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Compensation Claims for Losses of Access Rights to Interstate Highways

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COMPENSATION CLAIMS FOR LOSSES OF ACCESS RIGHTS TO INTERSTATE HIGHWAYS

The growth of the national system of interstate highways[1] has created a legal controversy over the claims of those people owning property along an existing highway who seek to be compensated for loss of their direct access to the highways. A cursory look at the scope of limited-access highways[2] and expressways[3] planned for the system shows the importance of the controversy. By 1969, one hundred billion dollars will be spent on roads, over 50% of which will be placed in 5500 miles of expressways skirting or penetrating 90% of all cities of more than 50,000 population.[4] By 1975, 41,00 miles of connected interstate highways will be completed[5] with almost every state in the union affected. For example, Illinois alone is to receive 1608 miles of limited-access highways[6] to be complemented by several state programs of major proportion.[7] Since an abutter[8] on a highway system built on lands bought by the state does not have a right of access to it,[9] the discussion herein is limited to the one-fourth of the inter-

[1] Federal Interstate and Defense Highway Act, 23 U.S.C. § 101 (1956).

[2] Ill. Rev. Stat. ch. 95½, § 109(i) (1963): a controlled or limited-access highway is "every street or highway in respect to which owners or occupants of abutting lands and other persons have no right of access to or from the same except at such points only as may be determined by the public authority having jurisdiction over such streets or highways."

[3] Covey, *Right of Access and the Illinois Highway Program*, 47 ILL. BAR J. 634 (1959): an expressway is a highway which gives a greater degree of preference to through traffic by prohibiting all direct access. Access is gained by ramps and other means of indirect entry into the flow of traffic.

[4] EDITORS OF FORTUNE, EXPLODING METROPOLIS (1958).

[5] Covey, *Frontage Roads: To Compensate or Not to Compensate*, 56 NW. U.L. REV. 587 (1961).

[6] Covey, *Right of Access and the Illinois Highway Program*, 47 ILL. BAR J. 634 (1959).

[7] The Illinois Toll Road Act, ILL. REV. STAT. ch. 121, § 314a (1957), authorized the construction of 187 miles of controlled-access roads in the area adjecent to Chicago. The Illinois Freeways Act, 1 Laws of Ill. 1943, at 1177, repealed and superseded by provisions of the 1959 Illinois Highway Code, authorized all counties of more than 500,000 population to construct expressways to be financed by the sale of bonds. Cook County has constructed four expressways under this authorization: the Northwest (John F. Kennedy), Congress (Dwight D. Eisenhower), the Dan Ryan, and the Southwest.

[8] An abutter is a person who uses the land which is directly next to (abutting) the highway. The term is not limited to the owner, but applies to whoever has possession of the land.

[9] State v. Calkins, 50 Wash. 716, 719, 314 P.2d 449, 450 (1957): "Where a new limited-access highway is established by condemnation in an area where no highway previously existed, there is no taking of an easement of access, because such an easement has

state system which is to be built or placed on present conventional highways.[10]

An abutting landowner's right of access is a property right[11] entitled to the same legal safeguards as other rights incident to his realty. The controversy over compensation for the extinguishment or substantial impairment of this property right is based upon a decision as to whether such limitation should be compensated through the state's eminent domain power,[12] or whether the state is exercising its right to regulate traffic, in which case it is exercising its "police power"[13] in such a way that compensation is not required.

An abutter's right of access has not always been a property right. In fact, the entire concept of access is relatively new to the law. Previously, the roads were considered the private property of those landowners who built them and through whose property they passed.[14] The degree of ownership enjoyed by these landowners, and the relationship between the public's use of the highway and the landowner, were acutely stated by Lord Mansfield in the historic case of *Goodtitle v. Alker:*[15] "The King has nothing but the passage for himself and for his people, but the freehold and all profits belong to the owner of the soil."[16] At first, the roads were the landowner-farmer's only means of travelling to the closest community. This meant that the roads played a significant role in the development of the farmer's lands, and the primary purpose of these early roads, usually no more than a path through the woods, was to provide the farmer with a means of communication. With the expansion of the country and

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never in fact existed." See South Meadow Realty Corp. v. State, 144 Conn. 289, 130 A.2d 290 (1957); Smick v. Commonwealth, 268 S.W.2d 57 (Ky. 1956); State v. Burk, 200 Ore. 211, 265 P.2d 783 (1954).

[10] Covey, *Frontage Roads: To Compensate or Not to Compensate,* 56 Nw. U.L. Rev. 587 (1961).

[11] Hillerege v. City of Scottsbluff, 164 Neb. 560, 573, 83 N.W.2d 76, 84 (1957): "The right of access of an owner of property abutting on a street to ingress and egress to and from his premises by way of such street is a property right in the nature of an easement in the street which the owner of abutting property has, not in common with the public generally. . . ."

[12] Ill. Const. of 1870 art. II, § 13: "Private property shall not be taken or damaged for public use without just compensation. . . ."

[13] Note, 3 Stan. L. Rev. 298, 302 (1951): police power is that "power which the state inherently has to restrict property rights without paying compensation by regulations tending to promote the public health, safety, morals and general welfare."

[14] Watson v. Sparks, 1 Salk. 287, 71 Eng. Rep. 255 (Q.B. 1707); Lade v. Shepherd, 2 Str. 1004, 93 Eng. Rep. 997 (K.B. 1733). For a general discussion of the history of access, see Duhaime, *Limiting Access to Highways,* 33 Ore. L. Rev. 16(1953).

[15] 1 Burr 133, 97 Eng. Rep. 231 (K.B. 1757).

[16] *Id.* at 143, 97 Eng. Rep. at 236.

the increasing importance of travel, the need for planned highway systems for public use became evident. The implementation of the plans required that the states take title to the roads in order to guarantee that the public's right to the use of the roads would not be impaired. Those landowners abutting the public roads gained the right to enter or leave their land at any point on the highway, thus giving rise to the right of access. Complete and direct access became recognized as an important property right to be protected by operation of law[17] and was subject to the sole restriction that the public's right to travel the roads was paramount.[18]

The continued development of the highway system led to the need to limit an abutting landowner's access rights. Allowing him free access anywhere on his land interfered with the public's right to travel, because they never knew at what point someone might enter or leave the highway. To provide for an adequate limitation without unnecessarily interfering with an abutter's ingress and egress, access has been limited to that which is reasonable.[19]

In discussing access, at least passing mention must be made of circuity of travel[20] and diversion of traffic.[21] An abutting land user who must take a circuitous route from his property to reach the highway has suffered an injury,[22] as has the person whose business has suffered economically by the diversion of traffic from it. This rather typical quote from a decision in point shows that neither has suffered a compensable injury:

> the general rule is that there is no property right of an abutting property owner in the free flow of traffic past his property and thus no compensation can be claimed if traffic is diverted from his premises or made to travel a more circuitous route.[23]

[17] See Duhaime, *supra* note 14.

[18] See Covey, *Highway Protection through Control of Access and Roadside Development*, 1959 WIS. L. REV. 567.

[19] Hillerege v. City of Scottsbluff, *supra* note 11, at 574, 83 N.W.2d at 85: "The measure of the right of the property owner abutting on a street to access to and from it by way of the street is reasonable ingress and egress under all circumstances."

[20] Circuity of travel is the necessity of taking a more roundabout (circuitous) route of travel to reach an abutter's property.

[21] Diversion of traffic is the consequence of constructing a highway in such a way that traffic is diverted from passing in front of an abutter's property as it once did.

[22] See Covey, *Frontage Roads: To Compensate or Not to Compensate*, 56 NW. U.L. REV. 587 (1961). Mr. Covey states that the three major losses suffered by abutters upon being placed on a limited-access highway or an expressway are decline in the market value of their lands, decline in the accessibility to their properties, and a loss of potential exploitation of the express lanes of the road.

[23] State v. Ensley, 240 Ind. 472, 489, 164 N.E.2d 342, 350 (1960). See Department of Public Works and Buildings v. Mabee, 22 Ill.2d 202, 174 N.E.2d 801 (1961).

Although many pleas for compensation have been made, the courts have consistently held that circuity of travel[24] and diversion of traffic[25] are not regarded as interferences with an abutter's property rights, and that the damage suffered is noncompensable.

As regards this discussion of the legal repercussions of the extinguishment of a landowner's access rights, "police power" is that power which the state has to regulate traffic in the interest of the public safety.[26] It appears that the definition of "regulation" has gained in scope to the point that compensation can be denied an abutter under almost any circumstances. The "normal" and obvious regulatory devices interfering with an abutter's access are traffic signals, no-left-turn signs,[27] one-way streets,[28] the allowing of only certain traffic on a street,[29] closing streets to traffic,[30] and not allowing vehicles over a certain weight to use a street.[31] Such regulations can be as injurious to an abutter as those for which compensation is regularly granted, but they are not compensated so long as they are reasonable, and it seems that "a regulation or ordinance adopted to speed up traffic and eliminate danger is reasonable."[32]

From these "standard" methods for regulating traffic, police power has been expanded to include the placing of median strips or curbs between the lanes of a highway to prevent traffic from crossing to the other side.[33] Such action is even more of a direct interference with an abutter's right of access, because he will only be allowed to enter and leave his property

[24] Illinois Malleable Iron Co. v. Commissioners of Lincoln, 263 Ill. 446, 105 N.E.336 (1914);Hanson v. City of Omaha, 157 Neb. 403, 59 N.W.2d 622 (1953); Selig v. State, 10 N.Y.2d 34, 176 N.E.2d 59 (1961); Walker v. State, 48 Wash.2d 587, 295 P.2d 328 (1956).

[25] Arkansas Highway Commission v. Bingham, 231 Ark. 934, 333 S.W.2d 728 (1960); People v. Ricciardi, 23 Cal.2d 390, 144 P.2d 799 (1943); Department of Public Works and Buildings v. Mabee, *supra* note 23; Dantzer v. Indianapolis Union Ry. Co., 141 Ind. 604, 39 N.E.223 (1894); Selig v. State, *supra* note 24; State v. Linzell, 136 Ohio St. 97, 126 N.E.2d 53 (1955).

[26] Police power, defined *supra* note 13, is regulation as distinguished from the concept of "taking" under eminent domain.

[27] Iowa State Highway Commission v. Smith, 248 Iowa 869, 82 N.W.2d 755 (1957); Jones Beach Boulevard Estates v. Moses, 268 N.Y. 362, 197 N.E. 313 (1935).

[28] Commonwealth v. Nolan, 189 Ky. 34, 224 S.W. 506 (1920).

[29] Illinois Malleable Iron Co. v. Commissioners of Lincoln, *supra* note 24.

[30] Chicago National Bank v. City of Chicago Heights, 14 Ill.2d 135, 150 N.E.2d 827 (1958).

[31] Fergusaon Coal Co. v. Thompson, 343 Ill. 20, 174 N.E. 896 (1931).

[32] Jones Beach Boulevard Estates v. Moses, *supra* note 27 at 369, 197 N.E. at 315.

[33] Department of Public Works and Buildings v. Mabee, *supra* note 23.

in one direction.[34] However, preventing cars from crossing from one side of a highway to the other clearly is a regulatory device which promotes traffic safety, and

> rights of abutter are subject to rights of the state to regulate and control the public highways for the benefit of the travelling public, even though the abutter may be inconvenienced. . . .[35]

While the use of median strips in the center of a highway can be rationalized as a means of controlling the traffic's flow by only impairing an abutter's access to the degree that he can only go but one way,[36] some courts have held that the placement of curbing or other means of impairment in front of an abutter's property is a regulatory device requiring no compensation.[37] That such curbs are useful in the promotion of traffic safety is not to be questioned, but the effect of such actions on the abutter's right of access is a direct extinguishment of his rights of ingress and egress, an action for which most authorities feel compensation should be given.[38] Those favoring such action as an exercise of police power probably rationalize their position by claiming that the regulatory importance of placing the curbing in front of his property is so great that it overrides the "taking" aspect of such action.

The broadening scope of the regulatory nature of police power reaches its greatest width in those cases which hold that limited-access highways or expressways are created to regulate the flow of traffic, thus promoting traffic safety, and are therefore an exercise of the state's police power.[39] Clearly, this is not the attitude taken by many courts, but it clearly shows the extent to which the concept of police power has been expanded.

If it were possible to find a corresponding reduction in the scope of eminent domain, the solution to the controversy might be obtained by

[34] *Id.* at 205, 174 N.E.2d at 802: "the rule [regarding compensation] cannot be applied . . . where the property owner's free and direct access to the land of traffic abutting on his property has not been taken or impaired."

[35] Calumet Federal Savings and Loan Association v. City of Chicago, 306 Ill. App. 524, 529, 29 N.E.2d 292, 294 (1940).

[36] The fact that an analogy is possible between the creation of one-way streets and highways separated by a median strip in the center may be an important factor in holding such action to be an exercise of police power.

[37] Calumet Federal Savings and Loan Association v. City of Chicago, supra *note* 35; Ryan v. Rosenstone, 20 Ill.2d 79, 169 N.E.2d 360 (1960); Department of Public Works and Buildings v. Maddox, 21 Ill.2d 489, 173 N.E.2d 448 (1961); Darnall v. State, 79 S.D. 59, 108 N.W.2d 201 (1961).

[38] Hillerege v. City of Scottsbluff, *supra* note 11; McMoran v. State, 55 Wash.2d 37, 345 P.2d 598 (1959).

[39] Riddle v. State Highway Commission, 184 Kan. 603, 339 P.2d 301 (1959); Nick v. State Highway Commission, 13 Wis.2d 511, 109 N.W.2d 71 (1961).

comparison, but such is not the case. It is difficult to discern any pattern to the use of eminent domain compared to that pattern found for police power, but this is probably due to the fact that many more factors are present in eminent domain.[40] It would serve no useful purpose to make an exhaustive study of all access cases dealing with eminent domain, except to show by way of example the variety of ways eminent domain has been used to compensate a landowner. Compensation has been granted in those cases in which an abutter's access was impaired or eliminated by an elevated train or streetcar,[41] a bridge,[42] the closing of a street,[43] changing of a street's grade,[44] construction of a safety island in the center of a highway,[45] construction of curbing in front of a landowner's property,[46] construction of an underpass,[47] widening of a highway,[48] and the conversion of a conventional highway into a limited-access one.[49] As a matter of practice, many states[50] condemn a landowner's access rights without bringing the matter into court. Also, the creation of a limited-access highway often requires the condemnation of a portion of a landowner's property, and his loss of access is reflected in the amount paid.

[40] In deciding whether eminent domain is applicable many questions have to be answered, the major ones being did the abutter suffer an injury which was different from the injury suffered by the community as a whole, and did the abutter have a reasonable means of ingress and egress. Related to the question of reasonableness of access are circuity of travel and diversion of traffic. The only factor involved in determining police power is whether the state's action can reasonably be classified as a regulation or regulatory device.

[41] Adams v. Chicago, B. & N.R. Co., 39 Minn. 286, 39 N.W. 629 (1888); Story v. New York Elevated R.R. Co., 90 N.Y. 122 (1882); Lahr v. Metropolitan Elevated R.R. Co., 104 N.Y. 268, 10 N.E. 528 (1887).

[42] Field v. Barling, 149 Ill. 556, 37 N.E. 850 (1894).

[43] Village of Winnetka v. Clifford, 201 Ill. 475, 66 N.E. 384 (1903).

[44] Bacich v. Board of Control, 23 Cal. 343, 144 P.2d 818 (1943); Horn v. City of Chicago, 403 Ill. 549, 87 N.E.2d 642 (1949); Coyne v. City of Memphis, 118 Tenn. 651, 102 S.W. 355 (1907).

[45] State v. Linzell, *supra* note 25.

[46] See *supra* note 38.

[47] Rose v. State, 19 Cal.2d 713, 123 P.2d 505 (1942).

[48] People v. Ricciardi, *supra* note 25.

[49] Mississippi State Highway Commission v. Finch, 237 Miss. 314, 114 So.2d 673 (1959).

[50] See Covey, *Frontage Roads: To Compensate or Not to Compensate*, 56 Nw. U.L. Rev. 587 (1961). Mr. Covey sent a questionnaire to every state highway commission asking them if they compensated abutters for their loss of direct access to an expressway even though a frontage road was provided. Of the forty-five who replied, twenty-two said they did compensate as a matter of course, and twenty states and the District of Columbia replied that they did not. California and Illinois said that as a general rule, they would compensate if the frontage road was not part of the old highway.

From the above discussion, it is clear that there is a certain "overlap" in which the same fact situation could conceivably be decided either way.[51] Opposing results have occurred in cases dealing with the erection of curbing,[52] creation of limited-access highways,[53] and the closing of a street to traffic.[54] A similar result could well occur in other situations, and, thus, a real problem exists in determining whether a landowner should or should not be compensated.

Among the variety of solutions offered, the one given the most interest is the creation of a test or formula which would determine whether eminent domain or police power should prevail.[55] Such a test does not seem to have been devised. The biggest obstacle is finding factors upon which to base a workable test. Unfortunately, most attempts have ended with terms similar to those which have helped create the controversy. One writer feels the need for the property and the burden of compensation upon the public, on the one hand, and the injury to the landowner, on the other, should be considered.[56] Another suggests that the abutter's right of access be set against the government's power to create reasonable regulations.[57] A third writer chooses to balance "the rights of the landowner, the rights of the highway user, and the rights of the state."[58]

Two solutions proposed by the courts are more pragmatic but do not take in the full impact of the controversy. They both deal with determining whether the regulation as a police power is reasonable. These solutions are important, for, if the regulatory power is unreasonable, the police

[51] This discussion of "overlap" and a court's decision of similar factual situations applies to a hypothetical court that is free to decide the issue without disrupting precedent.

[52] As to curbing in the center of a highway, see *supra* note 33 (police power) and *supra* note 45 (eminent domain). As to curbing in front of a landowner's property, see *supra* note 37 (police power) and *supra* note 38 (eminent domain).

[53] See *supra* note 39 (police power) and *supra* note 49 (eminent domain).

[54] See *supra* note 30 (police power) and *supra* note 43 (eminent domain).

[55] See HAAR, CHARLES (ed.), LAW AND LAND: ANGLO-AMERICAN PLANNING PRACTICE (1964). Mr. David Craig, in his chapter *Regulation and Purchase: Two Governmental Ways to Attain Planned Land Use*, contends that the differences between eminent domain and police power are practically extinct and that old tests between them are no longer dependable. (See the Book Review section of this issue for a review of Mr. Haar's book).

[56] Note, 11 KAN. L. REV. 388 (1963). These comments as to the sufficiency of the terms proposed are not to be interpreted as criticism of those who formulated them but are meant to illustrate this contention that the solution to the problem is, at best, most difficult.

[57] Note, 14 BAYLOR L. REV. 70 (1962).

[58] Covey, *Highway Protection through Control of Access and Roadside Development*, 1959 WIS. L. REV. 567, 576.

power cannot be applied and the remedy of eminent domain may be available. A California court held that all questions of the reasonableness of a regulation were within the purview of the legislature, and the court looked to it for a determination of the issue.[59] The other pragmatic solution is that deference be given to the position of the state highway commission or similar body on the question of the reasonableness of a regulation, because the commission is believed to have superior knowledge of all the factors involved.[60]

Two obvious solutions to the controversy would be to build all expressways and limited-access highways on new sites, thus alleviating the need for compensation;[61] or to create legislation superseding the concepts of police power and eminent domain, thus granting compensation only under specific factual situations determined by the legislature.[62] Both of these solutions, however, duck the issue at hand—namely, to find a method of distinguishing eminent domain from police power.

To be just, any solution must take into consideration the age-old problem of the rights of the public clashing with the rights of the individual. On the one hand, if every access right is to be compensated, the construction of this much-desired highway system will be impeded by lack of funds. On the other hand, if a landowner's right of access, a property right in the past, can be taken without compensation, an injustice is being done to him. Of all the solutions proposed, perhaps the most acceptable would be a modification of the "formula" approach.[63] This proffered "solution," while by no means completely satisfactory, would be to place all factors involved (legal, social, economic and political) in a "formula" in which "the police power ends and the eminent domain power begins when the injury to the abutter in not being paid is greater than the injury to the public in having to pay for the property."[64]

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[59] Graham v. Kingwell, 218 Cal. 658, 24 P.2d 488 (1933).

[60] Ryan v. Rosenstone, *supra* note 37; Iowa State Highway Commission v. Smith, *supra* note 27.

[61] See *supra* note 9.

[62] Since both eminent domain and the state's police power are usually guarantees found in the state's constitution, such a solution would require a great deal of work to accomplish.

[63] See Note, 3 STAN. L. REV. 298, 302 (1951): "When does the taking of a property right cease being useful and start being necessary? . . . The answer . . . does not depend on legal concepts at all. Rather it is dependent upon economic and social considerations."

[64] Covey, *Frontage Roads: To Compensate or Not to Compensate,* 56 NW. U.L. REV. 587, 606 (1961).