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**HIGHWAY RESEARCH  
CIRCULAR**

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**COMMITTEE ACTIVITY**

Committee on Condemnation and Land Use Control, LS-1  
Department of Legal Studies, Highway Research Board

**LAND ACQUISITION  
MEMORANDUM 201**

In a slight departure from its prior format, this HRB Circular will consider some recent developments in a single area of condemnation law. No attempt has been made to resolve conflicting viewpoints or to weave the cases into a consistent pattern. Rather, the cases are independently analyzed and collected in a single HRB Circular to afford easier reference to some recent developments in that area of law.

201-1    **IMPAIRMENT OF ACCESS**

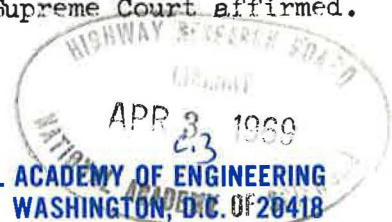
By way of background, access is a landowner's vested right of ingress and egress to existing and adjoining roadways. It includes not only his personal access but that of invitees and licensees as well. Problems arise with respect to alterations of adjoining roadways which affect the quality and nature of the access or the distance to be traveled. These problems are magnified where the property is primarily commercial or industrial, and the impairment to access creates little personal inconvenience to the landowner but seriously diminishes the commercial availability of the land.

Arizona - Many access difficulties are engendered by the building specifications of the Federal highway program. By requiring upgrading to controlled-access roadways, the program eliminates many preexisting private access roads. In State v. Wilson, 438 P.2d 760 (Ariz. 1968), the landowner conducted a motel business on property which had direct access to State Route No. 86 on both sides of that four-lane divided highway. The two properties were connected by a roadway culvert passing under Route No. 86. Thus, the owner was able to afford direct access to traffic in either direction.

Upon conversion of the State highway to U.S. Interstate No. 10, the old access was fenced off and the highway could only be entered at an interchange located almost one mile away. This distance obscured the scenic attraction of the motel (at the mouth of a canyon containing unusual rock formations) and, therefore visitors traveling west would not observe the countryside until after the interchange was passed. At trial, the owner was permitted to testify as to the loss of business suffered after completion of the new highway. The trial court granted compensation for the impairment of access and the Supreme Court affirmed.

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The majority of the court reasoned that while the State had no obligation to send traffic past the property, what traffic does go past is available for business exploitation by the landowner. And, where a landowner has attracted such traffic and a subsequent impairment of access deprives him of a similar quantity of customers, he is entitled to compensation. For this reason, the lower court was correct in permitting the jury to consider traffic flow, the Supreme Court asserted.

The court also held that evidence of business loss may be introduced to show that the taking has damaged the condemnee, even though such loss is not, itself, a permissible item of damage. The rationale for admitting such evidence is that it also tends to establish a diminution of the highest and best use through the loss of access. Consequently, "from such a loss the jury could conclude that the expert's opinion of a reduction in the market value was reasonably supported by facts."

In a strong dissent, Chief Justice McFarland challenged the entire concept of compensating for impairment of access in the context of modern highway development. Noting that "the old rules are simply not suitable for these superhighways," the Chief Justice observed that there is not requirement of obsolete equality of convenience. For a landowner to obtain compensation for impairment of access he must show that his inconvenience is of a different kind from that suffered by the general public, and not merely a greater degree. Since new superhighways, by definition, limit the access of all travelers, circuitry of access is a common loss to all. For the Wilsons to obtain compensation, they must show something more than a more damaging degree of circuitry than that experienced by the general public.

The Chief Justice also suggested that the higher speeds occasioned by superhighways may well contribute to the loss attributed to impaired access. Similarly, the better roadway may be responsible for attracting new competition which contributed to the Wilson's loss. These factors, though not considered at trial, further dilute the need for compensating impaired access.

Arizona - The degree to which the Wilson case has expanded the notions of impairment of access can be seen in the case of State v. Jacobs, 440 P.2d 32 (Ariz. Ct. App. 1968). The condemnee owned property abutting U.S. Route 66, to which he had direct access via two roadways. Both roadways traversed the right-of-way of the old highway. Claimant conducted a business on the property consisting mainly of tourist items. The highway was upgraded to meet Federal standards and became Interstate 40. In the process, condemnee's two old access roads were made to feed into a service road which provided access to Interstate 40 at an interchange located 7,300 feet west of the property. No property was appropriated from claimant in constructing either the frontage road or the controlled access highway. The only claim made was the loss of direct access and the consequent loss of business occasioned by the circuitry of route. The jury awarded \$21,000 in compensation on evidence, which indicated that the highest possible before value was \$53,714.



In affirming the trial court, the Court of Appeals considered two points: (1) whether this type of impairment of access was compensable, and (2) whether loss of traffic flow and business income were proper subjects of jury consideration. As to the first point, the court considered the case to be controlled by State v. Wilson, supra, and noted that, "the loss to the property owners by taking their right to direct access is not mitigated in the least by the fact that there was no physical taking of any of their tangible fee property."

On the question of traffic flow and lost business income, the court, citing Wilson at length, recognized that such evidence could be admitted for the limited purpose of demonstrating that the impairment of access had caused injury. However, the Court of Appeals then continued this line of reasoning to also conclude that the trial judge's refusal to give a limiting instruction on this point was not reversible error. While not completely clear on this point, the court seemed to reason that Wilson merely prevented direct evidence as to business loss in access cases and thus any such evidence introduced for other purposes need not be further limited by a jury instruction.

Kentucky - Problems of access are not limited to roadway ingress and egress. Similar, and often more difficult, problems surround riparian access. A landowner abutting waterways is entitled to have access to those water routes and may be compensated for impairment. In Commonwealth, Dep't of Highways v. Thomas, 427 S.W.2d 213 (Ky. Ct. App. 1968), the claimant owned land abutting on Lake Barkley as well as on an inlet which fed the lake. Claimant had divided his property into 57 lots, 13 of which fronted on the inlet. The State constructed a roadway across the mouth of the inlet, permitting water flow via culverts. The roadway effectively prevented any pleasure boat navigation from the inlet to the lake. Claimant alleged that the 13 lots abutting the inlet had been deprived of water access to the lake. The trial court awarded \$18,000 as compensation for this taking.

The issue was a novel one for Kentucky courts and the jurisprudence of other States afforded little aid since they are equally divided on the existence and extent of rights of riparian access. In affirming the lower court decision, the court took full cognizance of the many jurisdictions which deny recovery to riparian proprietors, including the recent United States Supreme Court decision in United States v. Rands, 389 U.S. 121 (1967), where that Court noted that, "the navigational privilege permits the Government to reduce the value of riparian lands by denying the riparian owner access to the stream without compensation for his loss . . ."

Because of the split in authorities, the Court of Appeals concluded that the ultimate determination should be a reflection of the public policy of Kentucky. To this end the court noted the growing importance of the State's numerous lakes and streams for both industry and leisure. A necessary adjunct of this increasing prominence of riparian property would be a corresponding increase in land having access to such waterways. Influenced by this policy consideration, the court concluded, "that riparian landowners have the right of a reasonable access to the entire body of water on which their land borders."

Kentucky - Returning to terra firma, the Court of Appeals exhibited a much stricter approach to impairment of access in Commonwealth, Dep't of Highways v. Noe, 426 S.W.2d 459 (Ky. Ct. App. 1968). Claimants property fronted on Highway 119 and contained several improvements. The highway was relocated causing the old road to dead end a short distance from claimant's property and necessitating appropriation of the Northwest corner of claimant's tract. Access to the old road was undisturbed and the new highway could be reached by traveling approximately one quarter mile. Among other things, claimant sought compensation for the impairment of access to the highway.

In a terse opinion, the court noted that while complete loss of access is a compensable factor, mere circuitry of travel may not be considered in assessing damages. Influencing this conclusion was the fact that access to the old road was not lost and reasonable access was provided to the relocated highway.

The case is strikingly similar to the Thomas case on riparian access, although reaching an opposite conclusion. The old road here is analogous to the inlet in Thomas -- direct access remained in both instances. The only question was where that direct access would take a traveler. In Thomas it would no longer take him to the lake and access was deemed impaired while in Noe the old road no longer linked to the highway but access was not deemed compensably impaired. The distinction appears to be that in Thomas there was no reasonable riparian access to the lake, no matter how circuitous, while in Noe the highway could be reached after a quarter mile trip.

Missouri - The right of access, like any other property right, may be contractually eliminated or restricted. Where such restrictions are placed on access, their interpretation will ordinarily be in favor of free use of the property. In Shepherd v. State, 427 S.W.2d 382 (Mo. Sup. Ct. 1968), the court was presented with the problem of ascertaining what was meant by an access restriction for "residential purposes." In 1953, claimant had transferred a strip of land abutting Route U.S. 69 to the State of Missouri. The deed reserved to the claimants a right of highway access over the strip for "ordinary . . . residential purposes." The highway had no service road or other alternate access.

Upon learning that the claimant intended to construct multi-family dwellings or apartment houses on the property, the State informed the plaintiff that the reserved access points could not be used to service such a development. The issue resolved to determining the meaning of ordinary residential purposes as applied to access.

The claimant urged that the State Highway Commission was without the power to restrict the use of access points and the phrase was, therefore, without force. The State urged that the volume of traffic involved in an apartment development was beyond the contemplation of the exception for residential use.

The court concluded that since the State Highway Commission, under its general power of eminent domain over highways, had authority to restrict access, it could also accomplish such restriction by contractual arrangement. However, the court then went on to conclude that the exceptions for residential use could

not be narrowly construed to prevent any residential-type development of the land. "It appears to be the general rule that any kind of a building devoted exclusively to residential purposes, whether a duplex or an apartment house, may be erected under a covenant limiting the use of the property to residential purposes." By extension, therefore, a right of access for residential purposes would be a right of access for any legitimate residential use of the land.

Texas - Since access involves the ingress and egress of business invitees, alterations of streets which affect flow of traffic will often give rise to claims of impairment of access. In City of Beaumont v. Marks, 427 S.W.2d 111 (Texas Cir. App. 1968), the claimant owned commercial property on a corner lot fronting on a two-way street divided by railroad tracks and a one-way street in the direction of those tracks. In conjunction with a program to elevate and enlarge the railroad tracks, there was a substantial alteration of the streets, all of which is portrayed in two maps included in the opinion. The net effect for claimant was that the one-way street was reduced to a one-way, ten foot wide traffic lane and the two-way street was reduced to a 14 foot one-way street with access to the opposite lane of traffic no longer available across the railroad tracks.

No property was physically taken from claimant and he had as many direct means of access before as after the construction. The sole difference was that the streets were now so diminished in size, and the main flow of traffic so greatly diverted, that this amounted to an obstruction which impaired claimant's access. The jury awarded \$46,000 for the impairment of access on property it concluded was worth \$55,000 before such impairment.

In sustaining this award, the Court of Civil Appeals ruled that the facts presented a compensable taking as a matter of law. According to the cited jurisprudence of Texas, compensable damage occurs with impairment of reasonable access. For the Marks court, it was enough that "there was a change of the street grades in both Orleans and Gilbert Streets. This is a basis for permitting recovery by Marks."

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LS-1

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