66

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In This Issue...

EFFECTS OF DISCLOSURE OF INFORMATION RELATING TO SUBSURFACE CONDITIONS: WUNDERLICH v. CALIFORNIA
by Kingsley Hoegstedt 1

TWO RECENT CASES ON DUTY OF DISCLOSURE OF INFORMATION TO CONTRACT BIDDERS
by Ross D. Netherton 7

LEGISLATIVE PROBLEMS IN WISCONSIN'S SCENIC EASEMENT PROGRAM
by Carl A. Neumann 14

Bibliographical Notes on Recent Legal Periodical Writings and Papers 25

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DEPARTMENT OF LEGAL STUDIES

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EFFECTS OF DISCLOSURE OF INFORMATION RELATING TO SUBSURFACE CONDITIONS: WUNDERLICH v. CALIFORNIA

Kingsley Hoegstedt
Assistant Chief Counsel
California Department of Public Works

In a recent California case, Wunderlich v. State of California (1), the California Supreme Court analyzed the subject of warranties in highway construction contracts. Although the distinction between warranty and misrepresentation in construction contracts is blurred and the theories are frequently used interchangeably (2), the theory of the plaintiff in the Wunderlich case was based solely on warranty.

The Wunderlich case has provided an analytical review of the effect of a public agency's disclosure of information relating to subsurface conditions, in this case, of a borrow site which was an optional source of material, and use of which by the contractor was not required under the contract.

The case arose out of a State highway construction contract performed in the desert region near Palm Springs. Prior to the bid opening, the Division of Highways conducted a "pre-bid showing" in the project area, and made available for inspection by prospective bidders various test reports taken by the State in various possible material sources in the vicinity of the project. One of these sources, known as the "Wilder Pit", was the optional material site designated in the contract.

Also available for inspection at the "pre-bid showing" was a Division of Highways interdepartmental memorandum, which summarized the test results obtained from the various borrow sites from which samples had been taken. This memorandum set forth, as to each of such potential borrow sites, the quality of the material (i.e., hardness, etc.) and the range of the gradation tests made as to the samples. In the case of the Wilder Pit, the gradation test range as to material passing through a No. 4 screen (recognized as the demarcation between sand and rock) was 55% to 88%. This indicated that of the samples taken from the Wilder Pit, the gradation tests ranged from 55% sand to 88% sand.

In designating the Wilder Pit as an optional source of material, the State used the following language in the contract:

> "Samples indicate that material of satisfactory quality for the production of imported base material, gravel blanket material, and mineral aggregate for plant-mixed surfacing and cement treated base, may be obtained left of approximate Station 615. ..."

But it stated that the contractor should satisfy himself as to the "quantity of acceptable material which could be produced" at any such source designated in the Special Provisions, and that the State would not assume any responsibility as to the quantity of acceptable material at such designated location. Also included was a disclaimer of responsibility as to the accuracy or interpretation of the test reports.

The contractor claimed he had submitted his bid on the basis that the gradation of the material in the Wilder Pit would be the midpoint between the high and low tests taken by the State. That is, he assumed that the material in the pit would average 71.5% sand and 28.5% rock, the midpoint between the 55% to 88% range for sand shown in the memorandum. Although the interdepartmental memorandum was not part of the contract, the contractor claimed that it explained the meaning of the above-quoted statement from the contract Special Provisions, and therefore could be relied upon by the contractor and form the basis of a warranty.

In the trial court, considerable testimony was introduced by both sides regarding the actions of other bidders on this project. Most significant were two bidders who testified on behalf of the State to the effect that they had taken samples themselves from the Wilder Pit, and had run both quality tests and gradation tests on these samples, which showed approximately the same grading as the tests made by the State. These bidders also testified that they had based their bids, which contemplated taking material from the Wilder Pit, upon the results of their own examination and tests, and not upon the tests made by the State, even though they had examined the State's tests. The State also introduced testimony of a third bidder who had based his bid upon taking all of the material from a pit other than the Wilder Pit; his decision was also based upon his own investigation.

The investigations by these bidders were contrasted with the actions of the plaintiffs, who took no samples whatever, who limited their inspection to a visual survey of the site, and who failed to examine any of the test reports taken by the State, using only the summary contained in the interdepartmental memorandum, even though they knew that the actual test reports were available for their inspection.

The plaintiff contractor asserted that after commencing operations in the Wilder Pit he encountered more than the 71.5% sand in the native material upon which he had based his bid, and it was therefore necessary to erect a second crushing and screening plant some distance away to supply much of the rock actually used for the project. The contractor claimed damages in excess of $900,000 for the costs incurred in setting up and operating the second plant, together with the extra costs in operating the Wilder Pit plant because of excessive waste material encountered in that pit.

The trial court held that the State's representations regarding the Wilder Pit constituted a warranty as to the quality of the material, including the gradation of the material, and that the contractor was justified in relying on the interdepartmental memorandum and basing his bid upon the conclusion that the material would be 71.5% sand and 28.5% rock.

The trial court's award in excess of $600,000 damages was affirmed by the District Court of Appeal. The California Supreme Court subsequently granted a hearing and reversed the judgment.

The Supreme Court took the position that the crucial question presented was whether the contractor was justified in relying on the representations made by the State. The court stated the general proposition that a contractor can rely on positive representations of matters presumably within the knowledge of the State despite a general disclaimer requiring the contractor to investigate the site, citing Hollerbach v. United States.(3)

But, the court declared, if the statements made by the State are honestly made and may be considered as suggestive only, the burden caused by unforeseen conditions will be placed upon the contractor, especially if the contract so stipulates.(4) The court held that in the instant case the Special Provisions simply stated what the samples taken from the site indicated, and that there was no representation as to the quantities that could be obtained from the source, nor that the materials in the source would be consistent throughout the source. The court also held that the contractor had access to the same information that the State did and therefore could draw the same conclusions as to what the test indicated as the State had.(5) Moreover, the court stated, citing Chris Nelsen & Son, Inc. v. City of Monroe,(6) that the assumption upon which Wunderlich claimed to have submitted a bid, i.e., that the material in the Wilder Pit would turn out to be the median point between the range 55% to 88%, was an assumption made solely by Wunderlich and not by the State, and the State should not be responsible for this erroneous assumption.

The court held that the Hollerbach rule does not stand for the proposition that the government may never effectively disclaim the intention to warrant conditions, and pointed out that in the Hollerbach case there was no specific disclaimer. The court contrasted this with the situation in the Wunderlich case where the very paragraphs which plaintiff claimed contained the alleged warranty contained direct references to the disclaimer paragraphs and to a specific disclaimer of the attributes of the source (i.e., quantity) allegedly warranted. The court further commented that an alleged warranty may be disclaimed when statements alleged to constitute the warranty are neither positive nor specific, citing Mac Arthur Bros. Co. v. United States.(7)

The court concluded that under the circumstances in this case, where there was no misrepresentation of factual matters within the State's knowledge or withholding of material information, and where both parties have equal access to the information relating to tests which resulted in the State's findings, the contractor may not claim in the face of a disclaimer that the presentation of the information or a reasonable summary thereof amounts to a warranty of the conditions that will actually be found.

Two other companion cases were heard by the Supreme Court in conjunction with the Wunderlich case. In the first of these, E. H. Morrill Co. v. State of California (8), the contract contained the following statement regarding subsurface conditions:

> "... The soil is composed of granite boulders, cobbles, pebbles, and granite sand. Boulders which may be encountered in the site grading and other excavation work on the site vary in size from one foot to four feet in diameter. The dispersion of boulders varies from approximately six feet to twelve feet in all directions, including the vertical."

The lower court had held that the general disclaimer clause as a matter of law prevented plaintiff from stating a cause of action, even though the subsurface conditions differed materially from those stated in the contract. The Supreme Court, in reversing the decision, held that because of the positive assertion made in the contract (9), the general disclaimer clause would not as a matter of law prevent the plaintiff from stating a cause of action. The court distinguishes the Morrill case from Wunderlich in that in the Wunderlich case the State merely presented the results of its own tests and investigation, but in the Morrill case the State flatly asserts that the bidders could expect to encounter only specified site conditions and that the statement in the Morrill case was a "'positive and material representation as to a condition presumably within the knowledge of the government,' ..."

In the second of the two companion cases, City of Salinas v. Souza & McCue Construction Co.(11), the contractor encountered quicksand conditions which greatly increased the cost of installing a sewer. The contractor alleged, and the trial court found, that the City Engineer of the City of Salinas had known before construction that the line along which the sewer was to be constructed contained these quicksand conditions, the area being a filled-in slough, and found further that in making tests of subsurface conditions the tests were placed so as to avoid the area in which the difficulty was encountered. The Supreme Court held that the exculpatory provisions in the contract would not protect a public agency from fraudulent concealment of known conditions, pointing out that even if the language of the contract had expressly directed bidders to examine subsoil conditions, which the contract did not, such general provisions cannot excuse a governmental agency for its intentional concealment of conditions.

Prior to the three cases discussed above and the case of A. Teichert & Son, Inc. v. State of California (12), California had very few recent appellate decisions which delineated a public agency's responsibility in making available to bidders on public projects the results of subsurface investigations made by the public agency. The decisions in these cases appear to align California with the majority of states regarding liability for misrepresentation and warranty as they apply to a public agency's disclosure of subsurface information.

Clearly, where there has been an intentional concealment of information, the disclaimers by the public agency will afford no protection.(13) Likewise in a situation where the public agency makes a flat statement in the contract as to subsurface conditions without a reasonable basis for making such a statement.(14) But where such a statement is a reasonable conclusion based upon investigations accurately and truthfully reported, the public agency is not liable should the material turn out to be different.(15) In the latter case, the disclaimer provisions are effective and the primary inquiry is not the representations that were made but, rather, whether in the face of the disclaimer the contractor is justified in relying on the representations. It would appear under the rule in the Wunderlich case that a public agency would be immune from liability even for innocent or negligent misrepresentation. The rationale of this conclusion appears to be that where information as to subsurface conditions made by a public agency is fairly and accurately taken and reported the bidder relies upon such information at his own peril where the contract contains disclaimer provisions which place upon the bidder the obligation to ascertain the nature of the subsurface conditions himself.

Footnotes

(1) Wunderlich v. State of California, 423 P. 2d 545 (Calif., 1967).

(2) Souza & McCue Constr. Co. v. Superior Court, 370 P. 2d 338 (Calif., 1962); see also 166 A.L.R. 938-939, 85 A.L.R. 2d 217.

(3) Hollerbach v. United States, 233 U.S. 165, 172 (1914).

(4) T. E. Kelly & Sons, Inc. v. Los Angeles, 45 P. 2d 223 (Cal.App. 1935); 76 A.L.R. (1932) 268, 273.

(5) Elkan v. Sebastian Bridge Dist., 291 F. 532, 538 (1923).

(6) Chris Nelsen & Son, Inc. v. City of Monroe, 60 N.W. 2d 182 (Mich., 1953).

(7) MacArthur Bros. Co. v. United States, 258 U.S. 6 (1922).

(8) E. H. Morrill Co. v. State of California, 423 P. 2d 551 (Calif., 1967).

(9) Hollerbach v. United States, supra, note 3.

(10) Hollerbach v. United States, supra, note 3.

(11) City of Salinas v. Souza & McCue Construction Co., 424 P. 2d 921 (Calif.,1967).

(12) A. Teichert & Son, Inc. v. State of California, 238 Cal. 2d 736 (1965) [48 Cal. Rptr. 225].

(13) Salinas v. Souza & McCue, supra, note 11.

(14) E. H. Morrill Co. v. State of California, supra, note 8.

(15) Wunderlich v. State of California, supra, note 1.

TWO RECENT CASES ON DUTY OF DISCLOSURE OF INFORMATION TO CONTRACT BIDDERS

Ross D. Netherton
Counsel for Legal Research
Highway Research Board

California's Wunderlich decision is one of several recent instances in which courts have considered the state's duty to disclose to construction contractors the essential information needed to accurately bid on public works projects. Further insight regarding current judicial views of this subject is furnished by recent decisions of the Supreme Courts of Wisconsin and New York.

BREACH OF WARRANTY AND THE "50 PERCENT CHANCE"

Wisconsin's case was brought on a theory that the state breached an implied warranty to the contractor in regard to information which the state had prior to bidding the contract.1/

The Giertsen Company specialized in building bridges; the Groves Company specialized in paving and topping for roads and bridges. Together they engaged in a joint venture to build twin bridges across the Wisconsin River as part of I90-94 in Columbia County, Wisconsin. In preparation for the project, a vice president of Giertsen visited and investigated the project site and concluded that pier construction could be carried out by a dike and well point system. This method involved building dikes in the river, inserting well points in the river bed and pumping the work area dry while bridge piers were constructed. (See Fig. 1) The dike and well point method was selected rather than the alternative of building steel cofferdams and pouring a concrete seal into the bottom of the dam before pumping out the water, despite the fact that it was more vulnerable to flooding than the latter.

At the point selected for construction, a sandy island of 779 ft. elevation, the river channel was constricted, and the recorded high water mark was at 778 ft. Knowing this, Giertsen constructed its dikes to 779 ft. However, as work got underway upstream reservoirs discharged unusually large amounts of water which, because of the velocity of the stream, overtopped the dikes and flooded the work area.

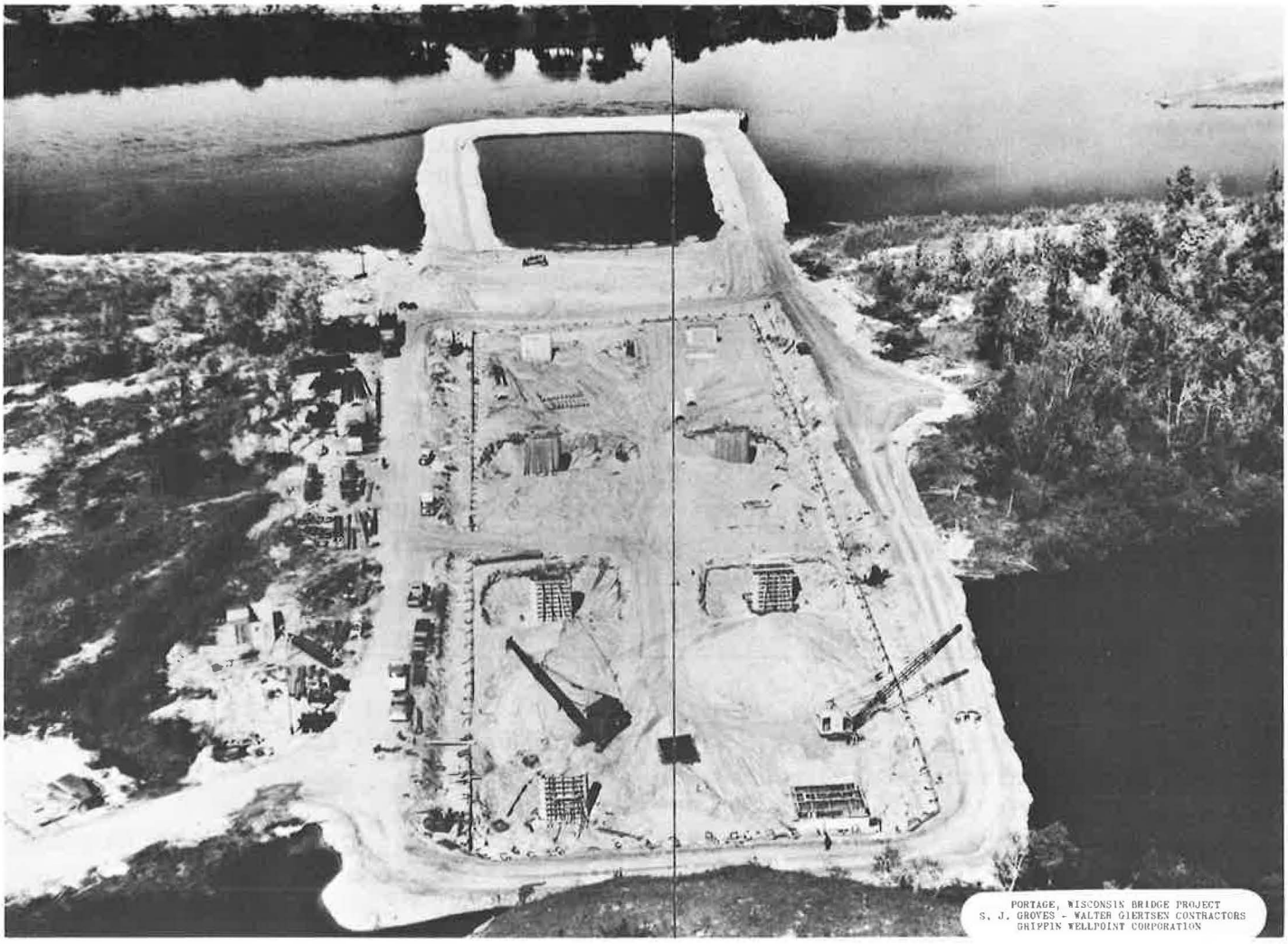

Figure 1.

This flooding occurred on two occasions, four months apart, and caused the damage on which Giersten based his claim against the state.

Essentially Giertsen claimed a breach of warranty because the state had not disclosed to it a survey of the bridge site made 2 years before by the U. S. Geological Survey for the state highway commission. The survey report stated that the upstream reservoirs had little or no flood storage capacity, and that despite the reservoirs' operation, there was a 50 percent chance in any given year that the river would reach an elevation of 778 ft. Although this report had been secured by the state for the purpose of determining the design of the bridge, the state did not volunteer its information to Giertsen prior to awarding the contract. In asserting that this failure was a breach of

the state's implied warranty, Giertsen contended it would have used a different construction technique if it had had the information possessed by the state.

The circuit court dismissed the complaint, and, on appeal, this decision was affirmed by the state supreme court.

The supreme court noted that the parties entered into the contract "at arm's length", with the contractor specifically obligated to make his own study of the conditions to be encountered. The contract clause referred to by the court was as follows:2/

> "The bidder declares that he has carefully examined the site of, and the proposal, plans, specifications and contract forms for, the work contemplated, and it is assumed that the bidder has investigated and is satisfied as to the conditions to be encountered, as to the character, quality, and quantities of work to be performed and materials to be furnished, and as to the requirements of the specifications, special provisions and contract. It is mutually agreed that submission of a proposal shall be considered conclusive evidence that the bidder has made such examination."

The court distinguished cases of warranty breach where a contractor was misled by affirmatively false statements on the part of a governmental agency, and cases where concrete facts -- such as subsoil conditions -- were known but not disclosed.3/ Comparing Giertsen's situation with this latter case, the court felt that here the U. S. Geological Survey report contained only "estimates and predictions, as opposed to firm facts".

In deciding the case thus, the court primarily emphasized the speculative nature of the facts, citing testimony that the state considered the data unreliable because it was based on expert opinion of the USGS staff. The court did not squarely discuss another possible basis for justifying non-disclosure, namely that the data "was obtained for design purposes only". Therefore, the extent, if any, to which the purpose rather than the nature of the data may justify withholding it from the contractor remains largely undefined.

Comments on the decision indicate the court's decision now clarifies the duty of the state's agencies to disclose information not known by a contractor. Apparently the contracting agency has an obligation to disclose all factual matters that would otherwise be unknown

to the contractor which might be significant in the execution of the contract. However, there is no duty to reveal information of matters which are speculative. Further, the clause of the contract requiring the contractor to investigate the site and be satisfied as to existing conditions is extremely important, and when, as in this case, the contractor makes an inadequate investigation, he has no right to complain.4/

QUANTUM MERUIT AND THE REALM OF REASONABLE CONTEMPLATION

In New York, the Depot Construction Company contracted with the state to build a $6 million building at Manhattan State Hospital on Ward's Island.5/ The project included substantial excavation of rock providing a lump sum payment for the work except for differentials in the unit price for excavation of quantities in excess of or less than specified in the contract. As the matter turned out, the excavation required for the job greatly exceeded the expectations of either party, and Depot sought a claim for his added cost, arguing that his remedy should be based on quantum meruit. The contract's unit prices, he contended, were no longer binding because the excess work was beyond any reasonable contemplation of the parties.

In this context the disclosure of information regarding the site prior to the contract became a key issue. As to the state's previous test borings, the specification note on the construction plans stated:

> "Test holes have been drilled on the site, at locations shown on the Plot Plan drawing. The test hole data shown on the plans are not guaranteed by the State in any respect, nor represented by it as being worthy of reliance. They are made available to the Bidders, who shall make their own independent determination as to what value to assign to them. The State makes them available as information in its possession without intent or attempt to induce the Bidders to rely thereon."

The test borings referred to were made a year before the contract was let, and, as the trial court said, "represented merely average borings for a given area". Seventeen borings had been made; the contract called for Depot to construct 216 pier footings, and expert testimony at the trial affirmed that if borings had been made at locations where the building footings were to rest, the state would have been able to advise the contractor of the exact sub-surface conditions.

The trial court therefore criticized the state for what it called a "haphazard" practice in testing the sub-surface, and its disavowal

of any reliance on them or any liability for reliance by bidders. Yet, as the court saw it, these same test borings were used by the state to estimate the amount of work in the job, and base the contract bid. Accelerating this vicious circle, the court observed that

> "There is neither time nor opportunity to permit, nor a moral right on the part of the State to demand, independent borings by the contractor prior to the acceptance of its bid. By the very nature of its own methods of public bidding, the State makes its borings the sine qua non of the bid, while at the same time, the State proclaims, without blushing, that its borings are unworthy of reliance and are submitted merely as information in its possession."

Unwilling to say that a contractor was obliged to spend money for preliminary borings before he knows whether or not he will be awarded the contract, the court declared that the state specifications note, quoted earlier, was:

> "confusing, illogical, contradictory and even deceptive. It seems to have been drawn with the thought in mind of permitting easy escape on the part of the State from its own prime responsibility to present to the prospective bidders as complete and efficient information concerning the sub-strata of the situs as modern techniques and machinery make possible."

On appeal from the trial court's holding in favor of Depot, the state Court of Appeals took a different view. The contract bidder was, it noted, no better or worse advised than the state itself on this matter. Moreover, it declared:

> "No reasonable bidder could have assigned to the borings a more significant role of specificity; or could have expected them to represent more than a small number of samplings over a large area.
>
> If this were not enough in itself to advise a sophisticated bidder, the State attached to the 'Foundation Investigation Notes', which were referred to in the specifications and furnished to claimant, an express signal to bidders that 'This information is intended for State design purposes only, and is made available to bidders only that they may have access to identical subsurface information available to the State. It is presented in good faith, but is

> not intended as a substitute for personal investigations, interpretations of judgment of the Contractor'.
>
> Thus, there is no proof to sustain the claimant's argument that the State misrepresented the rock excavation risk. The record, rather, sustains the view there was no misrepresentation."

New Yorkers consider the Depot Construction Co. case as important to them as Wunderlich is to californians. The state boring specifications for buildings and highways are almost identical, and the issues raised by Depot could apply with equal force to highway construction work.7/ As other states face increased and accelerated construction activity, the rationales of all three cases noted here may be of recurring interest.8/

Footnotes

(1) Walter D. Giertsen Co. v. State, 148 N.W. 2d 741 (Wis., 1967).

(2) Respondent's Brief, p. 3.

(3) Eg. Murphy, Inc. v. Drummond Dolomite, Inc., 232 F. Supp. 509 (7th Cir., 1965), where plaintiff engaged to excavate a private road and did not have defendant's knowledge that a hard rock-like subsoil would be encountered, and represented that subsoil was loose sand and gravel.

See also: W. H. Knapp Co. v. State Highway Department, 18 N.W. 2d 421 (Mich.,1945); Valentini v. City of Adrian, 79 N.W. 2d 885 (Mich., 1956).

(4) Foregoing comments are based on correspondence with R. E. Barrett, Assistant Attorney General, Wisconsin, April 24, 1967.

(5) Depot Construction Corp., v. State, 224 N.E. 2d 866 (N.Y.,1967).

(6) Correspondence with Saul C. Corwin, General Counsel, New York Department of Public Works, May 2, 1967.

(7) Ibid.

(8) Among other recent decisions dealing with the state's duty to disclose information prior to bidding, see: Macomber v. State, 250 A.C.A. 457 (Calif.,1967); E. H. Morrill Co. v. State, 423 P. 2d 551 (Calif.,1967) and City of Salinas v. Souza & McCue Construction Co., 424 P. 2d 921 (Calif.,1967), both companion cases to Wunderlich; Appeal of Parsons Construction Co., 146 N.W. 2d 211 (Neb., 1966); and State Highway Commission v.Garton, 418 P. 2d 15 (Wyo., 1966).

LEGISLATIVE PROBLEMS IN WISCONSIN'S SCENIC EASEMENT PROGRAM*

Carl A. Neumann
University of Wisconsin Law School

Since 1952 the State Highway Commission of Wisconsin has been acquiring less than fee interests in lands adjoining certain highways to preserve their scenic use. To date the commission has acquired over 1275 parcels along more than 300 miles of its highway system. This experience has revealed the need for addition to a clarification of the legislative element of the state's total program. In particular, three aspects of this element deserve attention, with a view, possibly, of amendment of existing statutes. These aspects relate to (1) declaration of legislative purpose and public interest regarding the program, (2) determining scenic acquisition priorities, and (3) providing for land use changes within the structure of the scenic easement deed.

DECLARATIONS OF PURPOSE AND POLICY

To conform with the federal Highway Beautification Act of 1965 three bills were introduced into the Wisconsin Assembly early in 1967 dealing with control of billboards, junkyards, and landscaping and scenic enhancement. One of these pending bills deals with scenic enhancement and scenic easements,1/ and was drafted to conform with federal legislative to obtain the federal funds allotted to Wisconsin for the program. The bill and amendments allow for the purchase of additional scenic easements with the federal funds provided.2/

Passage of this legislation is needed to give the state highway commission of Wisconsin basic authority to use its powers of land acquisition for scenic enhancement and preservation in areas beyond the highway right-of-way. Yet, in the legislation proposed so far, nowhere is there set forth a clearly stated general purpose for the entire program in Wisconsin which would assist the courts and the highway commission in carrying out the program effectively. Case law indicates the importance of a carefully drafted definition or statement of purpose. In a recent decision,3/ the Wisconsin Supreme Court indicated that there was no express statutory definition of "scenic easement", and "found" the purpose and general meaning of a scenic easement from legislative history. The commission's authority to acquire scenic easements was upheld because the court found

that the scenic easement legislation was not illusory and controversial rendering it meaningless as plaintiffs had argued. The court found that the concept of a scenic easement, with its emphasis upon maintaining a rural scene and preventing unsightly uses, was sufficiently definite so that the legislature made a meaningful decision in terms of public purpose.

Promulgation of a statement of purpose has special significance where there are no statutory priorities for the purchase of scenic easements. In 1961 the State Highway Commission of Wisconsin was provided with statutory acquisition priorities 4/ which involve problems of construction, but no statement of purpose or workable definition of "scenic easement". Nor were these provided in earlier scenic legislation,5/ under which the highway commission had been left to orient itself to the scenic easement concept and establish a workable statement of purpose for administrative action. States just beginning scenic easement programs with no experience in scenic easements, or states switching to non-statutory priorities, are likely to be severely handicapped without legislative guidelines in the form of legislative statements of purpose and policy.

Thus, when the Wisconsin highway commission began scenic easement purchases it lacked legislative clarification of the objective "to preserve scenic beauty" for its administrative personnel, and especially for those in the field dealing with the landowners. Only after several years of experience, from which emerged a basic understanding of the terms of "beauty", "scene" and "preserve", was the commission able to develop a workable statement of purpose which trained personnel could apply in day-to-day operations.6/

A general legislative statement of purpose and expression of intent relating to scenic beauty and the highway beautification program is provided in the preamble, section one, of the presently pending Scenic Beauty Bill:

> It is the intent of this section to promote the safety, convenience and enjoyment of travel on, and protection of the public investment in, the state trunk highway system, and to provide for the restoration, preservation and enhancement of scenic beauty within and adjacent to such highways.7/

This section is regarded as providing a basic and necessary statement of purpose for a highway beautification and scenic easement program, which is broad enough to authorize scenic easement purchases.

THE PROBLEM OF STATUTORY PRIORITIES

The third section of Wisconsin's Scenic Beauty Bill establishes a broad policy for the method of acquisition by the highway commission. It states that:

> The interest in any land authorized to be acquired and maintained under this section may be the fee simple or any lesser interest, as determined by the state highway commission to be reasonably necessary to accomplish the purposes of this section. Such acquisition may be by gift, purchase, exchange or condemnation.8/

Under the Outdoor Recreation Act Program of 1961, (hereinafter called ORAP) the highway commission has been limited in its potential acquisition sites to a list of priority areas designated in Wis. Stat. sec. 15.60(6)(i) (1965). Problems of construction have arisen in the application of these legislative priorities, as shown by the following case. In Columbia County, Wisconsin,9/ a property owners' group objected to the highway commission's attempt to acquire an easement, claiming the acquisition was not for a project eligible under the statute enacted for the 1961-63 biennium. Since the legislature had not reenacted the priorities list in the subsequent biennium, the issue was whether these same priorities were intended to apply after June 30, 1963.10/ On advice of counsel, the highway commission had used this earlier legislative directive, and argued for a liberal interpretation applying this directive to acquisitions after June 30, 1963. The Circuit Court, however, strictly construed the statute, and sustained the property owners' objection to the commission's action.

Other difficulties have been encountered. As a result of being restricted to the statutory priority areas the commission has had to let a number of excellent potential easement sites pass. Furthermore, the present list of priorities has been termed an "unrealistic" one which "handicaps" and "restricts" the commission.11/ Also, statutory priorities decrease the flexibility of the commission in its ability to establish new priority areas or change old ones as conditions change. Most of these difficulties would be avoided under legislative standards which were general in character and thus provided flexibility of action to acquire sites as opportunities arise and conditions change.

Section two of the Scenic Beauty Bill may be interpreted as removing specific purchase priorities even though its sponsors did not specifically mention scenic easement priorities. The needed flexibility is introduced by following the language of the federal guidelines:

> The state highway commission is authorized to acquire and improve strips of land provided they are not zoned for industrial or commercial use by an incorporated area, which are necessary for the restoration, preservation and enhancement of scenic beauty within the adjacent to the state trunk highway system.12/

The possibility that statutory priorities for scenic easement acquisition might be eliminated altogether has been suggested by the Governor's ORAP task force, which currently is engaged in reevaluating the ORAP program and its legislative basis.13/

If the priorities were removed the highway commission is prepared to fill the gap with its own set of general criteria for scenic easement site purchases. These criteria are now used (and would be used in the future if there were no statutory priorities) as a general guideline by a committee of three who make the specific site purchase determination, and give the highway commission a means of making specific selections from a greater number of possible site acquisitions than was possible under statutory priorities. The commission's general criteria have been extended to apply to scenic easement purchases along all federal-aid and state trunk highways throughout the state rather than to a designated number of sites under existing statutory priorities. The highway commission's general criteria are as follows:14/

1) The easements should not follow a predetermined pattern but be dependent upon the scenic features visible from the highway. The scenic strip size and shape should normally be governed by a natural boundary.

2) Site selection must also consider the existing natural beauty and the potential natural beauty along a highway corridor that can be improved by use of corrective measures.

3) The urgency of the project must be considered due to limited funds. The urgency is conditioned on the inherent scenic value as compared with the degree of probability that the land will be put to different use in the near future.

The existence of an administrative body, using administrative standards to determine sites for scenic easement acquisitions, is not necessarily inconsistent with existing legislative authority, but does suggest the need for caution to avoid possible abuse of authority delegated by the legislature. Actions of the highway commission must always be founded on legislative directives and be consistent with public policy. With respect to selection of sites for scenic easements, the question arises whether legislative policy can be made explicit enough to adequately control administration of the program without designating statutory priorities.

Are statutory priorities the only way of avoiding delegation of excessively broad powers to the commission or, at the other extreme, unduly restricting the commission's area of judgment? The legislature has the power to make appropriations for state funds to the commission, and application of Federal aid funds to particular projects is subject to the approval of the Bureau of Public Roads. Budget hearings at which the legislature can provide policy guidance to the commission is a time-honored remedial technique, but is not preventive. Whether this legislative power technique and prerogative can be used successfully as a replacement for statutory priorities is questionable. Reconciliation of administrative flexibility with legislative control in this area remains difficult.

In light of a substantially expanded program 15/ which is foreseeable, a legislative evaluation of the entire scenic easement program appears to be needed. One essential need of the program is for coordination with the activities of the conservation commission with various phases of the highway commission's work. For example, the highway commission purchased a scenic easement on one side of a highway while a conservation easement for hunting was purchased by the conservation commission on the other side. The conservation easement did not bar billboards. In order to remove the billboards and prevent erection of new ones, the highway commission had to obtain an additional easement on this land.

THE PROBLEM OF VARIANCES

Legislation introducing flexibility into the scenic easement program is also needed in order that variances from scenic easement deeds may be granted to landowners in appropriate cases. Frequently, owners on whose lands a scenic easement exists desire to modify certain features which are subject to the easement. The highway commission's normal guidelines on permissible changes are set forth in the information regarding scenic easements sent to landowners potentially affected by the program. This information states:

> Any use presently existing within the restricted area may be continued. General farming use may be expanded, including addition or expansion of buildings, However, new use of other than residential or agricultural purposes is not permissible, and where another use exists, it may not be expanded.16/

Yet, the commission's authority to grant variances is beclouded. For so-called "minor" variances as an addition to a structure where the landowner approaches the commission because he is unsure whether he may make the addition, the permission is readily granted. The major problems arise where there is a request to substantially change land use. For example, a tavern keeper may desire to change his tavern into a food market and add a motel. In such cases the commission must decide whether to grant the variance on the basis of the type of change requested, and must consider whether it will subvert the basic purposes of the program. Under the present language of the statute, the commission is unsure whether it may authorize such changes and continue its present procedures in handling them.17/

It may be argued with respect to the above example that change in land use was from a less intensive to a more intensive commercial use, and should therefore be permitted. The commission might well take the position that the change in use fell within the same general category as the original use, and thus might feel reasonably safe in approving the variance by letter. However, in the future problems will arise where a variance is requested for a change to a completely different type of land use. The commission is unprepared to continue to handle such requests without legislative guidance.

In February, 1967, the highway commission expressed a desire for legislative direction and approval of authority for handling variance requests. The following month the commission approved a proposal drafted by its counsel, which was later submitted to and approved by the Assembly as Assembly Amendment 2, to the Scenic Beauty

Bill. The amendment, set forth below, is intended to provide a method for dealing with "minor" variances by the highway commission.18/

> The state highway commission is authorized to grant variances or releases of conditions, terms or restrictions contained in easements secured for highway beautification or in conveyances containing any reservations or restrictions regarding the use or occupation of property conveyed by the commission under the following conditions:
>
> (a) Any variance of the original conditions shall be determined by the commission to be in the public interest.
>
> (b) Application shall be made by the property owner in writing on forms supplied by the commission stating the description of the property, the variance desired and the reasons therefor.
>
> (c) The commission may require the execution of conveyances, contracts or other documents as it deems necessary to meet the legal requirements necessary to accomplish the desired result.
>
> (d) A variance fee of $1 shall accompany each application.
>
> (e) Decisions of the commission shall be reviewable under chap. 227.19/

Wis. Stat. sec. 84.09(5) (1965) may be construed to apply to requests for "major" variances.20/ This statute provides for a sale of certain interests acquired by the commission back to the landowner when such rights or interests are declared in excess of the commission's needs. Such resales are made subject to the governor's approval. This procedure might be applied to the return of rights acquired by scenic easements.

Proposals at the time of this writing contemplate two separate methods of granting variances to landowners. Determination of what constitute "major" and "minor" variances would presumably be left to the highway commission. One possible basis of distinction between variance types might be their value. Presumably, a return of rights having significant value for which the landowner ought to be required to compensate the commission would fall under Wis. Stat. sec. 84.09(5) proceedings. On the other hand, requests for return of rights having little or no value as determined by the commission might therefore fall under the above proposed amendment of the Scenic Beauty Bill.

Having two separate approaches to variance authority seems unnecessary and difficult to administer. Admittedly, finding a workable distinction between types of variances is bound to be difficult where there are no established guidelines. Only an appraisal of the value of the rights to be returned, or an "educated guess" as to their value by the commission, will provide some basis for distinguishing variance types.

It is arguable that since legislation already exists for a sale of excess lands or interests by the highway commission with the governor's approval, variances with significant value ought to come within that statute's purview. This approach may be cumbersome when applied to scenic easements because it involves obtaining the governor's approval for each sale. Each approach, the present statute and section four of the Scenic Beauty Bill cover half the field ineffectively; what is most desired is a single coordinated procedure that will cover the entire field more effectively. When new legislation dealing with variances is enacted, it hopefully will apply to all variances and make it unnecessary for the commission to operate under two separate and distinct procedures.

Such an alternative coordinated system might involve empowering the highway commission to grant and record releases of scenic easement privileges previously acquired from landowners on the following suggested conditions: 21/

1) Application by the landowner should be made in writing on forms authorized by the commission.

2) The commission should determine whether the privilege to be released has little or no market value.

3) To aid in a value determination independent appraisers may be employed.

4) If the privileges to be released are of significant value the landowner requesting the release ought to pay such amount to the commission.

5) The commission after notice and hearing may grant a release if it is not contrary to the purposes of the program or plan for scenic protection.

This suggested procedure would provide a method for the commission to dispose of all variance applications. The grant of legislative authority and guidance to deal with variances is the most immediate concern. In addition, however, new legislation could, as an

important secondary matter, consolidate commission procedures as much as possible, giving it flexibility and rule making authority to implement legislative policy.

CONCLUSIONS

Wisconsin's scenic easement acquisition program has encountered numerous problems in its 16 year history. The program has advanced far enough now to provide substantive ground for its evaluation; the direction it has taken, the direction it is to take, its integration with other programs and its financing.

Lack of direction and flexibility of administration are major difficulties of the program. If enacted, most of the currently proposed legislation will go far toward giving legislative direction and flexible administration to the scenic easement acquisition program.

Such legislation may well introduce new problems. For example, legislative control over site acquisition and evaluating variances to determine whether payment should be made by a landowner for the variance. Yet, for the program to expand and make a significant contribution toward highway beautification, conservation and resources development, the basic problems requiring legislation must be tackled.

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Footnotes

(1) Bill No. 323 A, the so-called "Scenic Beauty Bill", sec. 85.03. Chapter 85 of the Wis. Stats. now "empty" is suggested by the Revisor of Statutes to be reserved for highway beautification.

(2) Assembly Amendment 1, to Assembly Bill 323 was introduced on March 27, 1967 and Assembly Amendment 2 was introduced on April 12, 1967. Both were adopted by the Assembly on April 25, 1967.

(3) Kamrowski v. State, 31 Wis. 2d. 256, 142 N.W. 2d. 793 (1966).

(4) Wis. Stat. sec. 15.60 (6)(i) (1965). Sec. 15.60 is the Outdoor Recreation Act Program which is a general conservation program encompassing outdoor recreational resources calling for a $50 million dollar expenditure over the ten year period, 1961-1971.

(5) Assembly Bill No. 323 is not the first legislation authorizing the commission to acquire scenic easements. Wisconsin has been purchasing scenic easements for 16 years under the Great River Road Parkway legislation and recently under the Outdoor Recreation Act Program.

(6) Address by R. C. Leverich, District Chief of Right of Way, State Highway Commission of Wisconsin, Conference on Scenic Easements in Action, Madison, Wis., (December, 1966).

(7) Proposed Wis. Stat. sec. 85.03 (1).

(8) Proposed Wis. Stat. sec. 85.03 (3).

(9) Reuben Enerson and Julia Marie Enerson v. State Highway Commission of Wisconsin, Circuit Court, Columbia County, Wis., 1964. A file of the case is located in the Wisconsin Attorney-General's Office, Madison, Wis.

(10) The commission's jurisdictional offer to purchase the scenic easement was made June 6, 1963.

(11) Interview with Mr. Richard Barrett, Assistant Attorney-General and counsel for the highway commission, Madison, Wis., February 23, 1967.

(12) Proposed Wis. Stat. sec. 85.03 (2) including Assembly Amendment 1 to Assembly Bill 323.

(13) Governor Knowles' ORAP Taskforce, Leo Roethe, Chairman, Fort Atkinson, Wis.

(14) "Criteria for Scenic Easement Sites", Negotiations and Training section, Right of Way Division, State Highway Commission of Wisconsin. These criteria will appear in a chapter of a new edition of the Right of Way Manual being prepared by the commission.

(15) The ORAP Taskforce intends to request an increase in the scenic easement purchases budget through tapping additional revenue sources. The fiscal impact if Bill No. 323 A were enacted would be to bring $672,000 to Wisconsin in federal funds under the Highway Beautification Act of 1965 during fiscal 1967 for highway beautification expenditures. Most of the federal funds are not now earmarked for scenic easement purchases.

(16) State Highway Commission of Wisconsin, et al., Workshop Manual for Conference on Scenic Easements in Action, Appendix 4, p. 69 (December, 1966).

(17) Interview with the Chief of Negotiations and Training section of the Right of Way Division of the State Highway Commission of Wisconsin, Madison, Wis., March 6, 1967.

(18) Proposed Wis. Stat. sec. 85.03 (4).

(19) Wis. Stat. sec. 227 provides for administrative procedure and judicial review of administrative decisions.

(20) Interview with Mr. Richard Barrett, Assistant Attorney-General and counsel for the highway commission, Madison, Wis., March 8, 1967.

(21) Recommendations by Professor Jacob Beuscher, University of Wisconsin Law School and the writer, February, 1967.

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