies are in the highway on a bare license subject to an obligation to relocate, if necessary, for highway construction and reconstruction, then a fortiori protection in place during construction and reconstruction should be the obligation

[17] New York Public Authorities Law, Section 359(3); New Jersey Highways Law, 27 N.J.S.A. 12B-6.

[18] The Port of New York Authority v. Hackensack Water Co., N.J. Super. (March 23, 1962); The Port of New York Authority v. Consolidated Edison Company of New York, Inc., 25 Misc.2d 45 (N.Y. Sup.Ct., 1960).

[19] New York City Tunnel Authority v. Consolidated Edison Co. of New York, Inc., 295 N.Y. 467 (1946).

of the utility companies.[20] The only difference I can see is a practical one: It may often be easier to adjust construction methods to minimize the need for protective measures than it is to adjust highway design to avoid the necessity for relocation. This is significant because, as a caveat to the common law relocation rule, we should keep in mind the possibility that a court may always qualify the right of a highway agency by an obligation to use reasonable alignment and grades to avoid, if practicable, greater relocation expense than necessary. If such a rule has been or should be established, however, I would hope that a wide administrative discretion would be allowed to the highway agency.

NOISE, DUST AND OTHER INTERFERENCES WITH THE PUBLIC

Decisions on noise, dust, and other interferences with the public, in the Port Authority's jurisdictions, tend to be scarce, and, when existing, to be lower court decisions. There is usually no point in a plaintiff taking the time to go to court or especially to appeal regarding temporary construction interferences since they are often over before a ruling can be obtained. (I speak primarily of interferences which residents near the construction would wish merely to enjoin as an annoyance, damages being difficult or impossible to prove.)

In *Modugno v. Merritt-Chapman Scott Corp.*, 17 Misc.2d 679 (N.Y. Sup. Ct., 1959), residents near the construction of the Throggs Neck Bridge in Long Island sued to enjoin pile driving between 7 PM and 6 AM, the hours which the New York City Administrative Code prohibits unreasonable, loud, disturbing, and unnecessary noise. The decision involved a motion for a temporary injunction. The contractor, the only defendant, replied that it was constructing a public project authorized by the State legislature under a contract imposing a severe time schedule with liquidated damages of $2,500 per day for delay.

The court granted the temporary injunction, however, with the following interesting observation:

> The fact that a public project is here involved does not entitle it to preferential treatment when a case of nuisance detrimental to human life and comfort is as clearly made as in the case at bar.

The situation suggests a subsidiary question of what effect should be given to local municipal codes on the standards of allowable noise or other interferences. In many cases, a State agency is not subject to these codes and its contractor therefore should not be so if the State agency is not to be indirectly subjected to the code. We cannot escape the fact, however, that the courts may regard the code provisions as reasonable standards to which the contractor should be held in any event.

Some times, fortunately, construction nuisances can be reduced to an acceptable point. About two years ago, we awarded a bridge approach contract entailing a great deal of rock excavation. The contractor began to set up a rock-crushing plant on the job site to reduce the cost of trucking away the excavated rock and to process it for his concrete aggregate business. The nearby residents became alarmed at the possibility of noise and dust going on for a period of at least a year and threatened an injunction suit based on nuisance. It was difficult to predict just what the degree of annoyance would be, prior to the start of the crusher operation, but we could not afford to risk a delay in construction and felt that if the residents could convince the court that it was potentially a nuisance, the contractor would be enjoinable notwithstanding the public nature of the project. The fact that the Port Authority could not be enjoined would be of no help. We therefore invoked a clause of the specifications requiring the contractor to

[20] Cf. Corbetta Construction Co., Inc., v. Consolidated Edison Co. of New York, Inc., *supra.*

operate with equipment which would reduce annoyance to the public. The contractor installed soundproofing and a spray device on the crusher and everyone was happy.

The question of continuous annoyance caused by highway traffic, which differs somewhat from the question of tort based on construction, is of interest at this point. We have in New York a rather uncertain situation arising out of the decision in a suit against the New York State Thruway Authority by residents of the Village of Pelham Manor, complaining of noise and glaring headlights from trucks and buses at night along the highway section running directly through the village next to plaintiffs' houses. The complaint asked for an injunction compelling the Thruway Authority to prohibit use of the highway by trucks, buses, and tractor-trailers through the village between the hours from 8:00 PM to 8:00 AM. The Appellate Division ordered dismissal of the complaint,[21] first on the ground that the State's waiver of sovereign immunity on behalf of the Thruway Authority did not go so far as to permit injunction suits, and secondly, on the ground that in any event the complaint did not show

> (1) that the noises emanating from the normal operation of the Thruway adversely affect plaintiffs more than any other property owners similarly situated; or (2) that such noises subject plaintiffs to a greater share of the common burden of incidental damage cast upon all those living in the vicinity.

This suggestion that a cause of action could possibly be made out but for sovereign immunity is disturbing enough to highway agencies, but action of the Court of Appeals leaves us still wondering, because though the court affirmed[22] the Appellate Division it did so by merely stating that the affirmance was on the authority of a companion case decided the same day, which held only that sovereign immunity had not been waived as to injunctions as to the Thruway Authority.

By thus pointedly avoiding any endorsement of the second ground advanced in the Appellate Division's opinion, I am not clear whether the Court of Appeals was only trying to avoid comment on a moot question or was suggesting that it would go even further than the Appellate Division in entertaining an injunction suit for annoyance or possibly that it would not entertain such a suit even if special effects on the plaintiffs can be alleged and proven.

PATENT INFRINGEMENT

We have probably all had the experience of being threatened with a patent infringement suit on account of a device used in a project. The Port Authority contracts ordinarily contain a fairly sweeping patent clause requiring indemnity from the contractor in the event of such a suit, on the theory that the contractor has the opportunity to ascertain before bidding whether a patent dispute exists regarding a certain article and to guard against suit by buying from the patent holder, or by obtaining himself an indemnity agreement from the competing supplier. Any other course would render a fixed price bid indefinite. An exception is made in the case of items completely detailed in our contract drawings or specifications, these being typically items we have designed ourselves and feel we should not ask for indemnity for, particularly since, under these circumstances, the items would not be of common manufacture.

In actual practice, we have little problem or even comment on this aspect of our patent clause, the only exception being a very peculiar and bothersome one. A favorite device used by holders of doubtful or disputed patents is to threaten prospective bidders during the bidding period with a patent infringement suit if they use an article specified in the contract documents. Ordinarily, bidders cannot afford to take a chance.

[21] Mathewson v. New York State Thruway Authority, 11 App. Div.2nd 782 (N.Y. App. Div., 1960).

[22] 9 N.Y.2d 788 (1961).

and under the pressure of preparing a bid, they have no time to investigate the validity of the claim. This is exactly why the threat is timed for the bidding period. The result is usually that the bidders play it safe by buying from the patent claimant at a higher price than would be paid to a competing supplier (or by buying off the claimant), so that the agency pays the bill in the contract price. In some cases, an extremely tenuous or even synthetic patent claim has been parlayed in a manner that would be impossible if the claim could be tested in a full patent infringement suit.

There is one way of combating this tactic. When we hear of such a threat being circulated, we obtain a quick opinion from patent counsel and if he believes no infringement exists, we reverse our position on patent immunity and we guarantee to the bidders that we will indemnify them against the threatened claim. This has worked well and, so far, at least, we have never been called on to indemnify.

DISCUSSION

LEONARD I. LINDAS, *Chief Counsel, Oregon State Highway Commission, Presiding*

Netherton.—Concerning what Mr. Abrahams said about the highway department actually paying the bill for tort liability of a highway project contractor, I am wondering whether some of these injuries and annoyances to landowners may not be reflected in the prices that are paid for right-of-way, perhaps in negotiations for purchase and back in the jury room when the condemnation award is being determined. Do any of the State highway counsel suspect that this may be the case?

Thomson.—In Iowa it is quite frequent, where we are relocating a highway or widening a highway so that lanes are made closer to residences, and this sort of thing, the landowner quite frequently adds an item of damage due to increased proximity of the highway, the added noise and dust. He does this as an item of damage affecting the value of the remainder. Certainly a real argument can be made, and quite frequently it has merit.

Netherton.—I know we all wonder what goes on in the minds of the jurors when they get into the jury room, and I suspect that the fact that there is sovereign immunity for tortious injury so that the landowner cannot have recourse directly against the State through customary actions for liability may lead to "taking care of the landowner" in the award of damages for condemnation.

Lindas.—I am quite sure that in our State juries resort to this. We do not know that they have done it, but we feel that they have compensated landowners for things that perhaps they have been instructed to ignore completely by the court. But this is something that you cannot handle. The matter of proximity damage I am sure is considered by them and they have sweetened the award by items that he otherwise could not receive damages for.

Lehmann.—We are troubled with the business of proximity damage. Where a highway comes close to developed property inevitably the appraiser will put a percentage of damage based on proximity, and when he is cross-examined on what this means he will say it is because of dirt and dust, and so on. We have heard something about how light can be measured and perhaps converted into something visual that can be placed before a jury, and I am wondering if anyone has any idea on how noise can be measured, and how noise can be decreased by screening, how this could be measured and then translated into visual aid.

Lindas.—We are anticipating a suit due to noise affecting a high-rise apartment, and I understand you can measure noise by a decibel meter. But how you relate that to market value and the tolerance people build up for it after a while I do not know.

G. A. Williams.—We have a situation in Wyoming where we are not bothered with blasting because of the dust and dirt, but we have a more sensitive neighbor called SAC, the Strategic Air Command, which is responsible for the Atlas missile bases. Recently we were doing some blasting for the Interstate System, and we had calls that this blasting was disturbing SAC's instruments, and they asked us to stop the blasting. Well, our contractor already had several miles primed and ready to go with heavy charges. The only thing we could do was to reduce the charges, take a good deal longer in this contractor's work, and see if the Bureau would participate in the added cost this would entail. Have any of the other States been bothered by this sort of thing in connecting with your blasting? And, what do you do about it because we have the same situation Mr. Abrahams mentioned in that our contractor is under a $2,500 a day penalty and he needed these extra blasting hours to meet his deadlines, and we needed the work done.

Liability for Drainage Damage

JAMES E. THOMSON, *State Counsel, Iowa State Highway Commission*

• The modernization of existing highways and the construction of new State and Interstate highways has in recent years greatly increased the number and variety of highway drainage legal problems in Iowa.

Drainage claims come into the office intermittently the year around. After investigation, some are disposed of by corrective action. Of those that are rejected, only a small number result in actual litigation. Fortunately, of those cases that have gone to trial, none to date have resulted in any spectacular success for the landowners' attorneys.

This relative lack of success has not created complacency. We have drainage cases in the office at present that could result in some extremely unfortunate precedents.

In prior AASHO legal affairs meetings, a number of excellent articles on limited aspects of the highway drainage law field have been presented. However, there is a need for further work. It is submitted that a highway drainage law study would be a commendable project for a Highway Research Board special report similar in general design to its Special Report 21, "Relocation of Public Utilities Due to Highway Improvement."

I have prepared a brief outline for discussion of various considerations relating to the liability of State highway departments for drainage claims, and have made some comments to indicate the scope and significance of its subdivisions. My purpose is to review the subject generally without resort to case citation and point up the general nature and extent of State highway departments' drainage legal problems. While I discussed some legal principles, I have not intended that such is to be more than suggestive and generally introductory.

BASIS OF STATE HIGHWAY DEPARTMENTS' DUTY AS TO DRAINAGE

Federal and State Constitutions

It is elementary that all landowners are protected by constitutional provisions against a "taking" of their property. In drainage matters, this has served as a basis for both inverse condemnation and mandamus actions to condemn.

There are a large number of State constitutions that additionally provide that a landowner's property shall not be "damaged" without compensation. In these latter States, the scope of the highway authority's liability would therefore be generally broader.

Several fairly recent Iowa cases indicate that the word "taking" in our State constitution is being equated to some degree with "damaged." It is probable in the future that there will be less distinction between the cases in the various States on such basis.

Statute Law

There are basically two categories of statutes that might concern State highway departments as to drainage. The first are statutes that specifically state the duties of the State highway departments in relation to drainage and the construction and maintenance of highways. The other are code provisions that either specifically or generally provide statutory remedies for the landowner.

In some States the statutes might be found to be nothing more than a codification of existing case law. In

others they may well add drainage burdens on the State highway department not borne by private landowners. (Obviously, consultation of one's own State code is basic.)

Case Law

The case law of drainage is important in those instances where statute law either does not exist or cannot be applied. Generally such law will be based in part on either a civil or common law origin or a modification thereof to best fit the conditions of a particular State.

The civil law rule provides that the owner of the upper or dominant tenement has a right to discharge water in its normal course to the lower or servient tenement; and that it is the duty of both owners not to divert water from the natural direction of its flow to the material detriment of either.

The strict common law or "common enemy" rule provides that an owner can embank or protect his property against flood waters or surface waters even though this may divert it from the direction it would naturally flow. However, under such rule one could not protect himself against the flow of a natural watercourse with a bed and banks with a constant or an intermittent stream located thereon.

A State highway department's duties may well be affected to the extent that either of these two general categories of case law has been accepted by the high court of a particular State.

In municipalities, even in those States following civil law rule, a landowner has been found to have a right to bring his lot to the grade of an established street or highway even though it may mean the blocking of a natural watercourse and the turning of such including surface waters back upon the highway. The practical remedy of the city is to cause a storm sewer system to be installed and to assess the costs against such landowner.

GENERAL CLASSIFICATIONS OF DRAINAGE AFFECTING HIGHWAYS

Most, if not all, of a highway department's drainage problems will involve one of five classifications of waters following. A determination of the nature of the drainage involved is generally basic to finding the correct legal principle applicable. In one respect or another, the office has been involved in problems involving all of the following classifications of drainage.

Natural Watercourse

A natural watercourse could be defined as a reasonably well-defined channel with a bed, bank, or sides, and a current, although the water flow may be small and not continuous.

Artificial Watercourse

Artificial watercourses are similar in characteristics to a natural watercourse, except as the term implies, they are man made. As against a landowner, road ditches might be established in legal effect as natural drainage ditches by either acquisition or prescription. It has been held that, even though a highway commission has acquired the right by prescription or otherwise to divert water out of its natural course by means of an artificial watercourse, it may subsequently restore the drainage to its former natural channel. Artificial drainage ditch channels established pursuant to statute are a common type of artificial watercourse in many areas.

Surface Waters

Surface waters constitute a class of waters generally derived from falling rain or melting snow or that which rises to the surface in springs where the waters are in a state of general diffusion over the surface. Some legal literature characterizes as within the concept of surface water so-called "drainways." A "drainway" is a place where surface waters collect,

though not to such a well-defined extent as a watercourse.

Flood Waters (Overflow or Escaped)

Flood waters have been defined as those over the highest line of the ordinary flow of the stream. There are circumstances where surface waters and flood waters merge and raise a real question as to what the proper characterization should be.

Subterranean Waters, Springs, Wells

The most common forms of waters that might be affected by highway maintenance or construction would be those waters which ooze, seep, or percolate through the earth. The highway department on occasion has received complaints that the establishment of a new roadbed and heavy dirt fill across a problem drainage area has interfered with the area's subsurface drainage. We have also experienced a number of complaints that our grading for cuts has for one reason or another destroyed either a well or a spring.

MAJOR HIGHWAY DRAINAGE AND LEGAL PROBLEMS

Diversion

A highway department would almost certainly be enjoined from diverting water from a natural watercourse to a landowner's material injury. In Iowa, the Code directs that highway authorities are not to "turn the natural drainage of the surface water to the injury of adjoining owners" and that it is their duty to "use strict diligence in draining the surface water from the public road in its natural channel." It is probable that not all States will have as high a duty as to diversion of surface water as ours, and especially a State that relies on common law principles.

Courts generally do not disapprove of diversion of water in highway engineering where the waters that are taken out of their natural course are later returned to such course without material injury to abutting landowners.

Collection of Waters

Any new highway to some extent will collect and concentrate surface water through necessary use of ditches, culverts, and other structures. Inherent in a strict sense is a degree of diversion. The collection of surface water has been recognized by the courts as an economic necessity in highway construction. They do impose limitations on such collection based both on its reasonableness under all the circumstances and on considerations of possible or prospective material damage to the landowner.

Though road ditches often provide a benefit to an owner by collecting and draining surface waters, the highway authority is generally not obligated to maintain such ditches in such condition that they drain the abutter's land better than if no highway were there.

Acceleration and Increase of Water Runoff

The collection of waters will to varying degrees accelerate their flow as do the concrete-surfaced beds of various structures. The establishment of hard-surfaced highways has a definite effect on increasing the amount of runoff. For the first few years after the construction or reconstruction of a highway there is some additional increase in water runoff and acceleration until erosion control practices become effective.

When highway right-of-way is acquired, either by negotiation or condemnation, it has been generally held that the highway department has acquired the right thereunder to collect the surface water that does not flow in well-defined channels; to the extent that the same is reasonably necessary to accommodate the same to the customary and usual mode of constructing a highway in such places, and to the extent reasonably necessary to so construct and maintain the road in a reasonable manner. All acceleration and increased runoff due to the same standards of construction would also be within the settlement by negotiation or condemnation.

Drainage Structure Size

If highway departments are not to incur liability, the selection of the size of drainage structures must be made on the basis of as much evidence as is reasonably obtainable. Failure to select the proper size of structure could result in impounding, flooding, or diversion of waters.

Most courts would probably find that the highway department must design for the so-called "ordinary" rainfall and "ordinary" flood as contrasted with the so-called "extraordinary" rainfall or "extraordinary" flood. Such terminology is often of little actual assistance in the problem cases. It has been intimated that the highway department should design for the reasonably predictable rainfall or flood. Generally, "acts of God" would not create liability. Only a careful comparison of the facts of one case with another will give us a true representation of the concepts embodied in the terminology of the courts.

In Iowa the design department has been generally designing for a flood of a 50-year frequency. Where information is lacking on the history of the stream or watercourse, the design size is determined on histories of apparently similar streams or watercourses. If there is a reasonable history of the watercourse available, the design size is selected on such basis.

In recent years we have had floods of the 100-year or above frequency (which could happen two years in succession). These have not created any great complaint from landowners in connection with the highways, as apparently it has been considered that such floods were so great that any damage therefrom would happen in any event regardless of the highway structure. The cost of designing for such floods would make improving or establishing certain highways economically prohibitive. It would seem that a court would have to consider relative design costs in making any reasonable or practical rule of law or interpretation thereof in this area.

COMMON PROBLEM LOCATIONS FOR HIGHWAY DRAINAGE ENGINEERING

Almost without exception, the drainage problems that have come into our office have been in four of the five following types of location. In those areas where there are pronounced watercourses or drainways, few drainage problems appear.

Level Land with Poor Natural Drainage

In areas of level land with poor natural drainage there is often a long history of private drainage disputes. When a new highway is established through such lands or an existing highway improved, it often irritates an already delicate situation. Extreme care has to be used in the engineering so that neither upper nor lower owners acquire a legitimate objection. In some locations, drainage structures will be merely "equalizers." There is the considerable problem in many locations of interfering with existing tile lines and subsurface drainage.

River or Flood Bottom Lands

In the case of rivers or flood bottom lands, practically all the same circumstances exist as in the previous category and the remarks thereon are generally applicable here. The problems are intensified where the surface water is supplemented by flood waters. Problems as to size of structures are common. As to complexity, this category would seem to have no rivals.

We have had one such long-standing problem involving the continuing maintenance and preservation of a certain road across the flood bottom of one of our interior rivers. This road leaves a city via a bridge across the main channel, which loops the bottomland through which it passes. Near the neck of the main channel loop, the road passes over an overflow bridge which marks a flood or overflow channel in the river. In times of high water, the ordinarily small stream in this overflow channel rises

to the bridge girders and has gone over or washed out other portions of the road.

About 8 years ago the overflow bridge was rebuilt and a long wing dam was built to protect the abutments of the bridge from washing out. The wing dam was to keep the force of the current directed toward midstream. Subsequently, a dozen landowners brought a mandamus action to condemn on the theory that such wing dam backed up water on their farm lands during high water, thereby taking portions of their properties.

In preparation for possible trial, we had engineers make various plats and hydraulic computations including backwater curves. Our own difficulties in determining the exact effect of such a wing dam led us to believe that the problems of evidence and proof for such plantiffs were probably insurmountable. We forwarded numerous interrogatories to the plaintiffs which they apparently were unable to answer. This, together with the fact that a flood of 100-year frequency eventually washed out most of such wing dam led to dismissal of the action.

We are still left with the problem of maintaining this road and our present design is unsatisfactory. We have considered a number of alternate proposals. The city at the bend of the river objects to one of these proposals for fear that the river will establish a new channel across the neck of the loop at the overflow bridge, depriving them of the flow of the stream which they have used for various purposes. It is therefore incumbent on our designers to come up with a new construction plan that we can successfully defend in the event of an action by either the city or upper landowners.

Suburban and "Exurban" Areas

Those areas next to municipalities, designated as suburban, and those areas just beyond, recently tagged as "exurban," have intensified the drainage problems along the highways due to increasing residential and commercial development. However, it is often the highway department which has more complaints against the landowners than vice versa because of the encroachment of land development on natural watercourses and drainways.

Areas Conducive to High-Volume "Flash" Floods

There are certain areas of Iowa where the scope of flash floods appears to be much greater than elsewhere. Extensive artificial drainage systems on valley plains combine with rapid runoff from ditches and gullies in neighboring hills that are devoid of sufficient erosion control cover to create an enormous rise in volume of water in a very short time. This problem is probably of much greater magnitude in portions of western United States.

Areas Conducive to Excessive Silting

The degree of silting has a very direct relation to soil types and land use. The problem of maintaining drainage structures and the danger of blocking natural watercourses is greatly increased in such problem soil areas unless maintenance is not considerably above average.

STATUS OF STATE IMMUNITY AS TO ACTIONS FOR DRAINAGE DAMAGE

Generally the doctrine of State immunity from tort action is being weakened either by legislative action or by court rulings based on constitutional arguments. In Iowa, the doctrine of sovereign immunity from tort still remains strong. Where an action sounds in tort there is little present possibility that it would succeed in our State.

In those various States that have recognized an action for "inverse condemnation" it is probable that the landowner will recover in many actions which formerly would have been considered as purely a "tort." One of the major issues in these States is what temporary invasions by water will come within such theory.

STATUTE OF LIMITATIONS ON DRAINAGE MATTERS

Basis for Prescriptive Rights

Where a highway department has maintained a particular drainage condition for a period of time in violation of the drainage rights of a landowner, it may acquire a vested interest to preserve the same by prescription. Highway departments have as much right to rely on drainage ways so established as they do on a natural course.

Determination of Time Period for Landowner's Remedies

The period of limitations which would bar a landowner could well depend on the nature and theory of the remedy he seeks. An action for damages on a tort theory could well have a much shorter period of limitations than that required for a State to acquired prescriptive rights.

Factual Basis for Start of Limitations Period

To have the benefit of prescription, obviously it will be necessary to show when the prescriptive period started. The easiest situation is where there is simple, direct, and continued invasion of the owner's property rights by some type of water diversion.

Where there are intermittent water invasions, there are questions as to whether a single cause or successive causes of action arise. The answer probably depends on both the theory chosen by the owner and the attitude of the court as to whether it is a tort of a "taking." If the court finds it is taking, a further determinative issue is whether it shall be found to be temporary or permanent.

There is the situation also where there is a danger of possible or prospective invasion created by construction or reconstruction of a highway. A few years ago we had a question arise in this connection with Interstate construction in the Missouri River bottom in western Iowa. A landowner was located in the northeast quadrant of the Interstate and a county road. To the north of him lay a large, diked drainage ditch. The attorney for the landowner complained that the construction of the Interstate grade left his client in a pocket and that given a certain degree of flood coming down the drainage ditch, it would overflow and his client would thereby suffer injury to his property. After investigation was made, it was agreed that though the contentions made by the landowner attorney were not out of the realm of possibility, that the probability of such happenings was very small and that the possibility of any danger to human life was practically non-existent. When the landowner's attorney became convinced that the statute of limitations would not start to run until the time of any first injury, he did not further press the matter.

NATURE OF LANDOWNER'S REMEDIES AGAINST HIGHWAY AUTHORITY FOR TEMPORARY OR PERMANENT DRAINAGE INJURY

Statutory Actions

In a number of States there are statutes providing for direct actions for damages against the State such as tort claims acts. These provisions will not be of general interest. However, where another State has a statute similar to your own, its interpretation may often be persuasive.

Inverse Condemnation

In inverse condemnation we have the landowner instituting a direct action against the State based on the theory that he has either temporarily or permanently lost certain of his property rights due to a drainage invasion contrary to his constitutional property rights.

Because our State still retains its full immunity from tort, it has been especially disturbing to find that there have been successful inverse condemnation actions involving a temporary invasion or trespass of waters. However, there are also such cases where the landowner's action

has failed because the court found that such temporary or isolated invasion was only a tort and not a taking in the constitutional sense.

Inverse condemnation action has the advantage to the landowner of requiring but one action to achieve his desired result. This area is well covered in the following two articles: Lindas, L.I., "Drainage-Inverse Condemnation" in report of Legal Affairs Committee, AASHO (Oct. 1961); and Lindas, L.I., "Ordinary vs. Inverse Condemnation" *Proc.*, AASHO, p. 52 (1957).

Mandamus Action to Condemn

Mandamus action to condemn is an equitable action based on the theory that there has been a taking of property as to which the alleged taker should be required to institute condemnation proceedings. Landowner's attorneys have used such procedure in our State where there has been drainage damage.

Injunction

Ordinary and mandatory injunctions are a common landowner's remedy. The former enjoins the highway department from taking a certain action while the latter requires it to abate a condition which it has created.

Where a clear statutory or drainage right is being violated to the landowner's material injury, equity courts will ordinarily grant an injunction to the landowner. When there is no substantial damage shown to the landowner, even though there is a technical diversion, courts of equity do not act.

Difficult questions are presented where the damage to the landowner is minor compared to the cost to the State to correct. It is probable that the landowner will find it easier to obtain an ordinary injunction restraining the highway department from certain acts as compared with obtaining an order to abate an already established structure or design at substantial expense.

Other

Our State's highway authorities have been given the right of summary abatement where a landowner blocks a natural watercourse that affects a highway. It is doubtful whether the courts would look with favor on a landowner so acting under most circumstances.

HIGHWAY DRAINAGE LAW PRACTICE AND PROCEDURE

Burden of Proof

It is probably universal that the burden of proof is on the landowner, at least initially, in all jurisdictions.

Measure of Damages

Where the landowner's damages are to be determined by either condemnation or inverse condemnation, it is to be expected that the measure of damages will be determined by the principles of eminent domain applicable in the jurisdiction. In other circumstances such as under tort claims acts, varying tort measures would apparently apply.

Nature of Landowner's Evidence

Often landowner's evidence will consist of neighbors who testify that a particular drainage condition never existed prior to some type of action or construction work by the highway department. As Mr. Lindas of Oregon has indicated, this type of evidence is commonly given too much weight in spite of well-prepared engineering evidence that is in direct contradiction.

State Highway Departments Procedure and Evidence

The highway department attorney will generally receive a department file of correspondence in connection with any drainage problem with which he is involved. He will wish to interview all highway department employees who can make any positive contribution to a further understanding of the problem. Design depart-

ment engineers with the greatest background in drainage engineering will often have to be enlisted.

In connection with problems arising from road construction work, he may have to talk with the inspectors on the project and occasionally to representatives of the contractor. As to established highways, he may find that members of the maintenance force and road patrols have a substantial familiarization with the property and problem. Some drainage problems on existing highways will have a history going back many years. This may mean that retired employees may have to be sought out on occasion. Private citizens occasionally may be willing to give their observations.

Discovery proceedings of various sorts, including oral depositions, may be basic to adequate preparation to meet the exact litigation claim of the landowners and their alleged proof.

Existing plans, including the cross-section sheets, and perhaps plans for such highway prior to its reconstruction, will be generally indispensable. In many cases survey crews will have to take additional elevations and perhaps plot them on a special trial drainage plat. In the face of testimony of the farmer's neighbors, it is difficult to be too well prepared.

Other sources in the gathering of relevant evidence may be the U. S. Weather Bureau, the U. S. Coastal and Geodetic Survey (Water Resources Division), the Corps of Engineers of the U. S. Army, and perhaps certain State agencies.

DISCUSSION

Canada.—We have just recently reestablished the rule in these drainage cases in Florida in a case called *Poe v. State Road Department,* 127 So.2d 898 (1961), that res adjudicata applies to recurrent claims arising from flooding. This may be an effective defense against such claims where the State builds its embankments but does not design them to anticipate the "7-year rain," so that the rain comes three years later and floods 10 acres of the back 40. The rule in this case refers to an earlier decision, I believe in Alabama, and another in Florida, holding that where the State has taken property from that landowner "he should have raised every issue that was reasonably known to him at the time of the original condemnation suit. Having failed to do that he is forever barred from recovering those damages in a subsequent action." Now, in this instance, Poe was the party to a condemnation action 6 years previously in which the State took part of his land for a highway, and in this action he did allege that the highway construction would endanger his land by flooding. So the jury in the condemnation case was presumed to have taken this into account in his original condemnation award.

Whether this rule would apply to successors in interest in the land, or just to the landowner who was originally a part to the condemnation and retained his interest, I do not know.

Montano.—In Colorado the court has said that all damages, present and future, must be determined in the original condemnation proceedings. But they have also gone a little further and said with respect to claims due to negligence that it will be presumed there is no negligence if the highway project is shown to be properly constructed. Thus the rule that all damages must be awarded in the original proceedings bars any future claims unless they can show that there was actually negligence in the construction of the highway facility.

R. E. Barrett.—We have argued that the construction of highway has nothing to do with eminent domain since it is carried out under the police power. We try to keep out water damage claims by separating them from eminent domain, and handling

them as a type of injury that is not attributable to the taking and may not happen again.

Thomson.—There are two distinct theories on this question, as we have just heard, and I think that the possibilities of each should be explored. I am not aware that they have ever been compared and clarified.

Banister.—In Louisiana we have a practice of taking our deeds and reciting in them that the landowner waives any claims for damages past, present or future. That has never been tested in courts and I do not know whether it is of any value. I wonder if anyone else has tested any similar waiver to see how strong it is.

Carlson. —In California we had a case along that line, and the court held that it covered only those damages that were reasonably foreseeable. We are afraid that this means we have to have another lawsuit to determine what is reasonably foreseeable.

Thomson.—In Iowa contracts we have a provision very similar to that but still we have the statutory mandate to drain the highways in their natural course of drainage. How those two will be read together and reconciled, I do not know.

Liability for Cost of Relocating Utilities Due to Highway Improvements

ROBERT D. CANADA, *Appellate Attorney, Florida State Road Department*

• I am going to direct my remarks primarily to the matter of relocating utilities, and my interest goes beyond the question of whether there should be reimbursement, and deals with the more specific question of what costs should be reimbursed. There are a number of cases on the constitutional validity of authorization to reimburse, but practically nothing on the question of how to do it. There are very few that even discuss or define the term "costs" of relocation.

I would like to start with a brief outline of Florida law. This is not because it is the only good one, but because we run the gamut on payment of relocation costs for utilities. We have no reimbursement whatever for public utilities located within existing primary, secondary, county, park, or lesser State-owned rights-of-way. We have full reimbursement for relocation of utilities on Interstate System highway right-of-way, except to the extent the Interstate System intersects existing right-of-way for one of the road systems just mentioned. We also have two expressway authorities. One of these has a law requiring reimbursement for relocation of utilities. The exceptions to that run a full column and a half on on 8½- by 11-in. page, prescribing the conditions that qualify a utility for reimbursement. The other expressway authority makes no provision whatever for reimbursement on their expressway. Therefore, we run into some interesting situations in Florida on this matter.

As an opening question I would like to ask how they got on the right-of-way in the first place. Where are they? Certain public utilities—water, gas, electric power—condemn various forms of interests in land to locate their facilities. This may be fee title because they think they need everything, including the right to dig into the ground. Others condemn only an easement; others take a lease. It is important to note this interest because when you build a highway the latitude of this interest may determine the latitude that you have in negotiating with the utility.

By far the largest amount of public utilities are located by permit on our State-owned rights-of-way. This includes both dollars and miles. The telephone, telegraph, electric power transmission lines almost all follow the highways since the highway system connects all our major cities. The occupancy of the right-of-way is by statute at the pleasure of the public agency owning the right-of-way with the exception of telephone and telegraph companies who have a statutory right to occupy space along the public highways as long as they do not interfere with traffic. There are several sections in the highway code that spell out what the utility has to undergo to get a permit, when they can go in, when they must take their facilities down, and the provision I referred to earlier that when they take it down they are not entitled to any reimbursement for these costs. The Federal Interstate System and our expressways are both exceptions to this general statutory rule.

Where a utility is on private property (that is, where the utility owns some form of interest in the land which it traverses), it is normally subject to condemnation. Conceivably this will present some situations where there will be a conflict of pub-

lic interest, but in Florida these have not yet been encountered very much. Many of our cities are in the power business, and are also very anxious to have highways. I think there is going to be some problem in this area. A city is likely to say, "We have just put in our new water line, and we are not going to take it out." When this occurs we are going to have to find out whose eminent domain authority is superior.

It is normally advisable in Florida, and I should think in most other States, to seek to negotiate these matters. There are several reasons for this. In Florida we would not be required to pay for the moving costs of a public utility as such, even where it is on private property. This is because such cases involve something less than a fee interest in the land, and we pay moving costs only to owners. We find, however, that we frequently pay these costs anyway because it comes in the back door and our dollar amount reflects it although it is called something else. We have found, however, that we have an important lever for negotiation in our power to permit the relocation of the utility. Consider the case of any highway in the open part of central Florida. It must cross a great number of privately-owned utilities. It is a great advantage to be able to say to the utility that if they will pull up their poles for about six weeks and then move them back in a location that conforms to the new highway we will let them come back for free. We can usually work out a fairly reasonable settlement on this basis. On the other hand, if they want to be bullheaded about it, we can always say that they are not complying with the statute and they can just go find themselves a new right-of-way somewhere else.

Consider also the damages that wily public utility lawyers will be able to slip in on you by way of "disruption of service." Any of you who have ever negotiated one of these reimbursements have, I am sure, heard that term. The familiar argument is that when we cut a utility line in central Florida, we black out the whole of southern Florida for months and months. Of course, this does not actually happen, but by the time they get done with us it sounds like we have multitudes of wives and children suffering great privations. This is another reason for attempting to negotiate these matters at an early stage, and attempting to work with the power companies as soon as you find out the highway will do something to their facilities.

On the technique of negotiation, this should probably begin with a discussion of some of the factual matters that are going to be the issues in the negotiation. Consider, for a moment, what constitutes the "cost of relocation." It is likely to run the gamut. In its simplest form it is the cost of the men, trucks and equipment required to pull a pole up out of the ground and move it over 20 ft to one side. In its broadest form it includes such things as administrative overhead, cost of disruption of service, the effect on the entire operation of the utility company throughout the immediate area, and other very interesting concepts that utility lawyers will come up with. You will also run into a great many accounting terms. The Milwaukee ordinance contains some terms that appear to mean one thing for tax purposes and entirely another thing for negotiation purposes. For example, the "unused life" of the facilities. What is this? Is this depreciated life expectancy? I doubt that this is what you will be paying for when you get to the final agreement.

Returning to the case where the utility is on public property, we have a very interesting provision in Florida law which I would commend to all of you who may be faced with payment of utility relocation costs. It provides that the State will pay for costs of relocation "and that in the case of a dispute as to the value or amount of the cost of relocation the decision of the chairman of the State Road Department shall be final." This removes many barriers to negotiation. It also means that you make

them the plaintiff in any lawsuit that may arise from failure to agree in negotiations.

I want to also mention one situation that can arise under our statute which is extremely difficult to deal with. In Dade County the terminus of the Sunshine State Parkway is in an interchange which we call the Golden Blaze Interchange. We are now in the process of reconstructing this interchange to serve as a connection of two Interstate routes, about four county roads, and a dozen city streets. You can imagine the complications we have figuring out under our four separate acts which utilities get reimbursed and which do not.

In the absence of a statutory provision such as we have in Florida, there is a very serious matter in my mind as to whether the condemnor can pay relocation costs. If your State is like ours you have to show some authority in a condemnation suit before you can condemn. Where do you put this relocation cost? Where would an auditor put it, if there was no statute covering the subject? This is a serious matter that is not solved by the Federal law which authorizes Federal-aid reimbursement. The application of the proper State law must be worked out before the Federal law will apply.

I suggest that all of the questions relating the constitutionality of statutes that provide for reimbursement may not yet have been settled. There are a number of cases on this that look both ways. Is it a gift of State funds, or is it a valid expense for a valid highway use? I have had a further query, too. How can we reconcile payment of utility relocation costs with the principle that the State may regulate the use of its right-of-way under the police power? Does the utility get a free ride both ways when the condemnor pays for relocation within an existing right-of-way? The question in Florida simply comes down to this: When we were discussing in our legislature the question of whether to reimburse across the board or whether to reimburse only for Federal-aid highways or whether to reimburse for any roads, we asked who should pay the costs of easements necessary for power transmission lines. Should it be the traveling public or the power consumer? We reached a rather interesting conclusion in that our law seems to let each one pay a little bit.

Those who do not have legislation on this matter should consider the practical and political considerations that arise in seeking it. It is quite possible that the first thing you will face is a possible lawsuit over the authority granted in a statute. Good lawyers representing taxpayers' groups or a public agency can make a very persuasive argument that this sort of law is unconstitutional. In such a lawsuit you would, of course, be aided by the utility lobby. I do not know whether they are good bedfellows or not, but they are very happy to support this type of legislation. If you do seek such a statute, make sure you control the language that goes into it, otherwise you are going to be in the same shape that Milwaukee County is now. There the utilities wrote the statute, and in some respects it now might be easier for Milwaukee County to buy the whole utility than to reimburse for relocation of the poles that are the subject of the present negotiation.

What are the practical problems in negotiating with utilities? Here is the heart of the matter. When you sit down at the table with the utility lawyers, whom should you have with you, and what should you be prepared to do? Consider first the simple case where the utility wants reimbursement only for the material and labor that goes into moving the poles involved in crossing the road. This is not likely to be a difficult problem because the amounts involved are not great. Neither the State nor the utility is likely to want to argue much about these little costs.

If there is more at stake, and you have a statute like that of Milwaukee County which provides for reimbursement of the costs of relocating utilities including a list of specific cate-

gories, you may have a more vexing situation.

Here you may be glad to have a negotiating lever in the form of the power to say whether the utility may relocate on the public right-of-way. This is perhaps the single most important unarticulated premise at the conference table. Nobody ever mentions it; nobody ever needs to because they know it is there.

I strongly recommend, also, a proviso in the State law that someone in the highway authority or someone who is sympathetic with the public interest be in a position to resolve differences, or at least appoint the arbitration panel.

And the last and most important thing: this is one area in which I have never tried to go it alone. We work in a field that is becoming more and more complicated every day; we work with engineers who have many many years of experience and rely on them. I recommend that the State highway counsel get himself a utility engineer; find out what the utility people are talking about, and what they are going to be doing after the relocation. Little things such as whether there was a better way or a cheaper way than the one the utility actually used may be very useful to know. Also, have a good accountant present. There are a great many accounting angles to this matter. The immediate impact of the tax picture is always considered. What does this relocation do to the utility in terms of taxes? Are they picking up money from tax deductions as well as reimbursements? Or, are they really being hurt both ways? These are things that an accountant can point out for you. Finally, be prepared as an attorney. Only after you have talked to your experts should you go to the negotiating table. And do not be surprised if, when you walk in with your three-man team, you find that there are three men on the other side of the table, too.

Going for a moment over to the relocation of property owners and tenants. In Florida we do not pay moving costs to anyone except the fee owner of land. In view of the Federal legislation adopted this year I think it is time we start considering the problem. If it becomes a requirement that we provide adequate relocation facilities for people that are dislocated from their homes this is going to be a moving cost, and many State statutes may have to be amended in order to comply with the Federal-aid standards.

DISCUSSION

J. Billett.—In Ohio we currently have a case that involves the authority of the Director of Highways to order relocation of a pipeline located on the right-of-way of a State highway, and also, in another instance, of a pipeline located on a county road where an expressway will cross both a county road and a State road. Ownership of the pipelines is one issue since one of the pipelines is owned privately, and the other is jointly owned, with the county holding legal title, and the private utility company having all the rights of operation and maintenance. The whole controversey is centered in these issues.

Banister.—There is a new Louisiana decision that may help on that point. It is a *Department of Highways v. Southwestern Electric Power Co.*, 145 So.2d 312 (1962).

Lindas.—In our State the difficulty has been not so much with the private utilities but with the public nonprofit utilities that want their moving costs. Our legislature has not authorized payment of costs of these utilities, and there are numerous water districts, irrigation districts, sewer districts, drainage districts, and so on that want to be included.

M. Cook.—We have problems in Oklahoma relating to pipelines. At the oil fields we have a gathering system that runs into a refiner, and the Interstate System will cross this sys-

tem. The line has been in the ground about 30 years and has a life expectancy of about 10 years so long as it stays in the ground. If you take it out of the ground it is a salvage. This has an effect on the Federal-aid reimbursement. The Bureau of Public Roads says it will pay 90 percent of the reimbursement for the relocation, but the utility company says that they want a new line. I think they are entitled to it, because the life expectancy of the oil field is about 10 more years, so they normally would not have to put in a new line, since the old one would have lasted the life of the oil field. Why should they put in a line that would last for 40 years when they can only use it for 10 more?

Measure and Proof of Damages

JOHN T. AMEY, *Assistant Attorney General, Arizona*

• Two main kinds of inverse condemnation actions are now developing. One may be called ordinary inverse condemnation. This deals with real and personal property. The other we must call extraordinary inverse condemnation because it deals with personal injury and wrongful death claims brought within the scope of the eminent domain concept.

In regard to the ordinary type of inverse condemnation, where property or a property right has been taken or damaged, I think the problems of proof and measure of damages are the same as those where the State proceeds directly to use its eminent domain power in a regular condemnation action. There is generally a slight difference in that the property owner or the party aggrieved has generally gone to the trouble of hiring an attorney, having an appraisal made, and securing engineers or other expert witnesses which he deems necessary to put on his case. This gives him an initial advantage over the attorney for the defendant-condemnor, who must on short notice scurry around, find expert witnesses, determine the facts, frame a defense, and get into a position to answer the complaint that has been filed. With us these complaints must be answered within 20 days. In Arizona the rules are parallel to the so-called Federal rules, and there are certain means of securing additional time to answer. If we are not successful in obtaining a stipulation from the landowner's attorney for an extension of the time to answer, we file such things as a motion for more definite statement, motions to strike and motions to dismiss, and others, so that by the time these motions have been disposed of the State's right-of-way personnel will have been able to make some investigation of the case. In this investigation they will, for example, determine such things as whether the State is in fact occupying the plaintiff's land, whether there is in fact any damage, and so on. All these may be important in helping determine what the State's defense will be.

The point is that in these inverse condemnation cases the plaintiff is always (or should always be) fully prepared before his case is filed, and the State needs a little time to find out the facts and prepare a position. This is an excellent opportunity to use what we have talked about earlier in connection with pre-trial discovery. This is extremely important in connection with preparing to answer the plantiff's theory, for frequently in inverse condemnation actions the plantiff brings his action on a new theory of law as to compensability or a new theory of valuation. So it is almost imperative for the inverse condemnor to discover these things before he makes any defensive moves of his own. For example, when we have an ordinary inverse condemnation case which involves damage to an incorporeal hereditament, or consequential damages—as in the case of a change in grade that interferes with the ease of access—the facts on which the action is based do not become readily apparent from reading the highway engineer's specifications or looking at the highway plans. Therefore it is important to discover what has actually happened that makes the landowner think he has a cause of action.

Our position has been that where the landowner shows that his property has suffered a depreciation in fact directly attributable to the highway improvement, and there has been

a legal right interfered with in this connection, then he has made a prima facie case.

Whether it is an ordinary condemnation case or an inverse condemnation case, the order of proof under Arizona law is identical. The property owner has the burden of proof and has the right to open and close.

We had a case of inverse condemnation involving land at the junction of two U.S. highways (US 60 and US 70) near a city of about 7,000 population in the western part of Arizona. The site was about 2 miles outside the city limits, and the subject property was about 1¾ miles from the intersection. The property abutted one of these primary routes. In the course of improving this highway a cut was made where it crossed a range of hills, and the dirt from this cut was placed in the right-of-way to change the grade in front of the plaintiff's property. None of this fill dirt was placed on plaintiff's land, since we (in those days before the Thelberg case) thought that changes of grade wholly within the right-of-way could be made without liability for consequential damage to abutting landowners. In this case the roadway was elevated between 7 and 22 ft throughout the section that was affected. We recognized the physical effect of the change in grade on the access of the plaintiff and built a ramp so that he could get on and off the highway from his property.

At that time the plaintiff's property was being used for cattle grazing and billboard advertising. The plaintiff had purchased his property in three parcels, assembling it into one holding just two years prior to bringing the inverse condemnation action, and paid in the neighborhood of $1,000 per acre. Now I am sure that westerners will tell you that you cannot graze many cattle on 16 acres of desert land, which is what the plaintiff had. We determined from the State's agricultural experts that you could support about one-half a cow per year on the grazing that this parcel of land provided. We also determined, or became convinced, that the highest and best use of this property was for grazing purposes, as it was in fact being used. Thus the influences that were at work in the previous purchase of this property were largely speculative influences which are very much in evidence in the Southwest.

The problem of proving that the plaintiff's valuation was vastly inflated was, however, more difficult. The jury had an extremely difficult time visualizing the speculative factors that have been operating to increase values throughout Arizona. But we did keep at it with our experts, and tried to demonstrate to the jury that the plaintiff's reasoning on the highest and best use of his land was faulty. In our evidence of value we used four sales of similarly-sized property immediately across the road from plaintiff. But down at the junction of the primary highways (1½ miles away) there was a prosperous commercial development including a restaurant, laundry, filling stations; and it did not occur to our people that the plaintiff's property should be compared with the value of these lots. Yet the plaintiff's witnesses testified that the highest and best use of his land was for commercial purposes in front and for a drive-in theatre in the back. They argued that these were specific highest and best uses since the plaintiff already had the plans drawn up and the survey done for these uses.

The result was to confront us with a new theory of valuation. We tried pre-trial discovery, but were not allowed to discover this. So we had to play by ear when the case went to trial. We found that there had not been a sale of property in this immediate area in 8 years. The commercial development at the junction had been by owners of individual lots. In the face of this, the plaintiff had taken each of these properties, capitalized the income from them, extracted the value of the improvements on the properties to get the raw undeveloped land, and then applied these values to the subject properties. As a result, the jury came back with

$84,000 whereas our appraisers had testified respectively to $4,200 and $5,700. Needless to say we appealed, partly because of the money involved, and partly because we had not been allowed to take depositions and submit interrogatories prior to the trial.

This is an example of the importance of relating the defense evidence to plaintiff's theory of law. Here we based our whole defense on a theory —change of grade within the right-of-way—which turned out to be wrong. The Thelberg case[1] was decided while this case was pending trial. Also, this decision for the plaintiff was based on what we regard as an erroneous theory of valuation which we were not able to anticipate in advance of trial. I am sure the verdict would have been different if we had been prepared to deal properly with this theory. You cannot rebut this type of evidence when it arises for the first time in the course of the trial. You cannot secure witnesses and prepare defensive evidence on that short notice. And once it is in the record, it is sure to influence the jury no matter what kind of instructions they get from the judge.

Now, turning to the unusual condemnation cases where personal property, personal injury and other forms of damages are the basis of the action, these had their genesis in Arizona in a case entitled *State v. Leeson,* 84 Ariz. 44, 323 P.2d 692 (1958). It involved an arroyo flooding out a laundry and dry cleaning establishment allegedly because of the manner in which a highway improvement was constructed. When plaintiffs brought suit against the State, they were thus claiming damages not only for their real property but also to their fixtures, personal property, and the personal property of their customers held by them under the terms of a bailment. Our supreme court held that the plaintiffs could not recover damages on the basis of goods left with them under a bailment, since this was a risk which was not reasonably foreseeable by the parties to the bailment and hence not within the bailee's responsibility. But, with respect to the rest of the alleged damages, and without discussing whether this taking or damaging was for a public use, the court held that the State was liable for damage to real property, personal property and fixtures.

Another Arizona case has involved the allegation that inverse condemnation authority can be used in situations where there is personal injury and wrongful death. The facts are as follows: a man and wife were driving north on Tucson Blvd. during a rainstorm, and the arroyo was flowing. As they crossed it they apparently hit a chuckhole so that the car was overturned and the wife was thrown out of the car into the stream and drowned. The husband suffered personal injuries. An action was brought against the State for damages based on this set of facts.

I do not know what the proof or measure of damages would be in this case. There were only four documents filed: the complaint, the motion to dismiss, the memorandum in support of the complaint and against the motion to dismiss, and the State's reply. Based on these the trial judge decided that the Supreme Court should rule on whether this theory of law should be sustained. This case is significant because it could become the one in which the doctrine of sovereign immunity is abolished in Arizona.

There is another case. We have touched on this nuisance element in inverse condemnation and proof of damages. I recently had a borrow pit inverse condemnation which started when the adjacent property owners sought to enjoin it. In Arizona we rarely condemn a materials site. If we cannot negotiate with the property owner we generally go to another location where we can negotiate. But in this case we were virtually in the downtown Tucson area. We negotiated what we call a license-royalty agreement with the property owner whereby we would remove the over-

[1] State *ex rel.* Morrison v. Thelberg, 87 Ariz. 318, 350 P.2d 988 (1960).

burden material and leave the sand and gravel for him. When we got into the area with our contractor the neighboring property owners started an injunction action to have the operation shut down. We argued that this was the wrong remedy, because what we can condemn we can lease or purchase; if they have any remedy it is inverse condemnation, and they cannot shut us down.

The judge did not accept this, and we could not get the case removed to Federal Court where I felt the doctrine of sovereign immunity might be on better ground. Ultimately we let the injunction issue and filed a direct condemnation action against the material pit, naming as defendants all the property owners who had been involved in the original action. We tried to avoid admitting these people's interest in the material pit property, and alleged that they "may claim some damage" by reason of the smoke, fumes, dust, vibrations, and so on emanating from the operations in the pit.

We anticipate being able to complete our operations in this pit in two months time, so that this is a temporary arrangement from our point of view. The property owners are talking about depreciation of the value of their property, and that may well be. However, under the ordinary rules of evidence in condemnation I do not believe they can show this for a temporary operation. It is our theory that the inconvenience is temporary and noncompensable.

But there is another problem. If the property owners' theory is correct (*i.e.*, that we cannot remove the materials from this site), they have something in the nature of a beautification easement created by implication on the land of their neighbors. They are not really concerned—and some of the property owners have admitted to me—about this two-month period of excavations; they are concerned about the hole that will be left afterwards. If they have something in the nature of an easement or right over this other man's land to have it remain substantially as it was for an indefinite period, then we have created a new form of property right that must be reckoned with. I do not know whether anyone else has encountered this same situation, or not. But if anyone has any ideas about it I would like to know.

In this inverse condemnation field there are a number of related problems none of which have been really touched in our discussion. One of these is the special statute of limitations. We are now trying this issue before our Arizona court. Other aspects of this subject are discussed in 18 Am. Jur., *Highways,* §394; 30 A.L.R. 1190 *et seq.*; 129 A.L.R. 1288; 123 A.L.R. 676; 1 NICHOLS, EMINENT DOMAIN. §4.102 [1].

These contain general discussions of inverse eminent domain relating to the statute of limitations. In Arizona we have a two-year statute of limitations, and our problem is whether it is constitutional. Our constitution provides that "no private property may be taken or damaged for a public use without compensation first having been paid." The property owners' attorneys take the position that if this constitutional provision has any validity no statute of limitations can ever run against an inverse condemnation action. The general rule, according to my research, is that where there is a specific statute of limitations, as our two-year statute in Arizona is, it will govern and bar the action after it has elapsed.

DISCUSSION

Lindas.—When does the taking occur in an inverse condemnation action? Is it at the time the injury occurs or at the time the facility is constructed?

Amey.—We have taken the position that it is when the injury occurs. And, in this connection, we have also taken the position that where there

has been a sufficient physical change in the highway facility to apprise the owner that his property rights have been damaged, then the cause of action commences to run, until the statute bars the action. For example, in the change of grade case, I described earlier, it may be that when the construction was half-completed the property owner could see that he was not going to be able to get on and off his land as he had before. He should then have been apprised of his damage, and in fact was.

This landowner had been dickering with us trying to get us to take this property, and he wanted too much. The State would just not deal and that is why it was decided to keep all the highway construction within the right-of-way. As a matter of fact, the landowner had hired an appraiser prior to the time any of our highway construction began. Shortly after construction began, the contractor who got carried away and sent a man with a bulldozer over onto the adjacent property and widened the natural drainage ditches that were there. The resident engineer on the job discovered it about 5 o'clock. He had to get the approval of the contractor to have the bulldozer operator work overtime, but that same night, working by artificial illumination, the property was put back in substantially the same condition that it was in before. Two years later it was impossible to tell that a bulldozer had been over on that property. The property owner's appraiser, who resided some 250 miles from where the property in question was located, was there with his camera to take photographs of what happened during the short span of a few hours that the property was torn up. This all went into evidence, not because they were claiming damages for the temporary trespass, but because our witnesses had not seen the property as it was in the before condition.

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.

Contract Administration: Problems of Enforcement

ARTHUR J. WALTERS, *Chief, Contracts Administration and Compliance Branch, Office of General Counsel, U. S. Bureau of Public Roads*

• Personnel in the Bureau of Public Roads are seeking to relate the results of general legal research to the basic causes of daily legal problems and, thereby, derive some cumulative benefit from the whole situation. Any who have worked in the advisory area of contract administration will recognize the need for this kind of an approach to some of these problem areas.

Rex M. Whitton, Federal Highway Administrator, in his remarks at the 41st Annual Meeting of the Western Association of State Highway Officials at Seattle, Wash., described four problem areas with which he is primarily concerned in the administration of the highway program. Three of these problem areas relate directly to contract administration and problems of enforcement: (a) nonuniformity in contract specifications, (b) research (insofar as it pertains to better contract requirements) and (c) integrity in dealing with public funds.

Each of these problem areas is, at least to some material degree, derived from the facts that (a) we have rather recently embarked on the construction of the Interstate System, which Mr. Whitton describes as "the greatest construction work in human history" and (b) we are presently engaged in this massive task during a period of rapid technological progress in the development of design criteria and in the development of the construction materials, methods and equipment used by the highway construction industry.

These developments generate new engineering problems, and they also generate new legal problems. The engineers are reckoning with the engineering problems arising from conversion from obsolete specifications to modern specifications which are based on improvements in design and in construction methods and equipment. Going from specified methods to specified end results is one of the things that is characterizing these changes in specifications.

Of course, the solution of the engineering problems will not resolve the legal problems involved. These legal problems are new to our program, but not to the body of Government contract law. It may be that our difficulties are arising from the fact that, in the pressures of the expanding program, with its new developments, we have lost sight of the guiding legal significance of the oft-quoted phrase of Justice Holmes, "Men must turn square corners when they deal with the Government."[1] Vast public works programs, such as the Interstate Highway System, are not merely ends in themselves, and the legislatures are generally concerned with more than the mere technical sufficiency of the end product from an engineering viewpoint. Rather, the legislatures, in authorizing such programs, are also concerned with the economic and social needs of the country, as well as the fiscal integrity of the Government. Thus, special conditions to be met in the performance of the Government public works contracts are enacted as statutory requirements precedent to the use of the public funds involved. These statutory requirements limit the personal discretion of the public officials and employees, and may well be viewed by the engineer, whose sole concern is to produce a technically acceptable product, as be-

[1] Rock Island R.R. v. U.S.; 254 U.S. 141 (1920).

ing unduly restrictive or burdensome. Nonetheless, they are statutory requirements which must be met and which cannot be compromised in conducting the programs to which they apply.

This discussion is addressed to the Federal requirements which are established as conditions to Federal-aid participation in highway construction projects, and will discuss some of the resultant problems of administration and enforcement.

The first and fundamental requirement to consider is that currently codified in section 112 of title 23, U.S. Code, which requires the following:

(a) In all cases where the construction is to be performed by the State highway department or under its supervision, a request for submission of bids shall be made by advertisement unless some other method is approved by the Secretary. The Secretary shall require such plans and specifications and such methods of bidding as shall be effective in securing competition.

(b) Construction of each project, subject to the provisions of subsection (a) of this section, shall be performed by contract awarded by competitive bidding, unless the Secretary shall affirmatively find that, under the circumstances relating to such project, some other method is in the public interest. All such findings shall be reported promptly in writing to the Committees on Public Works of the Senate and the House of Representatives.

(c) The Secretary shall require as a condition precedent to his approval of each contract awarded by competitive bidding pursuant to subsection (b) of this section, and subject to the provisions of this section, a sworn statement, executed by, or on behalf of, the person, firm, association, or corporation to whom such contract is to be awarded, certifying that such person, firm, association, or corporation has not, either directly or indirectly, entered into any agreement, participated in any collusion, or otherwise taken any action in restraint of free competitive bidding in connection with such contract.

(d) No contract awarded by competitive bidding pursuant to subsection (b) of this section, and subject to the provisions of this section, shall be entered into by any State highway department or local subdivision of the State without compliance with the provisions of this section, and without the prior concurrence of the Secretary in the award thereof.

(e) The provisions of this section shall not be applicable to contracts for projects on the Federal-aid secondary system in those States where the Secretary has discharged his responsibility pursuant to section 117 of this title. Added Pub.L. 85-767, §1, Aug. 27, 1958, 72 Stat. 895.

This requirement is implemented by section 1.15 of the Regulations for Administration of Federal Aid for Highways,[2] which is further supplemented by Public Roads Policy and Procedure Memorandum 21-6.

This requirement for competitive bidding is a Federal requirement. Hence, to establish the full scope of this requirement, we must turn for guidance to the opinions of the Comptroller General of the United States, and of the Federal Courts. Of course, it is also a requirement in most of the States.[3] In the Federal-aid highway programs, both Federal and State requirements must be satisfied.[4]

The personnel in the General Counsel's office are concerned with some relaxed attitudes which exist in the administration and enforcement of highway construction contracts. As an aside, in dealing with a landowner on land acquisition, you are dealing with a man who is not coming to the State agency to do business with the State; you are going to him. You put yourself into a business relationship with him because you have to, not because either of you wants to. In

[2] 23 C.F.R. 1.15.

[3] COHEN, PUBLIC CONSTRUCTION CONTRACTS AND THE LAW. (1961), p. 1ff.

[4] 23 U.S.C. §114.

that framework, it is interesting to note the procedures that you use to protect your interest in your case, and to assure that you are dealing with him at arm's length so that, in effect, this one individual landowner does not get more than that to which he is entitled. On the other hand, with the construction contractor, we do not find this attitude. There, the State or Federal Government goes out with their solicitations for bids on a particular job, and the contractor comes to the State and Government because he wants to do business with them. His intention is to make a profit. Yet we have a completely different attitude in many cases toward the contractor as distinguished from the attitude and relationship we have with the landowner. It is not nearly so much at arm's length. It is a much closer relationship, and in all too many cases we have too much concern for the welfare of the contractor. The Comptroller General has pointed out the following:

> . . . to permit public officers to accept bids not complying in substance with the advertised specifications or to permit bidders to vary their proposals after the bids are open would soon reduce to a farce the whole procedure of letting public contracts on an open competitive basis. The strict maintenance of such procedure, required by law, is infinitely more in the public interest than obtaining an apparently pecuniary advantage in a particular case by a violation of the rules.[5]

It can be readily seen that what would be a farce at the bid opening stage can become a tragedy if the contractor is permitted to vary his actual performance from the terms of the contract on which he bid, unless such change is essential to the sound accomplishment of the project.

It is elemental that the terms and conditions of a contract are fixed at the time of execution of the contract. Perhaps I should qualify that. Actually the terms of a public contract awarded by competitive bidding are fixed at the time the bids are opened. It is not then an executed contract, but you are then in a position that no change can be made in the terms without complying with the requirements of the laws which are designed to protect the expenditure of public funds under the concepts of competitive bidding. Therefore, it is the obligation of the contracting agency to insure that its plans and specifications properly define the nature and scope of the work contemplated by the project, so that the Government gains the true advantage of competition. The vast number of change orders, modifications, etc., are indicative of need for revision and updating of our plans and specifications, to define more adequately our technical requirements.

In terms of these modifications to contracts, including the so-called field modifications, the plans and specifications of properly prepared contracts represent the cumulative result of considerable coordinated and specialized engineer work done in advance of the publication of the specifications. If those are to be changed after the contract is awarded, it seems at least that the proposed change in requirements ought to have comparable consideration. Too many changes may be due to the fact that the plans and specifications are not completely geared to the job. Sometimes a change is made because a particular situation was not taken into consideration in the preparation of the plans and specifications prior to advertising for bids. You cannot insure against the necessity for changes of this sort. But it does seem that if the volume of changes that you have in your plans and specifications appears to result from the fact that the engineering is incomplete until you get out on the job and under way, there is some need for reviewing the situation in order to remedy that error and get your plans and specifications in such shape that it will be the unusual situation that will require a change.

Anything that tends to blur the definition of the work which the contractor is required to perform, or the method of measurement for payment.

[5] 17 Comp. Gen. 554, 558-9.

undermines the effectiveness of competitive bidding; for example, (a) ambiguous or conflicting contract specifications, (b) undisclosed or inaccurate information that is pertinent to bidding, (c) specific but uncertain requirements such as "as may be directed by the project engineer," (d) provisions for changes, changed conditions, time extensions and claims without precise criteria as to how these matters will affect price and time for performance, and (e) undefined procedures and criteria for handling claims, appeals and litigation, and undue volume of contract modifications. That problems can and do arise in all of these areas is well recognized. That problems in these areas do undermine the integrity assured by the competitive bidding system is not so generally recognized.

When you enter into the area of adjusting contract requirements, including prices, manner of performance, and time of performance on a negotiated basis, as you do when you are handling change orders, changed conditions, and time extensions, unless you have relatively fixed criteria for processing those matters you are subjecting your contract to a noncompetitive re-alignment of the contract requirements and the contract price. To that extent, you are undercutting the effectiveness of the competitive bidding system to assure that the State or Federal government obtains the full results of competitive bidding; *i.e.*, the lowest price for the specified work.[6]

The more recent audits of Federal-aid administration in the various States conducted by the General Accounting Office, and the examination of certain State contract administration and enforcement practices by the Blatnik Committee, illustrate the continuing and pressing necessity for improved contract administration and enforcement standards by the State highway department.

There is ample proof in the records that the legal significance of these requirements is being ignored in the relationships between some contractors and contracting agencies during the construction of our projects. Such an attitude cannot be justified by the argument that so long as the end product is satisfactory from a technical, engineering viewpoint and the funds budgeted for the project are not exceeded, the rights of the Government are adequately protected. This argument would place the engineer's estimate in a status that is superior to the statutory requirement that the contract be awarded by competitive bidding.

Returning to Justice Holmes' concept of "square corners," Justice Frankfurter applied it to Government contract matters:

> . . . the oft-quoted observation that "men must turn square corners when they deal with the Government" . . . does not reflect a callous outlook. It merely expresses the duty of all courts to observe the conditions defined by Congress for charging the Public Treasury.[7]

What Justice Frankfurter saw as a duty of the courts, is, of course, an even stronger duty on the part of the agents of the Government who are charged with the responsibility of administering these laws, because it is the administrative people, including the engineers who are handling these contracts, who are actually making the expenditures against these contracts who are creating the obligations, and who are charging the public funds. It is the rare case that gets to court.

In administering Federal-aid contracts, those in Public Roads have an obligation, flowing from the responsibility to protect Federal-aid funds, to insure that these square corners are met. We have been reasonably vigilant in this regard in reference to the advertising and awarding stages, but we may not have been as vigilant in demanding standards of contract administration and enforcement necessary to preserve the full

[6] For an excellent article, see L. Spector, "Confusion in the Concept of the Equitable Adjustment in Government Contracts." 22 Fed. Bar J. 1.

[7] Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 385 (1947).

benefits of the competitive bidding system.

What then are these corners governing Federal-aid contracts? First, we have a requirement in Title 23, U.S. Code, §114, that the construction of any highway on a Federal-aid system shall be undertaken by the respective State highway departments or under their direct supervision subject to inspection and approval by the Secretary of Commerce in accordance with the laws of the State and the applicable Federal laws. This contemplates that the Secretary would assure that the benefits of competitive bidding system would be preserved in the actual performance of the contract.

Although those in Public Roads have in recent years been vigilant in the enforcement of engineering standards, they are now striving for more uniform and clearer specifications and related requirements and better enforcement of the contract rights of the Government. One area of particular concern in the enforcement of these rights arises in the execution of change orders, modifications, and the assessment of delays and liquidated damages.

The general rule in reference to such contract matters is that "a contract may not be modified prejudicially to the interest of the Government without adequate consideration therefor,"[8] the principle being, as stated in *Pacific Hardware Company v. United States*, 49 Ct. Cls. 327, 335:

"It is unquestionally true that an official of the Government is not authorized to give away or remit a claim due the Government," and in *Bausch & Lomb Company v. United States*, 78 Ct. Cls. 584, 607, where there was an attempt by supplemental contract to change the rights of the parties prejudicially to the United States for which no consideration moved to the Government, that:

> If the claim was not based on such a contract it was invalid and unenforceable against the United States and could not be vitalized into a legal claim by a subsequent contract. Agents and officers of the Government have no authority to give away the money or property of the United States, either directly or under the guise of a contract that obligates the Government to pay a claim not otherwise enforceable against it.[9]

This conclusion is founded on the principle that public officials are creatures of the law, whose powers are carefully defined by the pertinent statutes, and whose acts beyond the scope of their authority as defined in these statutes, regardless of their good faith, are invalid, and any obligation resulting from their unauthorized activities is unenforceable.[10] It will be found, in one expression or another, in the case law of all the States. But, even if it were not, we are of the opinion that, insofar as the establishment of an obligation against Federal-aid funds is concerned, these principles would still apply.

These principles require that the contracting agency must ensure that contractors perform their contracts in conformity with the plans and specifications; they preclude modifying contracts when the sole purpose is for the benefit of the contractor, with no real benefit flowing to the Government; and, in general, they require the Government agents to act in a more affirmative manner to protect the public interests in such contracts.

Other statutory requirements which govern Federal-aid contracts relate in general to the socio-economic conditions established by Congress for such contracts. Illustrative of these conditions is the requirement of Section 114 (b) of Title 23, United States Code, prohibiting the use of convict labor in the construction of the Federal-aid highways. Section 113 of Title 23, United States Code, requires that the Secretary of Commerce take such action

> . . . as may be necessary to insure that all laborers and mechanics employed by con-

[8] United States v. American Sales Company, 27 Fed.2d 389, *affirmed*, 22 Fed.2d 141 and *certiorari denied*, 280 U.S. 574.

[9] 15 Comp. Gen. 25, 26; also, 37 Ops. Atty. Gen. 253, 255.

[10] See Marlboro Constr. Co. v. N.Y., 201 Misc. 697, 112 N.Y.S 2d 794 (Ct. Cl. 1952).

tractors or subcontracts on the initial construction work on highway projects on the Interstate System . . . shall be paid wages at rates not less than those prevailing on the same type of work in similar construction in the immediate locality as determined by the Secretary of Labor in accordance with . . . the Davis-Bacon Act (40 U.S.C. see 276).

The Attorney General has ruled that the responsibility for promulgating regulations and interpretations under this section of our code was tranferred to the Secretary of Labor pursuant to Reorganization Plan Number 14 of 1950 (5 U.S.C. 133z-15).[11] Accordingly the Bureau of Public Roads, while primarily responsible for the administration and enforcement of this section of law, must do so in conformity with the regulations and interpretive material published by the Secretary of Labor. Most here are somewhat familiar with the problems that have been encountered in this area. At least it is now clearly resolved that the Secretary of Labor issues the rulings, regulations, and interpretive decisions which a Federal agency is bound to follow, and which, in turn,—the supervisory agency over the construction of the Interstate System (to which these requirements are applicable) must also follow.

The Federal-aid highway construction project is also subject to the "Copeland Anti-Kickback Act"[12] which requires weekly payment of full wages to employees on such projects, without kickback or rebate, provides for the submission of certified payrolls verifying such payments, and which makes the extraction of kickbacks or rebates from such employees, or the falsification of the payrolls, a violation of the Federal Penal Code.

Pursuant to section 1.24(d) of the Secretary of Commerce Regulations for Administration of Federal Aid for Highways, contracts for the construction of projects other than Interstate projects must contain provisions requiring payment to the laborers and mechanics at a rate not less than that established in the contract as predetermined under State law, or, in the absence thereof, by the State highway department.[13]

These statutory socio-economic conditions of the Federal-aid contracts represent an area of laxity in contract administration by the contracting agencies. These too are statutory requirements. They stand in the same status as the basic authorization to construct the highway program. They do not have a lesser status and they cannot be ignored if we are to comply with the requirements laid down by Congress. They are among the "square corners" which must be complied with in transacting business with, and for, the Government.

RECOMMENDATIONS

The personnel in the General Counsel's Office are concerned with the extent to which contract legal actions are submitted for legal consideration without any accompanying expression of the legal opinion of counsel for the State highway department. We urge you to make your voices heard in providing guidelines for your contracting officers, more particularly for your project engineers.

The project engineers need your counsel. Their roles as contract administrators need to be defined and emphasized. The limits of their authority should be well known to them and the contractors with whom they deal. They should have ready guidelines to permit them to assemble information in contract disputes, and provisions should be available to assist them in recognizing such disputes.

To assure effective contract inspection and administration, your system should provide for forwarding all legal problems with accurate information to those who are responsible for making contracting officer decisions. If it does not, you may find that you have a "de facto" contract-

[11] Ops. Atty. Gen. Vol. 41, OP No. 82, Sept. 26, 1960.

[12] 40 U.S.C. 276c, and 18 U.S.C. 874.

[13] 23 C.F.R. 1.24 (d).

ing officer out in the field who may actually be modifying contract requirements, through relaxed enforcement, without even realizing that he is doing so. It is a dangerous situation—not because the man himself is dangerous, but because he has been placed in an extremely hazardous position both for himself and for the State when he has to make these decisions alone.

Excessive delegations of authority to project personnel may place them in the position of having to make decisions without the benefit of the staff coordination that would be applied to the same problems were they presented to the headquarters office. The need for such staffing should be considered in making or reviewing delegations of authority. In all cases where authority for making decisions is delegated, it should be accompanied by clearly defined criteria for making such decisions, and by a clear definition of the scope of the authority. You cannot expect your project engineer to conform to undefined standards. If you leave your project engineer to carry on alone without adequate guide lines for resolving problems of contract enforcement, or modification, and his decisions begin to come in for staff review, you may be tempted to question the soundness of his judgment. I suggest there may be nothing the matter with the project engineer. His decisions may indicate a weakness in a system that does not provide him with a basis for saying that this is the way it is because it is in the contract and it is backed up by the State highway department and its legal advisors. A man with this basis for his decisions is much more effective than the project engineer who cannot support his decisions on any other basis than his own authority.

When you have a legal problem that indicates that the project engineer is engaging in minor irregularities in favor of the contractor, it is a caution to review his whole situation to determine whether your system of field administration effectively cuts him off from those to whom he is legally responsible, leaves him without guidelines, and makes him feel personally responsible to the contractor for the difficulties that the contractor professes to be having in meeting the contract requirements. Under such conditions, it is a short step from "supervising construction" to "helping the contractor get the job done." This shift in attitude from one of public contract administration (inspection and enforcement) to one of construction management (which is clearly the exclusive responsibility of the contractor) may be attributed to some of the causes already indicated. Such a shift of concern from the immediate interest of the State or Government to the welfare of the contractor obviously endangers the effectiveness of the contract requirements as a part of the competitive bidding system. It is most likely to show up in those contract modification actions which originate in the field: changes, time extensions, changed conditions and other claims, and in weak enforcement of technical specifications or labor standards requirements.

CONCLUSION

At the 41st Annual Meeting of WASHO, Mr. Whitton pointed out:

> We in Public Roads are answerable to the people, through the Congress, just as you are through your State legislatures. We cannot sit on the sidelines through the whole game, hoping for the best but doing nothing while the score piles up against us I say this because we are on the AASHO team, but in certain respects we are being held responsible as coach, too. We don't want to call the plays necessarily, but we do feel justified in giving some guidance and advice.

The criticisms to which our highway programs have been subjected primarily relate to a breakdown in the field of contract administration. We urge you, as counsels to the highway departments to exert yourself in providing legal guidance to the solution of these problems. We are sure you will find a challenging area for action.

This is a large field which is in need of much attention. However, such attention can be highly productive in improving criteria for contract administration. Such improvement can eliminate much confusion and many troublesome recurring problems.

DISCUSSION

Abrahams.—What do you do about a suspicious claim of error in a low bid? We have had that problem very seriously. It is easy enough to manufacture some evidence afterwards to support a claim of error, and we are afraid our whole bidding practice may be called into question.

Walters.—Do you have in mind a phony bid or a phony claim by the contractor?

Abrahams.—Here is an example: A bid is put in considerably lower than any other, and is accepted. Then, later, the contractor comes in and says that the reason his bid is so low is because he forgot to add in some of the items on which he bid. Under New York law, and probably the law generally, if a claim of error is established, there is a legal right to withdraw it. You cannot hold the bidder to his bid under those circumstances. But it is so easy to adduce evidence which has simply been manufactured after the bidder has decided that he does not want to go through with the job for his price bid.

Walters.—That is one thing that the comptroller general has been highly suspicious of, and he rather prefers that when claims of this sort come in they be referred to the comptroller general for a decision unless they are clear-cut cases, in which case there is no reason why the contracting agency should not handle it.

I do not know what criteria the comptroller general uses in these cases to decide whether he thinks there is a valid or fictitious claim of error. It is essentially a factual problem for him, and sometimes an extremely difficult factual problem.

W. H. Donham.—The same question has come up in Arkansas, and we have felt that the weight of authority in the law is that an honest error gives the bidder a right to renege. As a result, and to protect ourselves, we sue on the contractor's bid bond and let the court determine whether there is a legitimate right to withdraw.

Contract Administration: The Challenge of Changed Conditions

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• Whether he is building a fallout shelter for his next-door neighbor or a multimillion dollar superhighway for the State, the contractor may encounter changed conditions, extra work, and additional work. There is a distinction between the meaning of "extra work" and "additional work" when used in connection with public construction contracts. The Courts have defined the term "extra work" to mean the performance of work and the furnishing of required labor and materials outside and entirely independent of and not necessary to complete the contract or something done or furnished in excess of the requirements of the contract, not contemplated by the parties and not controlled by the contract. Additional work is that which results from a change or alteration in the work that has to be done under the contract.[1] Extra work usually arises outside of and entirely independent of the contract and not required in its performance whereas "additional work" usually results from a change or alteration in work that has to be done under a contract and might arise from conditions that could not be discovered until the specified work under the contract was actually undertaken.

Under New York State Highway Specifications, additional work is referred to as "contract work," whereas extra work is considered to be any work which is determined by the Superintendent of Public Works not to be contract work. The "disputed work" clause in the Specifications states:

> If the Contractor is of the opinion that any work ordered to be done as contract work by the Engineer is extra work, and not contract work, or that any order of the Engineer violates the provisions of the contract, the Contractor shall promptly notify the Superintendent in writing of his contentions with respect thereto, and the Superintendent shall make a finding thereon; the work shall, in the meantime, be progressed by the Contractor as required and ordered. During the progress of such disputed work the Contractor and Engineer shall keep daily records of all labor, material and equipment used in connection with such work and the cost thereof.
>
> If the Superintendent determines that the work in question is contract work, and not extra work, or that the order complained of is proper, he shall direct the Contractor to proceed, and the Contractor must promptly comply. The Contractor's right to file a claim for extra compensation or damages will not be affected in any way in complying with the above directions of the Superintendent, provided the Contractor shall furnish the Engineer with the signed records above referred to. If the Superintendent determines that such work is extra work, not contract work, or that the order complained of is not proper, then the Superintendent shall have prepared, if necessary, a supplemental agreement covering such work, and the supplemental agreement shall be submitted to the Contractor for execution.

Whether "changed conditions" will result in extra work or additional work to be performed by the contractor has been the subject of argument and litigation in various States for many years. The very term "changed conditions" implies that there is a risk to be taken by someone—either the contractor or the owner. The Federal Government has endeavored to reduce this risk by requiring the

[1] Shields v. City of New York, 84 App. Div. 502; Kansas City Bridge Co. v. State, 250 N.W. 343; Blair v. U.S. *et al.*, 66 F. Supp. 405.

following article to be inserted in all Federal Construction Contracts:

> The Contractor shall promptly, and before such conditions are disturbed, notify the Contracting Officer in writing of: (1) subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract. The Contracting Officer shall promptly investigate the conditions, and if he finds that such conditions do so materially differ and cause an increase or decrease in the cost of, or time required for, performance of this contract, an equitable adjustment shall be made and the contract modified in writing accordingly. Any claim of the Contractor for adjustment hereunder shall not be allowed unless he has given notice as above required; provided that the Contracting Officer may, if he determines the facts so justify, consider and adjust any such claim asserted before the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made, the dispute shall be determined as provided in Clause 6 hereof

This reference to changed conditions is expressly applicable to subsurface conditions at the site that are materially different from those shown on the plans and specifications and also to physical conditions that were unforeseen and unknown and, therefore not shown on the plans and specifications. The subsurface or latent conditions, referred to in the first category must be a physical condition and must differ materially from those indicated in the contract and not merely in the drawing or specifications. The conditions covered by the second category must be "physical conditions" at the site. The word "physical" was added to "conditions" in both categories by a fairly recent amendment to the Article and the "contract" was likewise substituted for "plans and specifications."

New York State Highway Construction contracts do not contain a provision similar to the Federal Government's changed conditions article. With respect to the first category relating to subsurface conditions the New York State Public Works Specifications of January 2, 1957, provides the following:

> Whenever subsurface borings or other subsurface information obtained by the Department is available for a bidder's inspection, it is understood that it has been obtained with reasonable care and recorded in good faith with reasonable interpretations placed on the results and character of materials and conditions to be expected. The bidder must interpret this information according to his own judgment and not rely upon it as accurately descriptive of subsurface conditions which may be found to exist. The information is made available to the bidder only in order that the bidder may have access to the identical information available to the Department.

This means in effect that the contractor is expected to accept full responsibility for subsurface conditions encountered on the site except those resulting from faulty design or misrepresentation. The Department cooperates fully with the contractor and makes available to him all information on subsurface conditions that it has available. If subsurface conditions are encountered which depreciate the construction design features, the Department will authorize procedures to adapt the design. Such adaptations are usually in the form of increases in quantities of excavation, foundation piles, sheeting, concrete, or gravel. the bid prices are not modified. The Department endeavors to have a complete engineering design and to have the subsurface investigations fully tested by borings and laboratory tests. What we are actually saying to the contractor is that we put reliance on our boring data but we acknowledge that variations in texture, slope, earth strata and ground water are prevalent and that uniformity should not be surmised; therefore, you should make your own borings and subsurface investigations so that you will be apprised so far as possible of conditions at the site. However, we honestly believe that our borings will show the actual subsurface conditions at the site and we offer to make them available to you together with any other information that we have on the subject.

Of course, there is a gamble of sorts to the contractor but experienced contractors would not have it otherwise. It so happens that sometimes the gamble works to the benefit of the contractor. A competent contractor would not welcome a situation where the risk were completely removed so that any Tom, Dick or Harry with a dump truck and a shovel would be in a position to bid on a job. I do not suppose there are any statistics on the subject, but it would be interesting to know how often a contractor would promptly notify a contracting officer of subsurface conditions at the site differing materially but which would result in a benefit to the contractor. With all due respect to the contractors, we suspect that such reports do not exceed those reports which indicate conditions that will adversely affect the contractor.

It should be pointed out that in New York, the contractor is not without a remedy. I have already referred to the "disputed work" clause in our Standard Specifications which affords the contractor an opportunity to be heard when claiming extra work. The State of New York has waived its sovereign immunity with respect to contract matters and has established a Court of Claims in which an aggrieved person can sue the State and, on proving his claim, recover damages with interest.

The Courts have held that the State cannot insulate itself from liability merely by inserting a provision in the contract that it does not guarantee the correctness of borings when the State had knowledge of subsurface conditions that were not indicated on the plans. On the other hand, such a provision in the contract would protect the State if the material to be excavated proved to be different from what the State believed it to be and when the State had disclosed to the contractor all of the information it had on the subject.[2] In the case of *Foundation Company v. State of New York*[3], the contractor sought to recover for the increased cost of excavating to bed rock because the boring sheet, not made a part of the contract but shown to the contractor for the purpose of enabling him to make up his bid, indicated that bed rock was nearer the surface than it proved to be. It was held in this Court of Appeals case that no recovery could be had because the boring sheet was not a part of the contract, and if the bidder relied on the boring sheet he did so at his own risk, as there was no bad faith, concealment of information, or misrepresentation on the part of the State.

Officials of the New York State Department of Public Works have seriously considered the Federal Government's "changed conditions" clause and while recognizing that it has considerable merit, they have decided, up to this time at least, that it would not work out profitably under existing New York State Laws and procedures. Along with many other States, New York has a tremendous building program in progress. To quote some very recent statistics related to the Highway Program in New York State,

> The value of highway contracts let by the New York State Department of Public Works during the year of 1955 was upwards of $75,000,000. This annual value has grown tremendously each year so that in the year 1961 our Department let highway construction contracts amounting to more than $377,000,000. We anticipate that in 1962 we will reach the $400,000,000 mark. Currently, we have 444 highway projects under construction which are valued at 810.6 million dollars.

It is readily apparent that the administration of a program of such increasing dimensions is in itself a major challenge. Time is of the essence on most projects and completion dates must be strictly adhered to in order to meet program demands. We attempt to keep administrative hearings and conferences at a minimum, and even under existing procedures we often find it difficult to do.

[2] Jackson v. State of New York, 210 A.D. 115.

[3] 233 N.Y. 177.

If we were to invite the administrative work contemplated by the Federal changed conditons article on each of 444 highway projects the staff would find itself woefully undermanned, contract work could reasonably be expected to be delayed pending investigations at the site and additional claims against the State might easily follow.

The disputed work clause in our Standard Specifications is especially applicable to those claims for extra work which result from the condition referred to in the second category of the Federal changed conditions article; *i.e.*, "unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in the work of a character provided for in the contract." The "disputed work" procedure requires the contractor to continue with the work pending a determination by the Superintendent as to whether the "unusual conditions" are to be considered contract work or extra work. If the former, the contractor usually continues the work under protest and seeks his remedy in the Court of Claims. If the work in question is determined to be extra work, it can be progressed pursuant to a supplemental agreement therefor. The State Superintendent of Public Works cannot arbitrarily order any amount of additional work to be performed by the contractor. He is bound by the strict requirements of the State Finance Law which requires pre-audit of funds and all contracts including supplementals are subject to the "availability" of funds.

The authority of the Superintendent of Public Works to recognize extra work arising from unforeseen conditions and to enter into supplemental agreements for the performance of such work is found in Section 38, Subdivision 9 of the State Highway Law which states as follows:

> Contingencies and extra work. Whenever the superintendent of public works determines that from any unforeseen cause the terms of any contract should be altered to provide for contingencies or extra work, he may enter into a supplemental contract therefor with the contractor. The estimated expenditure pursuant to the supplemental contract shall not be an increase over the estimated expenditure pursuant to the primary contract unless the latter estimated expenditure shall have been amended by the superintendent of public works and a duplicate of such amendment shall have been filed with the comptroller.
>
> When such supplemental contract provides for similar items of work or materials which increase or decrease the itemized quantity provided for in the primary contract, the price to be paid therefor shall not exceed the unit bid price in the primary contract for such items. Agreed prices for new items of work or materials may be incorporated in a supplemental agreement as the superintendent of public works may deem them to be just and fair and beneficial to the state.
>
> Whenever the superintendent of public works also determines that in the cases herein provided it is impracticable for him to ascertain in advance the just and fair price to be paid by the state for new items of work or materials, the supplemental contract therefor may provide for performance of the work and the furnishing of the materials and equipment, in which event the contractor shall keep and shall make available at all times to the superintendent of public works such accounting records, data and procedure as may be required by the superintendent of public works. An estimate of the value of such work and the furnishing of materials and equipment shall be submitted by the superintendent of public works to the state comptroller who is hereby empowered to approve such estimate. Partial and final payments shall be made upon proper records and data itemized as hereinbefore indicated.
>
> Before any supplemental contract shall become effective, it shall first be approved by the director of the budget and also by the comptroller, and filed in their respective offices.

This section of Law provides some measure of relief to the contractor faced with changed conditions on the contract site. Although the procedure under the section has proven satisfactory for many years, we now find during this period of accelerated construction programs that further streamlining of the procedure is desirable. To that end we are currently studying proposed legislation that would lessen the so-called "red-tape" to a much greater extent.

In conclusion, this paper has not attempted to make a case against the use of the Federal changed conditions article. We recognize that it is designed to meet conditions under which the Federal system operates. Apparently for those purposes, it works very well since it has been in existence for many years. What I have attempted to do is to outline the procedures followed in New York State in dealing with changed condition problems of both categories. Our present procedure cannot be expected to be perfect. We do not maintain that it is the best possible one. We do feel it is adequate for our purposes at this time without causing an injustice to our contractors. We have an open mind and an alert eye for any changes of procedure in this area which will be in the best interests of the State without working a hardship on the contractor.

DISCUSSION

Banister. — In connection with changed conditions, we have had some trouble in Louisiana where, surprisingly enough, one contractor found rock in Louisiana, and our own borings had failed to find rock. When he made his checkborings he used the same spots we did. Apparently both sets of borings hit holes in the rock despite the fact that there was quite a layer of it. But this must have been what happened. The last I heard on that case we refused to recognize this as a changed condition.

In another case we were building a tunnel and an accumulation of cypress stumps and logs that had been there for a long time was struck. It posed quite a problem to the contractor but our specifications had thrown this burden on him and we did not revise it.

I appreciate the burden that rests on the project engineer. We recently conducted schools for our project engineers on the interpretation of the standards and specifications. I am happy to say that this was well received and our project engineers did very well. We also have an inspection team composed of one project engineer and a lawyer who is also a trained investigator. They tour the State and hit projects without warning to check on everything pertaining to the job.

Lindas.—We had a sad experience with a changed condition clause, and after I tried the case we decided to take it out of our contract form.

Here we had a ridge and a sidehill cut of 200-ft depth. On the side of the hill were outcroppings of sandstone throughout. Our plans called for a 1:1 slope and when the contractor got into this cut he ran into sandstone, as might be expected. He had intended to rip everything necessary to make this cut, but when he got into it he found he was going to have to shoot it. This cost him about $250,000 more than he had planned, so he went to the engineer and asked to be allowed to make the slopes steeper. The engineer, without consulting the legal department, told him to go ahead and make them a ratio of ¼:1.

After it was all over the contractor sued us for $250,000 because this was a changed condition and our plans had been guaranteed by our changed conditions clause. Our plans had shown a 1:1 slope indicating that we ourselves believed this was going to be diggable material, and when we found out it was not diggable we allowed him to make the solid rock slope steeper.

We had a clause similar to the Federal clause, and when I did my research I found forty-seven Court of Claims cases that made everything a changed condition.

We hired one welldriller to sink one hole in this ridge. We did not then and do not now guarantee our information about subsurface conditions. But our court held that if the contractor does not have time to bore his own hole, then we do guar-

antee ours. This welldriller's log said there was everything but sandstone, so this for practical purposes fixed our case, despite the fact that the contractor had walked over the site and seen the sandstone outcroppings.

After that we took the changed condition clause out of our contract form. It has been out about seven years, and we cannot see where it has changed our bidding one iota. The presence of a changed condition clause is supposed to mean that you will get lower bids because the contractor knows that if he runs into new conditions he can get an adjustment. But we cannot see where it has made any difference. Our courts have held that we do not guarantee our plans, and that the contractor takes a calculated risk after he looks the job over. We have one case in which the estimate of the number of yards of material to be moved was way off, but the plans had the right computations. The court held here that the contractor could have taken this information and figured out for himself what he had to cope with, so he could not recover.

We think we have had less trouble since we took our changed conditions clause out of the contract.

Canada.—A few years ago we started to reduce our plans photographically and distribute them. When we started this we did not think much about the consequences of it. Our plans have scales shown on them to indicate their reduction. For several years no one paid much attention to this. Then one contractor made a bid on a contract without figuring the scale. He got the contract and went to work, but about half-way through the job he started pulling his men off. When asked what the matter was he said he was finished, not realizing that he had overlooked that the plans he bid on were reduced by one-half.

At that point the contractor may have made a mistake, if I correctly understand some of the recent cases, because he said he would go ahead and finish the job and put in a claim for extras. He did, but the claim had to be litigated and we successfully defended against his charge that the scale shown on the plan was not accurate because of the reduction. The court held he was liable for discovering this fact for himself.

The moral of this story is that immediately after this case we started putting cover sheets on our photographic plans, and on this cover we say that contractors are warned that these plans are reduced one-half.

Abrahams.—Do you have any estimate as to how many claims you have had under your changed conditions clause, and how many you have paid?

Bennett.—I do not have exact figures but I do not believe it is very much. We do pay a substantial amount for "additional work." We have a unit price bid on highway construction. For example, our engineers recently took a highway through an abandoned cemetery of which there was hardly any record. To be on the safe side they thought they ought to tell the contractor about it and instruct him to preserve any human remains so that they could be relocated. They thought that there would be from 25 to 50 graves that would be encountered. When the contractor got through, however, he had evidence of several hundred. Thus at the unit price bid, the contractor collected a substantial amount of money. I do not know that this is anybody's fault.

A number of interesting questions are involved here. In the case of cemeteries, what is a grave? And what is a human remain? When highways are put through cemeteries that are hundreds of years old, as some of them in New York State are, the contractor has to make the decisions regarding these questions, and he is also the first one to have to face the question of whether something may be extra work or additional work under his contract.

Lehmann.—We have run into the same problem in Maryland, but we have encountered a variation. Before going through a cemetery we try to

find the official register of graves, and determine from that record how many graves will have to be moved. But occasionally we find these records are very inaccurate because of burials that have been made without any official record or permission.

Amey.—I think this matter of change of conditions points up the larger problem that is involved in contract administration; should the contractor work under the instructions of the project engineer in charge of directing the project, or should the contractor merely be held responsible for ultimately producing an end product that meets the contract specifications?

Some time ago I had occasion to do some research into this subject, and the best case I found from the highway department's point of view was either from Washington or Oregon, and arose out of a situation in which the contractor's failure to follow specifications in the material used for construction of a bridge resulted in the bridge falling apart after a short time.

Highway Law Revision Studies: Wyoming

GLENN A. WILLIAMS, *Assistant Deputy Attorney General, Wyoming*

• The subject of highway law revisions is of importance to all the States, because I am convinced that periodically we should review the type of law we are working with. If your State is like Wyoming you can stand a lot of revision. Our State is a neophyte in the matter of condemnation procedures. In the past we had a situation where most of the time people were very happy to give us right-of-way if we would build a road. But now our people are becoming educated in this matter of road-building, and are getting what we think are some outrageous verdicts in condemnation cases.

Back in 1888 our legislature saw fit to give the railroads a right-of-way across the State, and in so doing they set up a railroad eminent domain act. It was not until 1916 that the highway department was given the power of eminent domain to build roads, and at that time it was quite easy for the legislature to tell the highway department just to go ahead and acquire right-of-way in the same way the railways did. So when we looked at the law and saw it talked about a turntable, we said that is the same thing as an intersection; where they spoke of a waiting room or section house, we said that is where we could put up a maintenance depot; and so on. We floundered along for many years with that procedure.

Around 1937 or 1938 we acquired what was called a County Act of Condemnation. This then meant that we had two ways of acquiring right-of-way. One was through the old railroad right-of-way act, and the other was to go to the county attorney and ask him to acquire the right-of-way for us under his procedure. This latter method also had its handicaps, since it required a degree of cooperation between the State highway department and the county attorneys which often was missing.

One of the basic difficulties with the County Act was that it never said conclusively when a road had been established. Consequently, we have been queried about when and how some of our roads were established. If we could not establish the date under the county procedure, we had to fall back on the old railroad eminent domain act as the authority for acquiring the necessary land.

Although I have not enjoyed working with the railroad eminent domain act, I must say I think it is probably comparable to what is in effect in a number of States. For example, when we acquire right-of-way, we first attempt to negotiate and buy the land; if we cannot negotiate, we institute condemnation proceedings. We are required to have a necessity hearing. Prior to such hearing, however, the landowner is advised of the hearing and may appear. We present evidence as to the necessity, that we have the authority to condemn, and other jurisdictional matters, and then request a right of entry to the land. During this hearing we must have appointed three viewers, or appraisers, to set a value on the property who must later file a certification of award. If the highway department or the landowner does not like this award, they may file exceptions, and demand a jury trial of the matter.

When I first came over to the highway department, the attorney for the department was going over the files. We came to a case which I questioned, and the attorney said, "Don't bother about that. We've filed our exceptions, and in due course we will get new appraisers appointed and a

new award." Here is where we were mistaken, however, because the court overruled our exceptions and entered an award of $40,000 against us. Since the time for jury demand had long gone, we could not get a jury trial, and the only thing we could do was appeal on the ground that the trial court had exceeded its authority. In this case the Supreme Court upheld our position, but it taught us not to rely on the filing of exceptions to the award to stop the proceedings. Today, we automatically file a demand for jury trial.

We have found that by going through the railroad eminent domain act we are doing two things. First, we are educating witnesses for the landowner, and second, we are also paying the landowner's witnesses, because, as has been mentioned elsewhere this week, the landowner never has any witnesses until the very last minute. Usually he hires some local neighbor who is willing to come in and do the landowner a favor by testifying to extreme values, and the court-appointed appraisers are no better.

All of this convinced us that our basic condemnation law needed to be revised. We contacted the Automotive Safety Foundation to help us study our laws, and they agreed to work on a preliminary investigation of the problem. In this early stage it became very clear that we should have a complete study of all our laws relating to highways.

With this in mind, we went to our 1961 Legislature and made a request. Like many such things, however, they said we did not need it. But we did a little more groundwork, explaining our problem to the Legislature, and before the session closed they did appoint a legislative research committee under the direction of the Senate and the House to undertake several studies, ours being one of them. This committee authorized us to work with the Automotive Safety Foundation on the full-scale study that we had in mind.

In the very beginning of our study it was realized that if we were to have any success with the 1963 Legislature we would have to sell them the idea that this was not the work of the highway department or the Automotive Safety Foundation, but that it was the work of the legislative research committee, and that it was a combined effort of the State, the counties, and the cities. Also, we needed to make it clear that this was not merely a study of the condemnation law, but a study of all of the laws relating to highways. With this in mind we had several meetings at different levels in which we set forth our thinking to the people and the elective offices. As a result, we enjoyed fine cooperation.

Following this, we started to work on certain of the general laws. Our ground rule with the legislative research committee was that there should be no substantial changes in the existing law. We would entertain suggestions and recommendations as to hidden defects in the law, but essentially our intention was to study and organize the law so we could see what we had. For example, we found that our law called for white centerline stripes on Interstate System highways, and yellow stripes for the centerlines of other highways in the system. This was clearly a situation calculated to confuse the highway user, and so it was recommended that a uniform centerline stripe be adopted.

I will not go into the details of what we did, but I will note that it was important initially to have agreement on certain ground rules that the Automotive Safety Foundation should follow in its participation. Our contract with them called for the Foundation to conduct a study and codification of existing highway laws in Wyoming. The study would include a comprehensive analysis of all the highway laws of the State. This should consist of an analysis of the fundamental laws affecting highways in Wyoming, consideration being given to the following categories:

Legislative intent
Definitions

Highway administration
System classification
Planning and research
Programming
Intergovernmental relations
Traffic engineering
Bridges and drainage
Land acquisition
Control of access
Location and design
Contracts
Construction and maintenance
Public utilities
Financing
Federal-aid
Penalties

This study was financed by the Federal-aid Highway Planning Studies Funds. These are the so-called "1½ percent funds."

The next question that arose was who should handle this study? In the Wyoming highway department we have a planning and research section which has been given the responsibility of handling this study. Of course, their work involves many things that require legal interpretations. So, in the course of the study, our attorneys have had to work closely with the planning people.

Based on this experience, some of the things that the highway attorney should be prepared to do in connection with such a study include the following: First, comply with all requests from the Foundation for citations to your State's supreme court cases applicable to highway laws; also, the researchers need copies of all Attorney General's opinions and any briefs or memoranda on the interpretation of highway laws. Second, be prepared to sit in on any meetings between the researchers and the administrative officials of the highway department. Here you may have to defend your laws and procedures, or you may have your best opportunity to explain why some parts of your law should be revised. A great deal can be accomplished in this type of get-together with a free exchange of ideas.

The 1961 Legislature saddled us with the responsibility to construct and maintain all streets that are designated as part of the State highway system through cities. That is quite a problem because no details were included. They failed to mention where we were going to get the extra money to do it; they did not define our relationship to the local governmental units; in short, they left it to us to draw up our own set of ground rules. This was another aspect of our law which was aided immensely by the study given it by our researchers. There are a vast number of small, but difficult, problems that can arise in such a situation. For example, a utility company wants to tear up the street and repair its mains. We do not know who has the responsibility over this work. Another aspect is parking. How do you instruct people to park? Parallel or diagonal? And who decides which rule will be followed?

Throughout this process we made it a rule to always work closely with our legislative committee. We kept them informed and prepared our reports in a form that would be easily and quickly understood. We used loose-leaf binders, and on each page we showed each section of the law with comments on the suggested changes shown in another column beside it. As we discussed these proposed changes with the committee, we heard their views and were able to go back and do more work where it was needed. Eventually, we developed a more formal draft showing in parallel columns the old law, the new proposed changes as they would read, and the explanations of what was done.

As each of these steps was taken the legislative committee met and discussed it. We felt that if we could get this committee sold on the revision, we would have a solid foundation of support when the final product was sent to the legislature for enactment. We think that this close liaison with the legislature's own committee is essential.

As we worked with the committee we formulated the general ideas for

a new eminent domain law to be incorporated into this revision. The new law that we proposed patterns after the Federal condemnation procedure. It also is patterned after the law of the majority of States as shown in the Highway Research Board's studies. One thing that we wanted to do was to eliminate the necessity of having a hearing, and to be able to stop large interest amounts accruing by paying into court our estimated damages, even though it goes up to the supreme court before it becomes final. Also, we are a large State and it often takes three days to go out and hold a hearing. So we need a quick-taking provision in our law.

We are hopeful the 1963 Legislature will accept our recodification. It represents much time, thinking, and effort on the part of many levels of State government and members of the Automotive Safety Foundation. As highway attorneys, it gives us better tools to work with and ultimately can save the taxpayer much money.

Highway Law Revision Studies: The Researcher's View

MASON MAHIN, *Assistant Director, Laws Division, Automotive Safety Foundation*

• The purpose of the law revision study that Mr. Williams has just described is to give Wyoming the best code of laws possible for the development of a modern network of highways.

To reiterate a point that he brought out, no matter how fine a code is recommended, it is not worth the paper it is written on unless it is enacted into law. Unless you start out under the general sanction of the legislature and the direct auspices of one of its committees you are doomed to failure. That has been our experience. That is true because most legislatures meet for 60 or 90 days and they are not able in their busy session to go through a complicated recommended code, understand what it is about, and pass on it. A legislature, as you know, must rely on the judgment of a legislative committee that has had an opportunity to work closely with the study process and becomes familiar with the proposals made and purposes behind them.

Another point that I think should be brought out is that a highway code is in effect a set of tools that permit the engineer in the highway department and the county authorities, and others, to go out and construct and thereafter maintain and operate a highway system in the most efficient and economical manner. Now I know that in law school we used to have a lot of feuds with the engineers, but when it comes to building highways the engineer is the one that has to do the job, and the lawyer has to work with him and understand his problems.

In Wyoming, an engineering study had been made of every mile of highway for the purpose of developing an integrated system of highways. All roads were tested as to traffic service, economic impact, geographic service, integration and circulation, topography, service to national defense, road classification, etc. And as a result of this study by the engineers, it was determined that to develop an integrated system of highways that was best for the State of Wyoming, four systems should be established. One was the State Primary System, limited to 3,700 miles. This should be built to certain standards, and it included the Interstate System mileage in Wyoming. It connected the larger cities and major regional networks. Next was the State Secondary System, built to lesser standards, but also meeting certain criteria. A County System was also laid out, and was to be composed of 13,000 miles. The plan also called for each city to develop an arterial street system. These four systems would form an integrated system for the State, and other roads that were built would serve as access roads to these systems. It was thought that the State's gasoline taxes should be geared to finance these systems. State aid to the counties would go primarily for the 13,000 miles of county roads, and State aid to the cities would be spent on the arterial streets.

So far, the study was almost entirely an engineer's study. But for it to be of any use, the law had to be revised. That is where the proposed code described by Mr. Williams came into the picture.

Another point that deserves to be emphasized is that of intergovernmental relations. The boards of county commissioners or boards of supervisors are generally strong political organizations. Most of them are rather conservative, so it becomes a selling job to bring their support behind the highway law revision. In Wyoming we had excellent advisory committees from both the cities and counties. They were men who were loyal to their own localities and road systems, but they were also willing to think about the interest of the State as a whole. So we were able to bring them along in the study conferences, and they are now in a position to help with the legislation proposed.

Also, changes should not be made in statutes unless there are good reasons for so doing. Moreover, if proposed legislation is to have a good chance for enactment, no matter how necessary or desirable it may be from the standpoint of its proponents, every effort should be made to apprise fully the legislative body of the revisions recommended and the objectives to be achieved.

It is therefore important to make it easy for the recommendations to be readily analyzed and understood. Our study procedure takes this into account. We use columns in which the various sections can be read and compared with each other. In the middle column is the proposed code; in the left-hand column is the old law as it now exists; and in the right-hand column is the explanation of any changes that have been made.

As to suggested techniques for law revision studies, the Automotive Safety Foundation has prepared a series of figures that describes the various steps that we have found helpful.

The first step (Fig. 1) in a law study is to review the law and rearrange it where necessary. The highway law is classified and placed in functional categories, using where applicable those developed in a national study by the Highway Research Board. That simply means that you collect all the laws relating to highways, wherever they may be located in your code, and arrange them so that the various functions of the highway program can be viewed together. Where it is possible to work with it, the existing arrangement of laws within the code should be preserved.

What are the categories or functions that ought to be covered by law in order to provide the necessary powers for highway programs? Figure 2 shows the list that Mr. Williams read in connection with the study undertaken in Wyoming. Of course, some of these categories involve more work than others. In the present Wyoming law there is only one definition; in the draft that has been prepared there will be between 90 and 100 definitions. The highway system classification is based entirely on the engineering survey's recommendations. In highway administration we found that only one county in the whole State had its own county engineer. If the counties are going to administer their programs effec-

The highway law is classified and placed into functional categories using, where applicable, those developed in a national study by the Highway Research Board

Figure 1.

FUNCTIONAL CATEGORIES
Which Might Apply

Legislative Intent	Location & Design	Bridges
Definitions	Contracts	Drainage
Highway Administration	Construction & Maintenance	Public Utilities
System Classification	Equipment & Materials	Financing
Planning & Research	Programming	Federal Aid
Land Acquisition	Intergovernmental Relationships	Penalties
Control of Access	Traffic Engineering	Miscellaneous

Figure 2.

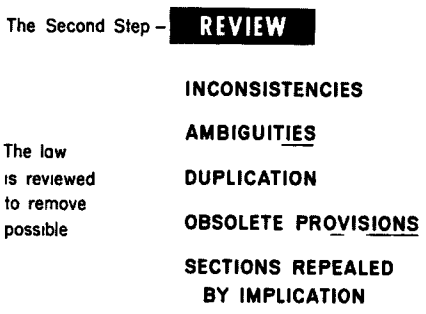


Figure 3.

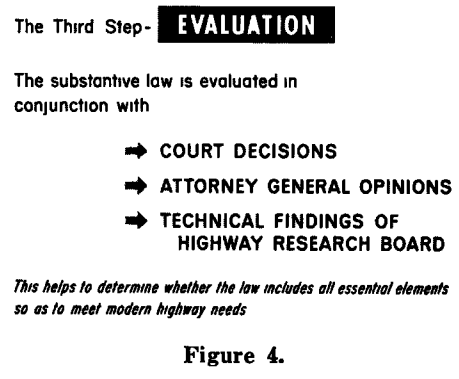


Figure 4.

tively, they will have to have engineering assistance, and the study recommends that each county employ its own engineer. In some counties, and also in the case of some cities, it may make better sense for several units of government to join together and employ one engineer to serve a consolidated area. But these are optional provisions that will make it possible at least for the units at these levels of government to have specialized technical assistance which they have lacked so far. In the traffic engineering part, the proposed code used a great deal from the new manual because conformance with the manual is required on Federal-aid highways.

The study did not go into matters of financing because policy decisions involved in raising and allocating highway funds should be handled, we think, by specially constituted groups working with the legislative committee responsible for financial matters. In Wyoming the counties and cities are getting together through special committees and working out their position with the State legislature. But aside from finance, practically all of the highway code is what I have called "engineering law."

Arranging the law according to functional categories has the advantage of providing an outline for the major subdivisions of a revised code (Fig. 3). This outline also provides a framework for reviewing the material that has found its way into the existing body of highway law that may be repetitious, obsolete, or repealed by implication; ambiguities and inconsistencies can also be identified and earmarked for removal by the legislature. Wyoming did not have a great deal of this type of law, but in other States where we have helped conduct highway law studies we have found that a great deal of good came from such a housecleaning. In Michigan's study a few years ago it was found that there were 103 different statutes, containing over 1,000 sections of law, which made up the existing body of highway law. When we got through with this second step in the study, practically one-third of the law had been removed because of repetitions, repeals by implication, etc. You can imagine how difficult it was prior to this time for the Attorney General to render an opinion on a matter of highway law. Thus, the results of this step can help materially by showing where inconsistencies, ambiguities, duplications, obsolete and repealed laws should be eliminated.

The third step (Fig. 4) in this technique that has been successfully used in highway law revision studies involves evaluation of the substantive provisions of the law after it has been arranged for study. This evaluation should be done against a background of court decisions, Attorney General's opinions, and the technical findings of comparative studies such as those published by the Highway Research Board. We realize that many times you have a court decision that you do not like. It can often be corrected by legislation, but this can

IN THE EVALUATION OF THE LAW...

Determination and recommendations for improvement must be made with the cooperation and advice of the officials of all highway agencies – state, county, city

Figure 5.

be done only if you carefully review the body of interpretative law that has grown up through the opinions of the courts and the Attorney General. The technical findings of the Highway Research Board can also be of value in this process. In Wyoming we used a number of special reports of the Board, and these gave us an over-all picture of what the other States had and what they did in practice.

One of the most important aspects of the whole study is shown when we come to the determination and recommendation of improvements (Fig. 5). This must be done with the cooperation and advice of the officials of all the highway agencies—State, county and city—that are affected.

The construction engineer knows more about the problems involving construction than probably anyone else, because he lives with it daily. He may not be able to tell you technically whether a policy should be made by statute or administrative determination, but he certainly knows when an improvement is needed. And you cannot give him the best possible set of legal tools unless you find out from him what his problems are and what he suggests as the solution. This also applies to sitting down with the county and city administrative officials, too. The Wyoming law which placed responsibility in the State highway department for constructing and maintaining city streets on the State highway system opened up a whole world of problems of coordinating State and local governmental programs. The question of drainage was also one of the same type.

WHAT ARE THE ADVANTAGES OF SUCH A STUDY...

It will lead to the development of a modern highway code that will benefit

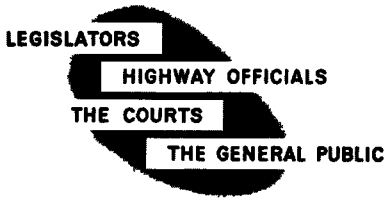


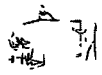
Figure 6.

All of this adds up to a study which can be of tremendous value to the legislature when it approaches the task of revising its body of highway laws and making it more logical and workable (Fig. 6). For example, in Wyoming, there was one section of the old law that covered about five or six different subjects. It created the State highway department, the highway commission, it provided for the duties of the various officials, it dealt with the Attorney General's duties, etc. In the proposed code these several provisions were broken into five different sections, each one dealing with related matters. The substance

HOW..

By providing Legislators with an orderly guide for future legislation

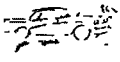
By giving Highway Officials clear-cut authority and responsibility for efficient management



By diminishing the Court's problems in interpreting the law

Figure 7.

AND FINALLY



By giving the Public increased value for every highway tax dollar through the efficiencies and economies resulting from an up-to-date body of highway law

Figure 8.

of these sections was not changed, but it is now better arranged for the legislature and officials to work with.

These benefits are summarized in Figures 7 and 8. The legislature, the highway officials, and the courts all benefit by a clearer, more orderly, and more logical statement of the law. The public is, of course, the ultimate beneficiary of this work, and rightfully so because it is the public that pays, through its tax dollars, for more efficient and economical highway transportation facilities.

DISCUSSION

Mahin.—What is the present status of the Highway Laws studies of the Highway Research Board?

Netherton.—At present there are 15 Special Reports in this series. The most recent one was published in March and dealt with State laws dealing with traffic engineering. A report on highway programming laws will be published in August 1962.

For anyone not familiar with the process of preparing these reports I would like to say that after the research is done the drafts are circulated to specially designated officials in each State, the District of Columbia and Puerto Rico for their review. These people are called the Legal Liaison Representatives of the States for these Highway Research Board studies, and many of you in this room are members of this group. This review provides us with an additional check and source of help to make the studies comprehensive and accurate reflections of the practices in each State. This is a valuable and much appreciated source of assistance.

Mahin.—I think after the discussion yesterday the subject of sovereign immunity might well be taken up in a future report. These documents are of immediate application and assistance to the States in the revision of their laws, and as new problems arise they may suggest new fields for research.

Netherton.—I think that is exactly what the Board's long-range objective is in expanding its staff to provide attention to legal research. We know that the HRB studies have been used in revision studies and also in the preparation of briefs, so these ideas on emerging problems are of very real interest. I wonder if those here from Tennessee and West Virginia would tell how they are using the law schools at their State universities to assist in highway law studies. I think this is an important development because State university law schools are a valuable source of research skill and manpower for such studies as this. Maybe the law schools ought to be brought into studies of this and other types to a greater degree.

A. G. Halkias.—West Virginia got authority to use State highway funds for this project. Then the State Roads Commission wrote up a memorandum to the various department heads asking them to tell us the problems they thought had developed in their administration of the law. We then set up specific areas that we wanted to investigate. Our study eventually came to cover more than just the legal aspects. It also got into the economic aspects of the highway program. Then we made a contract with West Virginia University to work with us in doing the necessary research. The research is going to be carried on in two projects: one dealing with the highway laws, and of the same type Wyoming is doing, and the other project will take up the economic matters. This contract was recently signed, so we have not yet begun to have results.

Netherton.—I know that the Bureau of Public Roads has taken an interest in these studies. Would you like to add anything on this point, Mr. Becker?

G. D. Becker.—The Bureau of Public

Roads is taking a strong interest in studies of this kind and would like to encourage them.

Netherton.—It has been mentioned that these studies can be financed with so-called Highway Planning Survey funds. To what extent does the Bureau have a responsibility for the project where these funds are used? How do they fit into the organization of the study?

Becker.—The Bureau will allocate Highway Planning Survey funds as needed for a project of this kind, and will assist with advice where it is requested, just as Automotive Safety Foundation functioned in Wyoming. We will work on the spot with the State study groups if they desire it, and request it through Bureau channels.

Williams.—Title 23, section 307 of the U.S. Code, dealing with highways contains the authority for the use of these funds for research.

J. A. Shaneman.—We codified the highway laws of Illinois in 1959. We did it with Highway Planning Survey funds and the assistance of Automotive Safety Foundation advice. We decided before we started codification that it would have to be done under the auspices of the legislature. We did not feel that it was possible for the highway department or any outside organization to draft a bill and take it into the legislature to be enacted. Prior approval of one of the legislature's own committees was absolutely essential. So we got the 1957 General Assembly to set up a codification commission, and we asked for a 15-member commission consisting of 5 senators, 5 representatives, and 5 members-at-large. We were able to give some advice on who would be appointed so that we got a blue ribbon commission. I do not mean that we advised on individual members, but we were able to have experts appointed in certain areas where we needed competent reviewers. We did something else, too. The man who sponsored the bill was quite apprehensive about the cost of this study, so we deliberately recommended that he appropriate as little as possible. We thought that if there was not so much money invested, the legislature would not be inclined to be so critical of us. We helped out this small appropriation with Highway Planning Survey funds. The commission hired an attorney who was not a highway lawyer, but who had a good deal of experience working on legislative matters for other commissions. He was hired full-time. The commission also had volunteer services from the Legislative Reference Service, and the highway department. We set up a working committee consisting of the chief bill drafter of the Legislative Reference Service who acted as the executive secretary; the highway department furnished a man, and the public agencies represented on the commission were asked to furnish men. These included the municipal league, the county and the township officers, etc. This committee did the hard work of going through the code section by section.

We ended up with a bill about 350 to 400 pages long. It was introduced in the State Senate, passed promptly with only a few minor amendments, and this story was repeated in the Assembly. Thorough preparation had paid off. Since 1959 there have been only a very few minor amendments. We are convinced that the time and effort spent in setting up the study commission was well spent and we would not have gotten our law enacted without it.

Mahin.—With respect to coordinating with the Bureau where Highway Planning Survey funds are used. We have made reports of every step taken to the district offices of the Bureau in Wyoming, and this has kept them informed of all that has taken place.

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

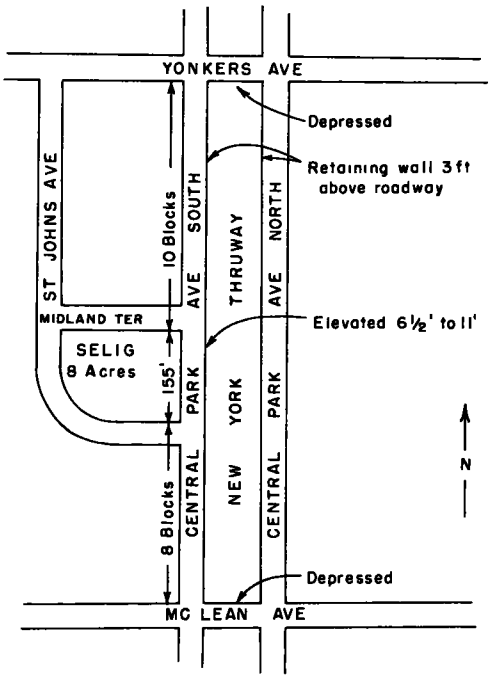


Figure 1. Change of grade, *Selig v. State of New York.*

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

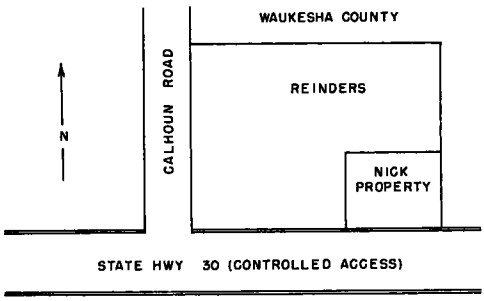


Figure 2. Conversion of existing road to controlled access, *Nick v. State Highway Commission* (Wis.).

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

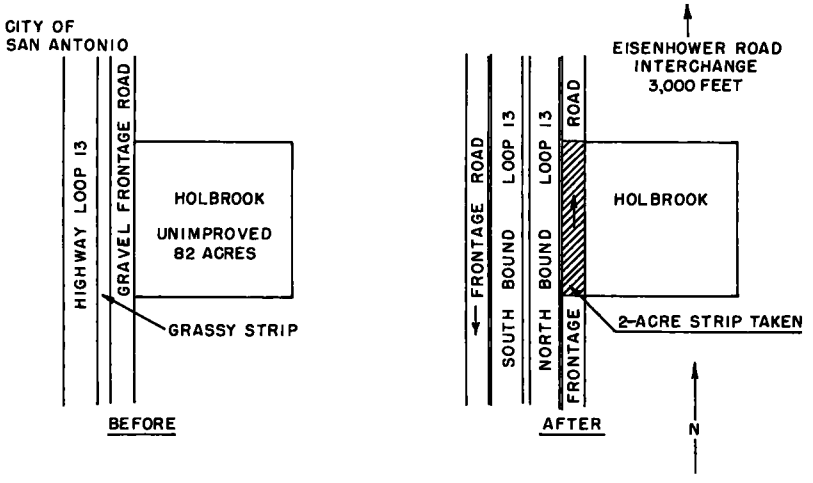


Figure 3. Conversion of existing facilities to controlled access, *Holbrook v. State* (Texas)

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

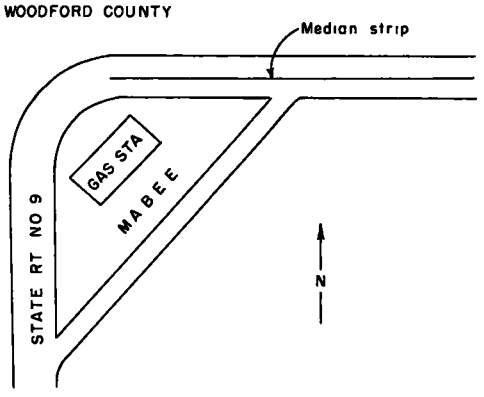


Figure 4. Traffic control, *Department of Public Works and Buildings v. Maybee* (Ill.).

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

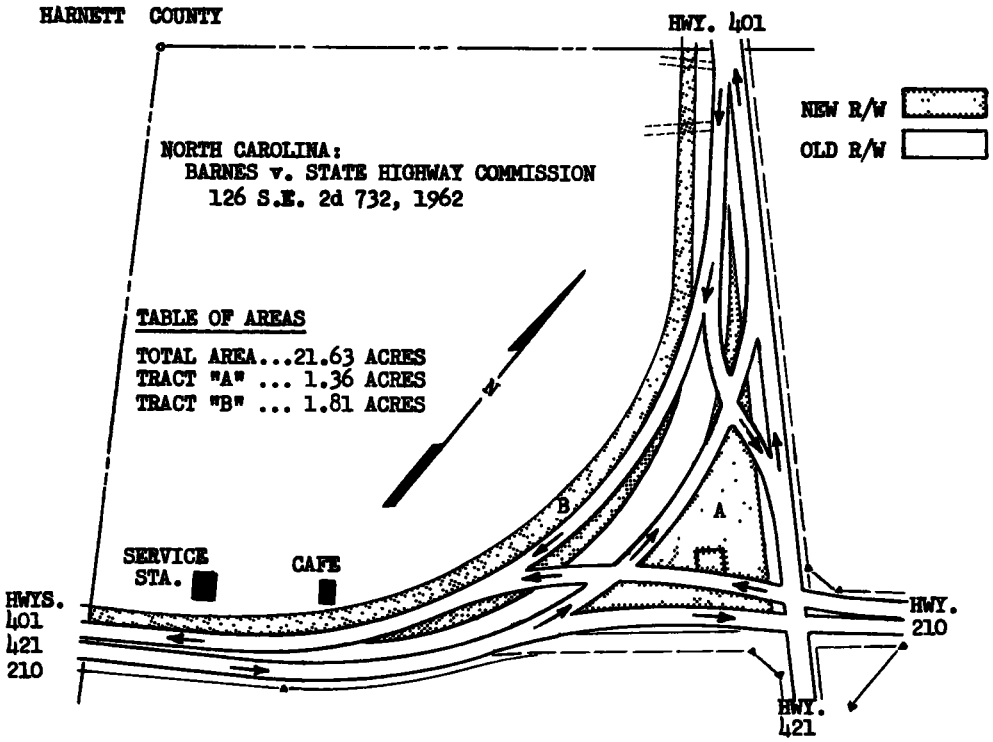


Figure 5. Traffic control, *State Highway Commission v. Barnes* (N.C.).

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

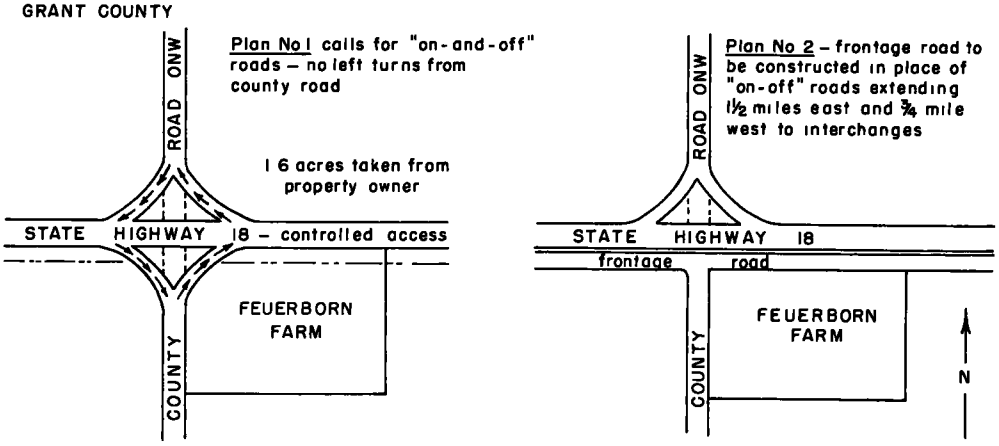


Figure 6. Contract case, *Feuerborn v. State of Washington.*

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.

Comments on Rights of Abutters Concerning Noise, Inconvenience, Dust, Light, Air, and View

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• The question of abutters' rights with respect to light, air, access, view, etc., has been of extreme interest to me ever since I became involved in the subject of eminent domain. In connection therewith, there has always been in my mind the question of just how far these rights extend; that is, what constitutes an abutter for the purpose of determining his rights to such light, air, view, access, etc.?

Basically, the cases involving compensability for the taking or damaging of an abutter's right to light, air, and view, also involve the impairment of ingress and egress—now called access—and arose primarily in connection with the construction of elevated structures within metropolitan areas and the construction of street railroads within and upon municipal streets.[1] The latter are referred to generally as the additional servitude cases. As a matter of fact, in reviewing these old cases, it is difficult to find a pure light and air case which does not have the question of impairment of access involved.[2] The subject of the impairment of access (when compensable) has likewise been well annotated and is outside the scope of this paper.[3]

An exception to this general observation that light and air claims usually involve access as well is found in the so-called "pure air" cases (and I do not make reference to the opinions of the appellate jurists!), where sewer improvment districts are often held liable for polution of the air of adjacent properties.[4] In the Fiscus case[5] the Court held that there need be no physical invasion or spoilation of one's land before he can maintain an action for damages for taking private property for public use without just compensation. The Court likened pollution of air to pollution of water and got sufficiently carried away to quote Lewis on eminent domain:

> The impregnation of the atmosphere with noxious mixtures that pass over my land is an invasion of a natural right, a right incident to the land itself, and essential to its beneficial enjoyment. My right to pure air is the same as my right to pure water. It is an incident to the land, and necessary to and a part of it, and it is as sacred as my right to the land itself.[6]

As I read this I could not help but think what a field day an enterprising barrister could have with this precedent in Los Angeles County—if he could only determine whom to sue!

[1] See 22 A.L.R. 145; 40 A.L.R. 1321; 45 A.L R. 534.

[2] In City of Baltimore v. Himmelfarb, 92 Atl. 595, recovery was denied even though the dust and gases incident to an adjacent public project actually depreciated value of subject property, because owners access was not disturbed. See also Haversak v. Allegheny County, 90 P.L.J. 40, where owner did not abut on the offending public improvement and thus recovery was denied.

[3] 43 A.L.R.2d 1072.

[4] Donaldson v. City of Bismarck, 3 N.W.2d 808; City of Wynn v. Fiscus, 193 S.W. 521; Contra—see City of Temple v. Mitchell, 180 S.W.2d 959; Taylor v. City of Baltimore, 99 Atl. 900; Kellogg v. Bd. of County Commissioners, 153 N.E.2d 521. For an interesting judicial disclosure on what happens when you try to stop a sewer district by imposing restrictive covenants against such use on neighboring property, see Smith v. Clifton Sanitation District, 300 P.2d 548.

[5] 193 S.W. 521.

[6] LEWIS, EMINENT DOMAIN. 3rd ed., vol. 1, §236.

The cases involving compensation for noise and dust also often involved smoke, vibration, and fire danger and arose primarily in conjunction with the coming and advance of the railroad.[7] Ironically, many of these early railroad cases, involving cinders, fire, and smoke, may now form the basis for recovery against our newest means of transportation—the jet aircraft.[8]

The word "inconvenience" should really not be a part of any serious discussion in this field because personal inconvenience, discomfort, or annoyance, unrelated to any property or right appurtenant thereto, and, hence, incapable of measurement as far as the value of the specific property is concerned, is just not compensable,[9] but it does insidiously creep in regardless of our efforts. When we have inconvenience or annoyance plus an invasion of or interference with a right or easement appurtenant to property (such as access, light, air or view), then the result can be different, but the recovery, if any, is predicated on the diminution in the market value of the subject property—not as recompense for the personal inconvenience involved, as in a personal injury case for pain and suffering. However, while numerous cases categorically state that personal annoyances, inconvenience, or discomfort are not compensable, a surprising number of these cases vacillate. For example, in a recent Colorado case the Court said:

> No personal inconvenience or annoyance, no interference with his trade or business, no decrease in the rental of his premises occasioned by the construction or operating of the railroad, and no temporary interruption or damage thereby constitutes the test. None of these things can enter into the question, except as they may appropriately aid in determining the actual depreciation in market value of the realty and improvements.[10]

Apparently, if you can prove that the personal inconvenience or annoyance was, in fact, not personal to the owner but would, in fact, be an attitude existing in the open market, then, I presume, it would be admissible.

With the classification of these items in mind, so that the trees can be distinguished from the forests, a further distinction must be noted—that these various types of injuries for which compensation may be claimed arise only in partial taking cases, or in cases where there is no physical taking at all. In other words, where the taking is total, these issues cannot arise. Additionally, it should be recognized that these items are often lumped together by the courts and erroneously referred to interchangeably as "speculative," "consequential," "potential," or "incidental" damages. These terms are not synonymous, as a reading of the cases clearly demonstrates, and judicial lack of precision accounts for much of the confusion existing in the minds of eminent domain attorneys and valuation experts.[11] For example, by statute[12] consequential damages are allowed in Colorado, although we lack

[7] See footnote 1.

[8] Most of these so-called items are actually potential or probable damages that may occur in the future. This, therefore, involves the subjective attitude or fear of an owner. For an interesting paper on this subject, well annotated, see "Fears of an Owner, Compensable?", by G. E. Rohde, given to WASHO in Portland in June 1960. See also very recent annotation on compensability of risk of fire as being an item to consider: 63 A.L.R.2d 313.

[9] See Eachus v. Los Angeles, 37 Pac. 750.

[10] Dandrea v. Bd. of County Commissioners, 356 P.2d 893. In an earlier Colorado case, LaVelte v. Town of Julesberg, 49 Colo. 291, 122 Pac. 774, the Court denied recovery for damages for noise, smoke, vapors and increased dangers from fire and said, "This inconvenience and injury would be common to all other property owners adjoining or adjacent to the power plant. The owner of property condemned is not entitled to recover damages to the residue for annoyance and inconvenience suffered by the general public. The damage to such residue is limited to some right or interest therein enjoyed by the owner, and not shared or enjoyed by the public generally." (citing other Colorado cases.)

[11] See ORGEL, VALUATION UNDER EMINENT DOMAIN (2nd Ed.), vol. 1, pp. 58-65.

[12] 50-1-6(2), C.R.S. 1963.

clarifying precedent. In essence, this statute states that the trier of fact

> . . . shall hear the proofs and allegations of the parties, and after viewing the premises, without fear, favor or partiality, shall ascertain and certify the compensation proper . . . as well as all damages accruing to the owners . . . in consequence of the condemnation of the same.

In the first situation, namely a partial taking, the results as to compensability are going to depend largely on the measure of damages applicable to each particular State. In other words, if it is a "taking plus damages to remainder" State, it is a lot easier to slip these items through, than in a straight "before and after" State.

In the other situation (namely, where there is no actual physical taking), the results as to compensability are going to depend largely on the type of constitutional requirement in effect. If you have a "taking and damage" clause in your constitution, as contrasted with a "taking only" clause, it will be a lot easier to sustain an award for any of these items, although it would appear to be only a matter of semantics—the same net result can be reached in either situation.

Finally, you should recognize that all these items could conceivably be a part of an allowance for damages to remaining property or to a property, no portion of which is taken, by mere proximity of a new highway to existing improvements in the case of a widening project, or as severance damages in the case of new highway alignment. So if the compensability of noise should be judicially proscribed, the clever respondent can accomplish the same result by merely eliminating reference to the word "noise" and take the position that all he seeks is damage to remaining property due to proximity or severance. (For example, did you ever try to get a respondent's valuation witness to state what portion of his damage is attributable to circuity of travel or some other noncompensable item?). An excellent example of this, which even the appellate court noted, is *State v. Calkins*,[13] a 1957 case arising in Washington where the Court went along with the now-recognized principle that compensation need not be paid for the "taking" of access to a newly located freeway, but recognized that the market value of the property remaining might be affected by the nature and extent of the taking for the limited-access highway and that certain factors or circumstances common to the total access denial cases might be considered in determining the severance damages. Among the listed circumstances, incidentally, were the added inconvenience, if any, in managing the property and in going from one tract to the other. As the Court prefaced this last remark by reference to market value of the property remaining, I assume it was not approving compensation for personal inconveniences! The case has further value in that it discusses and approves some good instructions and statutory provisions in this field. However, as a trial lawyer, I have found it most useful in cross-examination either to preclude certain expert testimony or to get it stricken where the expert has obviously proceeded on the loss of access theory—even though he cannot or will not state a specific amount allowed to each item of damage.

There are several recent cases[14] in this general field which deserve special attention because of the possible trends they may indicate. Some involve compensability for fear or noise in connection with the operation of an airport and aircraft. The cases are interesting and, since the United States Supreme Court got into the act, perhaps we may look forward to additional authorities on a local level which may follow the thinking of the Griggs case. In the

[13] 314 P.2d 449.

[14] Ackerman v. Port of Seattle, 348 P.2d 664; Cheskov v. Port of Seattle, 348 P.2d 673; Mathewson v. New York State Thruway Authority, 196 N.Y.S.2d 215; People v. Symons, 357 P.2d 451; Griggs v. County of Allegheny, 82 S. Ct. 531 (U.S. Sup. Ct.).

Ackerman case,[15] for example, they recognized that property is a thing, not merely in its ownership and possession, but in the unrestricted right of use, enjoyment, and disposal and that anything which destroys any of these elements of property to that extent destroys the property itself. Accordingly, they held that continuing and frequent low flights over appellants' land—even though vacant —amounted to the taking of an air easement for the purpose of flying airplanes over the land for which the owner was entitled to be compensated on an over-all before-and-after market value theory.

It would appear to me that those who operate airports may exercise a little more discretion in obtaining the necessary air easements of the type utilized in the Civil Aeronautics Board Regulations for safe landing and safe take-off patterns. In addition, we may look for a trend raising the minimum clearances for all types of aircraft.

What about the predicament of the property owner who purchased property with full knowledge that certain propeller-driven aircraft would be operating in the vicinity of his home but never dreamed that within a very short time the runways would be extended to accommodate the larger, noisier, jet aircraft? In the recent Griggs case,[16] the United States Supreme Court ruled that the County of Allegheny, which was the owner and operator of the greater Pittsburgh airport, was responsible for a certain taking and was the cause of the damage sustained by adjacent landowners. One quotation from this decision merits consideration here because it sets forth the various elements to be considered in arriving at the measure of damages for the type of taking involved:

> Regular and almost continuous daily flights, often several minutes apart, have been made by a number of airlines directly over and very, very close to plaintiff's residence. During these flights it was often impossible for people in the house to converse or to talk on the telephone. The plaintiff and the members of his household (depending on the flight which in turn sometimes depended on the wind) were frequently unable to sleep even with ear plugs and sleeping pills; they would frequently be awakened by the flight and the noise of the planes; the windows of their home would frequently rattle and at times plaster fell down from the walls and ceilings; their health was affected and impaired, and they sometimes were compelled to sleep elsewhere. Moreover, their house was so close to the runways or path of glide that as the spokesman for the members of the Airlines Pilot Association admitted "If we had engine failure we would have no course but to plow into your house."

The same analogy can be used, I think, with respect to highways. In *Mathewson v. N.Y. State Thruway Authority*,[17] residents and owners of property in a rather exclusive Westchester County village brought an equitable action to enjoin bus and truck traffic on the New England Thruway from 8:00 PM to 8:00 AM on the grounds that such use of the highway with such noise, character, intensity, and duration, and with such illumination in the nighttime, constituted a nuisance. The trial court recognized that while ". . . the noise, fumes and lights from the traffic of trucks and buses can be very annoying for persons residing along a highway . . ." these annoyances are not the ". . . basis of right to legal relief where such traffic is merely incidental to the ordinary and reasonable use of a local or state highway." However, the Court continued as follows:

> But, it is clear also that, while one may be expected as a part of his contribution to our way of life to assume incidents or ordinary highway traffic in the vicinity of his home, he may have a just complaint against the laying down of a super-highway near his door and the use of the same with the present-day type of huge buses and trucks operated at high speed in the interests of commerce. Such a highway, and such use thereof, if seriously affecting his health and comfort, and the value of his property, may constitute an actionable *nuisance*.

[15] Ackerman v. Port of Seattle, 348 P.2d 664; Cheskov v. Port of Seattle, 348 P.2d 673.

[16] 348 P.2d 664.

[17] 196 N.Y.S.2d 215.

After discussing at random, with equally wide strokes, the impracticality of injunctive relief, the Court thus gives it the coup-de-grace as follows:

> And if it appears that it is not practical for the Thruway Authority to so restrict and regulate truck and bus traffic thereon so as to protect plaintiffs in their rights, the judgment hereon may properly take the form of providing for a fixing of damages to plaintiffs properties and for payment of same.

The Appellate Division of the Supreme Court promptly reversed[18] on the ground that this Authority was immune from suit, but, even if it were not, the complaint failed to state a cause of action as there was no showing that the plaintiffs were annoyed any more than other property owners in the area similarly situated or that the noises or annoyances subject the plaintiffs to a greater share of the common burden of incidental damage than upon all those living in the vicinity. The New York Court of Appeals promptly affirmed the Appellate Division ruling.[19] If the elements of damage considered by the United States Supreme Court in the Griggs case are present as a result of construction of a new freeway or Interstate route next to a person's property, would not the same rationale apply?

One of the recent, leading, cases, wherein depreciation in value due to loss of view, noise, fumes, dust, etc., of a property abutting a freeway was denied, is *People ex rel., Dept. of Public Works v. Symons*,[20] a 1961 California Supreme Court decision. That case involved the partial taking of residential property in the City of Los Angeles for the development of streets adjacent to a State freeway. However, the condemnor was the State Department of Public Works and it was found that respondent's property was being taken for State highway purposes. The property taken consisted of a small piece of ground containing 440 sq ft on the south side of the city street in question, which was to be used for a turn-around or cul-de-sac of the city street in front of respondent's property. The State freeway right-of-way line apparently was respondent's east property line and the street was closed at its intersection with the freeway—apparently running north and south. In addition to compensation for the 440 sq ft actually taken, the respondent sought severance damage measured by the decreased value of his remaining property due to his immediate proximity to the freeway to the east. No portion of his property was acquired for the freeway proper, unless the cul-de-sac area on the city street in front of this property could be so construed. Among the factors considered by the respondent's valuation witness in arriving at his opinion that the residue was damaged, was changed from quiet residential area, loss of privacy, loss of view to the east, noise, fumes, and dust from the freeway, loss of access over the area now occupied by the freeway, and this misorientation of the house on its lot after the freeway construction. The trial court refused to allow any evidence relating to the decreased value of the residue, because the valuation witnesses could not separate the damage caused by the individual elements and, therefore, as some or all factors considered were noncompensable, the offer was irrelevant and immaterial. The Supreme Court affirmed the trial court, not on the grounds that it was correct in refusing to admit testimony relating to these items of damages,[21] but on the grounds that there had been no severance, as judicially construed in California, entitling the respondent to the damages sought. In other words, instead of passing on the issue of compensability which was readily available to it, the court avoided same and reached down into

[18] 204 N.Y.S.2d 904.
[19] 215 N.Y.S.2d 86; 174 N.E.2d 754.
[20] 357 P.2d 451.

[21] As a matter of fact, the rule in California, as established by People v. O'Connor, 87 P.2d 702, recognizing that where these damages are merely cited by the valuation witness as the reason for his opinion, and no claim is made for special damages for each item, they are admissible.

the procedural Code of Court Procedure (§1248) and, by a very strict interpretation, held "The construction of the improvement in the manner proposed by the plaintiff did not include the freeway—only the cul-de-sac and, hence, no severance as far as any damages resulting from the freeway."

Many of our problems concerning damages arise only when a public agency is involved. The public is the victim because, for the most part, the only times these occasions arise are when an agency is acquiring a portion or a piece of property for public purposes. As an illustration, assume that in an industrial zone one owner constructs a boiler factory next to a field lot and poultry farm. They are within their rights as far as the construction and operation of their respective industries is concerned and, probably, neither has a right against the other for noise, loss of production, noxious odors and gases, etc.; but if a highway ramp and overpass were to be constructed in the same area, then under the theory of constitutional rights these elements are considered.

As far as trends are concerned, abutters, be they physical abutters or abutters in the sense that their property is affected, are becoming more cognizant of their rights under the various constitutions and statutes.[22] Frankly, I feel that any item of damage resulting to a property, a portion of which is taken for public purpose, which actually depreciates the market value thereof, is and should be compensable. The respondent whose property is only partially taken and is left with a substantial, valuable remainder after the taking, is indeed fortunate compared to the person whose property is either totally taken or not touched by the public improvement. He who is only partially taken gets full value for the land taken plus damages, which damages include items discussed herein, if properly presented. He who is totally taken, gets full value, but does not get to enjoy the fruits of enhancement which his more fortunate neighbors outside the area of taking will reap.[23] The individual who is not touched, such as the owner of property that is by-passed and perhaps actually ruined, to a great extent has, in the past, been left without much remedy.[24] I submit that our more enterprising brethren are beginning to take a closer look at the elements that appear to depreciate market value—we who represent condemning authorities must more clearly show the obvious benefits which accrue to land after establishment of new highway and improvement of old ones. The Colorado Department of Highways is currently assembling data similar to some of the studies made in California, and perhaps other States, which will be extremely helpful to the appraisers and negotiators as well as the trial lawyers. This type of data should assist us in offsetting to a degree some of the handicaps under which we operate.

[22] State of Utah v. Parker et al., 368 P.2d 585—no damages allowed—State immune from suit. Impairment of light and air—Rose v State of California, 123 P.2d 505 and Williams v. Los Angeles, 89 P. 330. Impairment of view—First National Bank of Montgomery v Tyson, 39 So. 560 and Barnes v. Commonwealth, 25 N.E. 737, 127 A.L.R. 104. Invasion of privacy—Shano v. 5th Avenue Bridge Co., 42 Atl. 128.

[23] See recent case of Williams v. City and County of Denver, 363 P.2d 171.

[24] See 118 A.L.R. 921, and references cited therein, for collection of cases prior to 1939. Recent cases involving diversion show a tendency to group diversion of traffic and circuity of travel together. See City of Los Angeles v. Geiger, 210 P.2d 717; Quinn v. Mississippi State Highway Comm., 11 So.2d 810; State v. Linzell, 126 N.E. 2d 53; State v. Carrow, 114 P.2d 896; Holloway v. Purcell, 217 P.2d 665; Walker v. State of Washington, 295 P.2d 328.

THE NATIONAL ACADEMY OF SCIENCES—NATIONAL RESEARCH COUNCIL is a private, nonprofit organization of scientists, dedicated to the furtherance of science and to its use for the general welfare. The ACADEMY itself was established in 1863 under a congressional charter signed by President Lincoln. Empowered to provide for all activities appropriate to academies of science, it was also required by its charter to act as an adviser to the federal government in scientific matters. This provision accounts for the close ties that have always existed between the ACADEMY and the government, although the ACADEMY is not a governmental agency.

The NATIONAL RESEARCH COUNCIL was established by the ACADEMY in 1916, at the request of President Wilson, to enable scientists generally to associate their efforts with those of the limited membership of the ACADEMY in service to the nation, to society, and to science at home and abroad. Members of the NATIONAL RESEARCH COUNCIL receive their appointments from the president of the ACADEMY. They include representatives nominated by the major scientific and technical societies, representatives of the federal government, and a number of members at large. In addition, several thousand scientists and engineers take part in the activities of the research council through membership on its various boards and committees.

Receiving funds from both public and private sources, by contribution, grant, or contract, the ACADEMY and its RESEARCH COUNCIL thus work to stimulate research and its applications, to survey the broad possibilities of science, to promote effective utilization of the scientific and technical resources of the country, to serve the government, and to further the general interests of science.

The HIGHWAY RESEARCH BOARD was organized November 11, 1920, as an agency of the Division of Engineering and Industrial Research, one of the eight functional divisions of the NATIONAL RESEARCH COUNCIL. The BOARD is a cooperative organization of the highway technologists of America operating under the auspices of the ACADEMY–COUNCIL and with the support of the several highway departments, the Bureau of Public Roads, and many other organizations interested in the development of highway transportation. The purposes of the BOARD are to encourage research and to provide a national clearinghouse and correlation service for research activities and information on highway administration and technology.

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