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CONTROL OF HIGHWAY ACCESS

Frank M. Covey, Jr.*

State control of both public and private access is fast becoming a maxim of modern highway programming. Such control is not only an important feature of the Interstate Highway Program, but of other state highway construction programs as well. Under such programs, authorized by statute, it is no longer possible for the adjacent landowner to maintain highway access from any part of his property; no longer does every cross-road join the highway. This concept of control and limitation of access involves many legal problems of importance to the attorney. In the following article, the author does much to explain the origin and nature of access control, laying important stress upon the legal methods and problems involved.

The Editors.

I. INTRODUCTION—THE NEED FOR ACCESS CONTROL

On September 13, 1899, in New York City, the country's first motor vehicle fatality was recorded. On December 22, 1951, fifty-two years and three months later, the millionth motor vehicle traffic death occurred.¹ In 1955 alone, 38,300 persons were killed (318 in Nebraska); 1,350,000 were injured; and the economic loss ran to over \$4,500,000,000.² If the present death rate of 6.4 deaths per 100,000 miles of traffic continues, the two millionth traffic victim will die before 1976, twenty years after the one millionth.

Many of these deaths can be prevented only through law enforcement, motor vehicle administration, and driver education. But many others can be prevented through the design and engineering of our highways. Of all the design features, control of

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¹ Shearer, "Built-in Safety," *Automotive Industries*, Dec. 1, 1956, p. 71.

² "Accident Facts," National Safety Council (1956), p. 43. The total automotive deaths through mid-year 1956, 1,168,075, exceeded by a wide margin the 1,009,750 American military deaths in all the wars in our history from the first battle of the Revolution to the Korean conflict.

access contributes most to highway safety. It eliminates the danger of traffic entering the roadways, the danger of turns, and the danger of intersecting streams of traffic.

Although roads in the United States having a high degree of controlled access date back only to 1923, they have been in existence a sufficient length of time to allow the compilation of valid comparative records concerning accidents and fatalities on controlled and non-controlled access roads.³ It has been estimated that the fatal accident rate on highways with full control of access is one-fourth to one-half of the accident rate on comparable roads without access control.⁴ Known comparisons support this estimate⁵ and illustrate that control of access is a very necessary tool in reducing the staggering toll of death, injury, and property damage on our highways.

In addition to safety, limited access roads present the driver with a more economical and efficient means of transportation. The national highway system of over 3,300,000 miles of roads rep-

³ Information obtained from the Bureau of Public Roads gives an interesting comparison of the accident and fatality rates on controlled access versus non-controlled access facilities in major cities. There are 154 accidents with a fatality rate of 2.3 persons per 100 million vehicle miles driven on urban freeways as compared to 751 accidents and a fatality rate of 4.2 persons per 100 million vehicle miles driven on non-controlled city streets. See: "What Freeways Mean to Your City," Automotive Safety Foundation (1956).

⁴ Owen, "The Metropolitan Transportation Problem," The Brookings Institution (1956), pp. 43-45.

⁵ The following indicate the safety record of comparable limited access roads and land service roads:

- a. U.S. Route 1 in Maine, 22.3 deaths per 100 million vehicle miles; Maine Turnpike (controlled access—comparable), 2.8 deaths per 100 million vehicle miles. See: Gibbons and Proctor, "Economic Cost of Traffic Congestion," Highway Research Board Bulletin 86 (1954), pp. 1, 27.
- b. U.S. Route 1 in New Jersey, 103 deaths during years 1940 to 1944; Merritt Parkway (controlled access—comparable), 23 deaths during the same period. This reduction in the number of deaths compares favorably with the seventy-five percent reduction in accidents achieved in California after placing of limited access on the Arroyo Seco. See: Cunnyingham, "The Limited Access Highway From the Lawyer's Viewpoint," 13 Mo. L. Rev. 19,24 (1948). Hereinafter cited as Cunnyingham.
- c. U.S. Route 112 in Michigan, 15.0 deaths per 100 million vehicle miles; Detroit Industrial Expressway (controlled access—comparable), 6.7 deaths per 100 million vehicle miles. See: Williams and Fritts, "Let's Build Safety Into Our Highways," Public Safety, May, 1955 (reprint, p. 3).

resents the largest and best highway system in the world, yet it does not measure up to the requirements of modern highway transportation. A study in the Los Angeles area indicated that travel between two points which required ten minutes by horse and buggy in 1914 took fourteen minutes by car in 1942.⁶ Access controls have helped to remedy this situation in all sections of the country.⁷ In Detroit, the one and one-half mile trip on the Davidson Limited Highway reduced the time formerly required to cover the same distance from twenty or thirty minutes to three or four minutes. Limited access on the Arroyo Seco has cut twenty-five minutes off the driving time between Los Angeles and Pasadena, California.⁸

Studies of cost of operation on limited access roads indicate that they are much more economical for driving. In the Detroit area, it is estimated that operating costs on an expressway are 5.18 cents per mile as opposed to 8.90 cents per mile on city streets. In Los Angeles a similar study indicates 4.02 cents per mile for expressways and 8.12 cents per mile for surface streets.⁹ An extremely thorough study of comparative driving conditions concludes:

The data of this study indicates that fully and partially controlled-access highways carrying substantial volumes of through-traffic result in: (1) a significant saving in time and a significant reduction in gasoline consumption in urban areas; (2) a significant saving in time, but no significant reduction in gasoline consumption in suburban areas; (3) no significant savings in time nor reduction in gasoline consumption in rural areas; and (4) a significant decrease in the accident rate in urban, suburban, and rural areas.¹⁰

A limited access road is a more economical and efficient roadway for the driver.

⁶ Sert, *Can Our Cities Survive?* (1942).

⁷ This is clearly illustrated in a summary of twelve case studies. Where access was fully controlled, the average speed in both rural and urban areas was 47 miles per hour as compared with 39 miles per hour in suburban areas and 26 miles per hour in urban areas where no access control existed. May, "Economics of Operation on Limited Access Highways," *Highway Research Bulletin* 107 (1955), pp. 49-55. Hereinafter cited as May.

⁸ See Cunnyngham, *op. cit. supra*, note 5, at 19, 23. It is estimated that the Willowrun Expressway in the Detroit area saves five million man hours per year.

⁹ "Automotive Facts and Figures," *Automobile Manufacturers Association* (1956), p. 48.

¹⁰ See May, *op. cit. supra*, note 7, at 49, 61.

The controlled access road offers another significant advantage: it protects the state's investment in its road system. Our roads represent a tremendous investment in land, materials and money. Nebraska alone spent \$32,745,000 for its roads in 1955, exclusive of federal aid.¹¹ It is imperative to insure (1) that the state gets the maximum possible safe use from the roads it builds, and (2) that the maximum possible safe use is protected for as long as possible.

The maximum possible safe use of a roadway is best achieved through limitation of access. A six-lane controlled access road can carry 50,000 cars per day, but it would require 18 lanes for a non-limited access road to carry a like number. Fifteen hundred vehicles per hour can better be accommodated on a single controlled access lane than the 400 vehicles that a single non-controlled access lane can carry per hour.¹² Access control is an important device for insuring maximum use of our highways.

Furthermore, unless access control devices are used, a road may become functionally obsolete long before it is worn out. Without access control the "highway cycle" of overcrowding the roadside, growth of traffic-service facilities, and crippling of the road's traffic carrying capacity, will result in the reduction of the usefulness of many structurally serviceable roads.¹³ The state can ill afford the luxury of successively more frequent and more expensive highway relocations or by-passes. But with access controls we can "keep our highways young" and prevent such highway strangulation.

It would seem logical and justifiable to use similar measures to protect the public investment in the ordinary highways so important to the economy of the state. With the knowledge and skills now available to highway planners, it should be possible to lay out roads of reasonably permanent location with design standards adequate to insure that the roads will be serviceable indefinitely.¹⁴

¹¹ "Highway Statistics," Department of Commerce (1957), pp. 52, 56. Of this \$25,630,000 was spent for construction and \$7,685,000 was spent for maintenance. With the advent of recent Interstate Highway construction in Nebraska, this amount has substantially increased.

¹² Cunyngnam, *op. cit. supra*, note 5, at 19, 23. These statistics indicate that a limited access road can carry up to three times the amount of traffic with no increase or widening of existing traffic lanes.

¹³ Levin, "Public Control of Highway Access and Roadside Development" (1947), p. 5 *et seq.*

¹⁴ Ahner, "Planned Access-Control Keeps Our Highways Young," *Traffic Quarterly*, October, 1957, p. 459.

Control of access is the key to building safer, more pleasant, more efficient, and longer-lasting roads.

II. THE ORIGIN OF THE RIGHT OF ACCESS

While a leading access rights case states that “. . . [the right of access] may be said generally to have arisen by court decision declaring that such right existed and recognizing it,”¹⁵ the right developed by much more subtle means. In 1857, the leading American text on highway law made no reference to any rights that an abutter might possess in a highway,¹⁶ but such a concept had appeared in a 1741 Abridgement.

He that has *ingress into a house*, ought to have it at the *usual door*; and if they leave such door open, but *dig a ditch* that he cannot enter without leaped, it is a breach.¹⁷ [Emphasis in the original.]

This would seem to be the first legal recognition of the existence of a right of access from an abutter's land to an adjoining roadway.

In 1813 in a case that turned on whether a street was a public or private street, the Court of Common Pleas stated that if it were public, the plaintiff would have a right of access.¹⁸ “A public road differs from a private road in this: you may make an opening in your fence and go into it at any part of the length of the public road . . .”¹⁹ In 1860 in a similar case the court stated: “If it be a highway up to the boundary of the plaintiff's land, then as a matter of law, the plaintiff has a *right of access* to it from any part of his land.”²⁰ [Emphasis supplied].

While it was early recognized by the courts that access to the street system was a necessary adjunct to an urban lot,²¹ the first American case dealing with interference with the right of

¹⁵ *Bacich v. Board of Control*, 23 Cal.2d 343, 350, 144 P.2d 818, 823 (1943). For this reason, in determining the right of access, most cases rely, without discussion, upon precedents which are analogous to the circumstances in the case before the court.

¹⁶ *Angell and Durfee, Law of Highways* (1857).

¹⁷ *Viner's Abridgment*, “*Chimin Private*,” p. 516(c)(4) (2nd ed. 1741).

¹⁸ *Woodyer v. Hadden*, 5 Taut. 125 (C.P., 1813).

¹⁹ *Id.*, at 132.

²⁰ *Berridge v. Ward*, 2 F. & F. 208, 212 (N.P., 1860).

²¹ *Lewis Street*, 2 Wend, 472 (N.Y., 1829), where the court held that a purchase of a building lot bounded on a street shall have an easement of right of way in the street.

access was decided in 1839.²² The plaintiff tried unsuccessfully to enjoin the defendant from operating railway trains over the street on which the plaintiff abutted. The court stated:

The title to such [abutting] lots carries with it as essential ingredients, certain services and easements, not only valuable and almost indispensable, but as inviolable as the lots themselves. . . . [The abutting owners] have a peculiar interest in that street, which neither the local nor general public can pretend to claim—a private right of the nature of an incorporeal hereditament, legally attached to their contiguous ground—an incidental title to certain faculties and franchises assured to them by contract and by law, without which their property would be comparatively of but little value, and would never have been bought by them.²³

Several other scattered early cases deal with private or public non-highway interferences with the abutter's right of access.²⁴

The first court to develop a ratio decidendi on access rights was the New York Court of Appeals in the Elevated Railway cases.²⁵ These cases established the right of access in all abutting owners, no matter how the street was acquired (easement, fee, or in trust) by the city, as against *non-highway uses* of the street. The abutter has the right "to have the street left open, so that from it, access may be had to the lot, . . ."²⁶ This same court subsequently held that as against a *highway use* of the street, the abutter may not assert his right of access.²⁷ During this period, the United States Supreme Court held that it was bound by a state's determination of whether a right of access existed, and if

²² Lexington and Ohio R.R. Co. v. Applegate, 8 Dana 289 (Ky., 1839).

²³ Id., at 294.

²⁴ Haynes v. Thomas, 7 Ind. 38 (1855); Murphy v. City of Chicago, 29 Ill. 279 (1862); Jaynes v. Omaha Street Ry. Co., 53 Neb. 631, 74 N.W. 67 (1898). The latter case held that an abutting property owner is entitled to compensation if the presence of poles and wires in the street in front of his property causes such property to depreciate in value.

²⁵ Story v. The New York Elevated Railroad Co., 90 N.Y. 122 (1882); Lahr v. Metropolitan Elevated Railroad Co., 104 N.Y. 268, 10 N.E. 528 (1887); Kane v. New York Elevated Railroad Co., 125 N.Y. 164, 26 N.E. 278 (1891).

²⁶ Story v. The New York Elevated Railroad Co., 90 N.Y. at 146. Other important considerations were that light and air would be furnished to the property owner across the open way.

²⁷ Sauer v. City of New York, 180 N.Y. 27, 72 N.E. 579 (1904). An elevated viaduct was constructed by authorization of the state legislature and was devoted to proper street use. The court held that the structure was not, therefore, a nuisance and any losses to the abutting owners were *damnum absque injuria*.

so, when it was deprived.²⁸ In passing, the Court also noted that “. . . the right of an owner of land abutting on public highways has been a fruitful source of litigation . . . and the decisions have been conflicting, and often in the same state irreconcilable in principle.”²⁹

There are three possible reasons why the judicial concept of right of access was created: (1) the historical precedent that roads were intended to develop abutting lands; (2) the economic history of road construction; (3) the response to a need.

A. THE LOGICAL USE OF THE LOT AND ROAD.

Without free access to any abutting roads, the abutter's lot would have little use or value.³⁰ It was in reliance on the future use of such roads that the abutter purchased and developed his land.³¹ Since the early American law favored the development of our natural land resources, the courts easily conceived that the roads were intended to develop the abutting lands.³² From these premises the right of access logically flowed.

B. THE ECONOMIC HISTORY OF ROAD BUILDING.

Early road construction was *by* as well as *for* local use. Almost all highways were “land-service roads,” intended to provide access to abutting owners. Moreover, the abutters usually donated the land and materials, and often the labor used in constructing

²⁸ Meyer v. City of Richmond, 172 U.S. 82, 19 S.Ct. 106, 43 L.Ed. 379 (1898); Sauer v. City of New York, 206 U.S. 536, 27 S.Ct. 686, 51 L.Ed. 1176 (1906).

²⁹ Sauer v. City of New York, 206 U.S. at 548. The state courts have overruled or modified their own decisions so that, in the end, each state has, by legislation or judicial decision, established and limited the rights of abutting owners in accordance with its own view of the law and public policy.

³⁰ Burlington & M.R.R. Co. v. Reinhackle, 15 Neb. 279, 281, 18 N.W. 69, 70 (1883) where testimony tended to show that the property of the plaintiff depreciated in value about one-half because of the temporary blocking of the access street by the cars of the defendant while they were being loaded and unloaded.

³¹ *Supra*, note 21. The court felt that the purchaser had an easement of right of way in the street and that he was not liable to pay the owner for the value of the land appropriated by the corporation when the street was opened, but only for the fee subject to the easement.

³² Clay, Speech on Internal Improvement, 1824, in Hacker, “The Shaping of the American Tradition” (1947), p. 395 et seq.

the road.³³ The Supreme Court of South Carolina as late as 1836 upheld an order to open a road across private land using so much of the timber, earth, or rock from the land as might be necessary to build and maintain the road without receiving the landowner's consent or awarding him compensation.³⁴ Since the road was built by the abutting owner and was intended for his use, no one could deny his legal right to protect his access to it.³⁵

C. THE RESPONSE TO A FELT NEED.

The early cases primarily, if not entirely, are concerned with non-street uses of the streets for streetcars, elevated railways, and railroad tracks.³⁶ Since such uses of the street lowered the value of the abutting owner's property or made it less desirable and did not further the purpose for which the street was dedicated, the landowner deserved some form of protection or compensation. In order to grant such protection, the court needed a legal concept upon which to base its actions. Accordingly, it declared that the right of access existed and granted the desired protection.³⁷

In the *ad hoc* development of the right of access, it is more than likely that these three factors were interwoven to such a degree as to become indistinguishable. Whatever its origin, the right is now clearly established as a concomitant of ownership of land abutting on a highway.

The right of access to and from a public highway is one of the incidents of ownership and occupancy of land abutting thereon. Such right is appurtenant to the land and exists when the fee title to the way is in the public as well as when it is in private ownership. It is a property right of which the owner cannot be deprived without just compensation.³⁸

³³ Duhaime, "Limiting Access to Highways," 33 Ore.L.Rev. 16, 19 (1953). See *State v. Burk*, 200 Ore. 211, 265 P.2d 783 (1954).

³⁴ *State v. Dawson*, 3 Hill 100 (S.C., 1836). The theory behind this order was that a tacit reservation of so much material as may be necessary for the ordinary purposes of making roads and highways is part of every freehold grant.

³⁵ Note—"Freeways and the Rights of Abutting Owners," 3 Stanford L. Rev. 298, 300 (1951).

³⁶ *Jaynes v. Omaha Street Railway*, 53 Neb. 631, 74 N.W. 67 (1898)—a street car; *Metropolitan West Side Elevated Ry. Co. v. Stickney*, 150 Ill. 362, 37 N.E. 1098 (1894)—an elevated railway; *Adams v. Chicago B. & N. R. Co.*, 39 Minn. 286, 39 N.W. 629 (1888)—a railroad.

³⁷ *Supra*, note 15.

³⁸ 25 Am. Jur., *Highways*, § 154 (1954). This same section goes on to say that the right of access is, however, subordinate to the public convenience of which the public authorities having control of the streets are the judges.

III. THE NATURE OF THE RIGHT OF ACCESS

An abutting owner possesses an equal right with the rest of the public to the use of the street. In addition to this right he possesses other rights exclusive to him as an abutting owner.³⁹ This article, however, is concerned only with the owner's right of access, and then only about the interference with this right for *public highway purposes*.

Many of the early cases, and some of the modern ones, fall within three categories that are not applicable to the problem of public interference with, or control of, the right of access for highway purposes.⁴⁰ These categories are:

- (1) obstruction of access by a private individual for his own purposes, *e. g.*, obstructing the street with a private structure.⁴¹
- (2) obstruction of access by public acts, or failure to act, which deny the highway the use for which it was constructed, *e. g.*, vacation.⁴²
- (3) obstruction of access by public use of the highway for a non-highway purpose, *e. g.*, a railway.⁴³

These cases are not applicable to this problem because they do not concern either *public regulation* or a *highway purpose* which tends to increase the capacity or safety of the road.

³⁹ In this second class of rights are included: (1) the right of access, or ingress and egress, (2) the right of light and air, (3) the right of view, (4) the right to have the street kept open and continued as a public street, and (5) whatever adds to the value of the street to the abutter. See 10 McQuillin, *Municipal Corporations*, 3rd ed., § 30.56 (1950).

⁴⁰ Duhaime, "Limiting Access to Highways," 33 *Ore.L.Rev.* 16, 28 (1953).

⁴¹ *Michelsen v. Dwyer*, 158 Neb. 427, 63 N.W.2d 513 (1954); *McDonald v. English*, 85 Ill. 232 (1877). In the *Michelsen* case the Nebraska Supreme Court held that the use of part of any city street for private garage purposes would be injurious to and inconsistent with the public use of the street and hence could not be authorized by the city.

⁴² *Steck v. Platte Valley Public Power and Irrigation Dist.*, 132 Neb. 822, 273 N.W. 268 (1937); *City of Chicago v. Union Bldg. Co.*, 102 Ill. 379 (1882); *Johnson v. Oakland*, 148 Md. 432, 129 Atl. 648 (1925).

⁴³ *Jaynes v. Omaha Street Ry. Co.*, 53 Neb. 631, 74 N.W. 67 (1898); *Webb v. Baltimore and O. R. Co.*, 114 Md. 216, 79 Atl. 193 (1910).

Within this frame of reference, what is the right of access? The Supreme Court of Nebraska stated:

The right 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 the abutting property has, not in common with the public generally, and of which he can not be deprived without due process of law and compensation for his loss.⁴⁴

It inheres only in property abutting on the street.⁴⁵

The right of access need not be exercised to preserve it, but any failure to use the access may be reflected in diminishing the damages for taking the unexercised right.⁴⁶ While the older cases speak of access from any point on the land contiguous to the highway,⁴⁷ the modern well-reasoned cases restrict the right to reasonable access from the land.⁴⁸ The Supreme Court of Nebraska has stated:

The measure of the right of the owner of property abutting on a street to access to and from it by way of the street is reasonable ingress and egress under all the circumstances. The right of access does not extend to all points in the boundary between the abutting property and the street.⁴⁹

The right of access is subject to the fullest exercise of the public's primary right of travel on the street.⁵⁰ Accordingly the right of access is not impaired by reasonable traffic regulations

⁴⁴ *Hillerege v. City of Scottsbluff*, 164 Neb. 560, 573, 83 N.W.2d 76, 84 (1957). See also *Burlington & M.R.R. Co. v. Reinhackle*, 15 Neb. 279, 18 N.W. 69 (1883).

⁴⁵ *City of Los Angeles v. Geiger*, 94 Cal.App.2d 180, 210 P.2d 717 (1949).

⁴⁶ *Department of Public Works v. Filkins*, 411 Ill. 304, 104 N.E.2d 214 (1952). The jury viewed the premises and were of the opinion that ingress and egress would be provided in a better manner after the construction of the highway. Therefore, an award of just compensation was unnecessary as what was given up was of no value.

⁴⁷ E.g., *Berridge v. Ward*, 2 F.&F. 208 (N.P., 1860).

⁴⁸ *Hillerege v. City of Scottsbluff*, 164 Neb. 560, 83 N.W.2d 76 (1957); *State Highway Commission v. Smith*, 248 Iowa 869, 82 N.W.2d 755 (1957); *New York, C. & St. L., R. Co. v. Bucsi*, 128 Ohio St. 134, 190 N.E. 562 (1934).

⁴⁹ *Hillerege v. City of Scottsbluff*, 164 Neb. 560, 574, 83 N.W.2d 76, 85 (1957). The City of Scottsbluff was allowed to restrict access to the street (U.S. Hwy 26) which deprived the plaintiff's business, Terry's Town and Country, of off-street parking because the widening and curbing of the street was a reasonable good faith exercise of the police power.

⁵⁰ *Supra*, note 27.

even though they result in making the access more difficult or less useful.⁵¹ Left turn⁵² or one way street regulations⁵³ do not affect the abutter's right of access. They merely regulate the flow of traffic once access to the streets has been gained. Nor is the right of access affected by regulation of the type of traffic on the abutting street such as weight restrictions⁵⁴ and boulevard regulations.⁵⁵ All of these regulations fall into the category of reasonable traffic regulation to which the right of access is subject.

The right of access is subject to two other serious limitations. The right of access is not affected by (1) the fact that circuitry of travel will result from the action, and (2) the fact that traffic will be diverted from passing the abutting property.

A. DIVERSION OF TRAFFIC.

An abutting land owner has no legal right to a continuation of the flow of traffic in front of his property. Claims of damage have been made that the relocation of a highway has diverted the main stream of traffic away from the abutter's land, and that such diversion of traffic has reduced the value of the abutter's premises. This is not a compensable injury to the right of access.

While the cases have generally concerned an attempt to relocate the highway on other than the abutter's remaining property,⁵⁶ the strongest possible situation was presented in a New

⁵¹ The classic case on this proposition, *Jones Beach Blvd. Estate v. Moses*, 268 N.Y. 362, 197 N.E. 313 (1935), held that the plaintiff's access had not been deprived or injured where, because of no left turn regulations and divided traffic lanes, he was required to proceed an additional five miles from his property to his right before he could proceed to the left.

⁵² *Ibid.*

⁵³ *Chissel v. City of Baltimore*, 193 Md. 535, 69 A.2d 53 (1949); *Cavanaugh v. Gerk*, 313 Mo. 375, 280 S.W. 51 (1926); *Commonwealth v. Nolan*, 189 Ky. 34, 224 S.W. 506 (1920).

⁵⁴ *Wilbur v. City of Newton*, 310 Mass. 97, 16 N.E.2d 86 (1938); *People v. Linde*, 341 Ill. 269, 173 N.E. 361 (1930). The latter case held that a limitation of gross weight on one axle of a vehicle does not take property without due process of law, but is a proper exercise of the police power.

⁵⁵ *Illinois Malleable Iron Co. v. Commissioners of Lincoln Park*, 263 Ill. 446, 105 N.E. 336 (1914); *Abrey v. Livingstone*, 95 Mich. 181, 54 N.W. 714 (1893).

⁵⁶ *E.g., State v. Linzell*, 163 Ohio St. 97, 126 N.E.2d 53 (1953).

Mexico case.⁵⁷ The relocated highway, U. S. 85, was also on the abutter's land, but inaccessible to the improvements he had built to service the traffic on old U. S. 85. He alleged that since some of his property was being taken, the before and after valuation test should be applied, and that the after valuation should reflect the diminution in value of his property by the diversion of traffic away from his improvements abutting old U. S. 85. The court held that such an element of damage is non-compensable.⁵⁸

. . . an owner has no right in the continuation or maintenance of the flow of traffic past his property. The diminution in the value of land occasioned by a public improvement that diverts the main flow of traffic from in front of one's premises is non-compensable.⁵⁹

B. CIRCUITY OF TRAVEL.

An abutting owner has no legal right to travel from his property to his destination in the most direct route possible. We have already noted the effect of reasonable traffic regulations. The abutter's right consists of access to the system of public streets; from then on, his rights are those of an ordinary highway traveller. Claims of damage have been made that an improvement forces an abutter to travel a greater distance once on the road system to reach his destination. This is not damage to the right of access.⁶⁰

The most common occurrence of this problem is in the division into lanes of a highway. A dividing strip is placed in the middle

⁵⁷ *Santa Fe County v. Slaughter*, 49 N.M. 141, 158 P.2d 859 (1945).

⁵⁸ See also *City of Chicago v. Spoor*, 190 Ill. 340, 60 N.E. 540 (1901); *Petition of Johnson*, 344 Pa. 158, 23 A.2d 880 (1942); *McMinn v. Andersen*, 189 Va. 289, 52 S.E.2d 67 (1949). Contra, *Pike County v. Whittington*, 263 Ala. 47, 81 So.2d 288 (1955). The Pike case held that the abutter is not entitled to compensation merely by reason of relocation of a highway. However, if such relocation involves taking of a portion of the abutter's land, the fact that the abutter's buildings and business enterprises are thereby made less accessible to the highway is a circumstance to be determined in assessing damages.

⁵⁹ *State v. Linzell*, 163 Ohio St. 97, 126 N.E.2d 53 (1953).

⁶⁰ *Hanson v. City of Omaha*, 157 Neb. 403, 59 N.W.2d 622 (1953). The court held that persons claiming an interest in property not abutting on the street or alley to be closed were not entitled to recover damages unless they could show an injury which was different in kind, and not merely in degree, from that suffered by the public at large. Where such property owners had to travel a more roundabout way to reach certain points because of the closing of streets and alleys, the injury was held to be different from that sustained by the public only in degree.

of the roadway and the two streams of traffic are physically separated. An abutting owner may then proceed in only one direction on leaving his property; he must proceed in that direction to an area in which a U-turn or left turn is permitted and return to go the other way. This does not affect the right of access,⁶¹ even though it lowers the abutting land's value,⁶² or requires the abutter to travel several hundred feet out of his way.⁶³ Where such dividing strip also closes off an intersecting street some courts held this is encompassed in the non-compensable aspects of the circuity of travel doctrine;⁶⁴ others hold it compensable on a theory of vacation.⁶⁵

The circuity doctrine also applies where an improvement between the abutter's land and destination, but not affecting his immediate highway access, makes his travel more lengthy. A limited access road cutting off a direct road to town and requiring a landowner to travel over a different route that is a mile longer has been held mere circuity and non-compensable.⁶⁶ Once upon the highway the abutter does not deserve to be treated any differently than any other member of the traveling public; he has no legal right infringed by mere circuity of travel.

⁶¹ *Turner v. State Roads Commission*, 213 Md. 428, 132 A.2d 455 (1957); *State Highway Commission v. Smith*, 248 Iowa 869, 82 N.W.2d 755 (1957); *Dougherty County v. Hornsby*, 213 Ga. 114, 97 S.E.2d 300 (1957); *Brady v. Smith*, 139 W.Va. 259, 79 S.E.2d 851 (1954); *City of Fort Smith v. Van Zandt*, 197 Ark. 91, 122 S.W.2d 187 (1938).

⁶² *Langley Shopping Centers Inc. v. State Roads Commission*, 213 Md. 230, 131 A.2d 690 (1957).

⁶³ *People v. Sayig*, 101 Cal.App.2d 890, 226 P.2d 702 (1951).

⁶⁴ *Holman v. State*, 97 Cal.App.2d 237, 217 P.2d 448 (1950).

⁶⁵ *Hamilton v. State Highway Commission*, 220 Miss. 340, 70 So.2d 856 (1954). Here, plaintiffs were joint owners of corner lots upon different sides of the street. Defendant Highway Commission placed dividing strip in the center of the street upon which both lots abutted and allowed this strip to blockade the cross-street, thus effectively separating the properties. The court held that blockading the cross-street was a vacation of a street, for which compensation had to be given under statute, and distinguished this situation from that of causing mere inconvenience of travel where property does abutt on vacated street.

⁶⁶ *Department of Highways v. Jackson*, — Ky. —, 302, S.W.2d 373 (1957). But see *Nichols v. Commonwealth*, 331 Mass. 581, 121 N.E.2d 56 (1954). The latter case held that “. . . the Legislature [by statute] plainly established that any impairment or deprivation of access which an owner formerly had to a public way may so affect the value of the remainder of the land not taken as to be compensable in damages . . .” 121 N.E.2d at 58.

The right of access may be redefined as a right of ingress and egress from abutting premises onto the highway, which is subject to reasonable traffic regulations and is not affected by any diversion of traffic on the highway or any circuitry of travel encountered once on the roadway.

IV. THE MEANS OF ACCESS CONTROL

Control of access to promote safety, increase efficiency, and protect the highway investment is important to the Interstate Highway System at two levels: (1) the control of access on the 41,000 miles of the System itself, and (2) the control of access on the state primary roads that will act as feeder roads to the System and carry the eighty percent of American highway traffic not served by the Interstate System.

State actions to control access will fall under one of two basic constitutional classifications: eminent domain or police power.⁶⁷ In the area of access controls the power to take property for the public use on payment of just compensation and the power to regulate the use of property in the public interest without the payment of compensation are closely interwoven. In determining under which classification a specific act falls involves weighing many conflicting interests.⁶⁸ Rather than analyzing the legal results in terms of eminent domain and police power it is preferable to view the whole kit of access control tools available for both the Interstate System and the state primary system, evaluating the problems that arise thereunder, indicating where there have been court tests of them, and how the tools have been classified.

There are three general approaches to the problem of access controls: (1) *Denial or Limitation of Access*, which constitutes

⁶⁷ In England, while the right of access is recognized, *Marshall v. Borough of Blackpool*, 1935 A. C. 16 (House of Lords), no comparable constitutional limitation to just compensation exists on public takings. The right of access is subject to severe statutory restrictions without compensation. See Garner, *The Public Control of Land* (1956), p. 80.

⁶⁸ See *Bacich v. Board of Control*, 23 Cal.2d 343, 144 P.2d 818 (1943). Such interests include the private right of a property owner in the nature of an easement in the street which is appurtenant to his abutting property and which is his private right as distinguished from his right as a member of the public and from the general policy of distributing throughout the community the loss inflicted upon the individual by a public improvement. Such a policy adds the phrase "or damaged" to the word "taken" in the eminent domain clause of the Constitution.

control of access directly by restricting or fully denying it to the abutter; (2) *Control of The Amount of Access*, which constitutes control of access indirectly by controlling the number and location of the access points allowed to the abutter; (3) *Control of the Type of Access*, which also constitutes control of access indirectly by controlling the nature of the access allowed the abutter.

A. DENIAL OR LIMITATION OF ACCESS

Denial or limitation of access is a frontal assault on the access problem: it seeks a solution by either fully eliminating or seriously restricting the right of the abutting owners to access. Denial or limitation of access can take three forms: the controlled-access road, the freeway, and the parkway.⁶⁹ The first two directly limit the abutter's right of access; the latter prevents the land owner from becoming an abutter by swath-land purchases.

1. *The Controlled Access Road*

A controlled access road is one planned . . . "to give preference to through traffic to a degree that, in addition to access connections with selected public roads, there may be some crossings at grade and some private driveway connections."⁷⁰ This control device allows certain limited access in areas where it does not constitute an undue danger and eliminates it completely in danger areas.

In congested areas complete extinguishment of existing rights of direct access may be necessary. In areas where there is less extensive traffic, as in agricultural areas, some limited direct access may be permitted to abutting owners without unduly endangering through traffic.⁷¹

⁶⁹ According to the American Association of State Highway Officials, "An expressway is a divided arterial highway for through traffic with full or partial control of access and generally with grade separations at intersections." The three types of expressways discussed here generally follow the AASHO definitions. See "Roadside Protection," American Automobile Association (1951), p. 14n.

⁷⁰ Iowa State Highway Commission, Rules and Regulations Regarding Controlled Access Highways (Revised to Feb. 25, 1957), Rule II B. Nebraska has defined a "controlled access facility" by a recent statute as ". . . a highway or street especially designed for through traffic and over, from, or to which owners or occupants of abutting land or other persons have no right or easement or only a controlled right or easement of access, light, air, or view by reason of the fact that the property abuts upon such controlled access facility or for any other reason . . ." Neb. Rev. Stat. § 39-1302(6) (Supp. 1957).

⁷¹ *Finks v. Department of Public Works*, 10 Ill.2d 20, 24, 139 N.E.2d 242, 245 (1956).

The controlled access road presents a flexibility of approach to the access problem. It achieves some degree of safety and economy without condemning all existing access rights along a road. On such a traffic facility access for residential or farm purposes would be allowed in those areas and under those conditions which prevent it from being harmful to the flow of traffic.

An effective controlled access program involves three steps: (1) Freezing all existing access points on the highway and allowing future access points only under specified conditions of use and construction; (2) Restricting existing access points on the highway to their current use to prevent their becoming commercial or industrial; (3) Denying existing access in those areas, *e. g.*, curves, hills, vision triangles, or under those uses, *e. g.*, commercial, which constitute a hazard to the highway.

In Nebraska where an abutter's right of access grants him only reasonable ingress and egress under all the circumstances,⁷² there should be no legal problem involved in freezing all existing access points and allowing future access points only where they are reasonable in light of all the circumstances, *e. g.*, location, design and intended use.⁷³ Such a step will prevent a new unregulated roadside development along the highway.

All existing access points on the highway should be restricted to their current use. This is also a police power measure, and will prevent the conversion of existing residential or agricultural access points into commercial or industrial ones.⁷⁴ This will pre-

⁷² "The extent of that right is . . . we think . . . simply reasonable ingress and egress under all the circumstances." *Hillerege v. City of Scottsbluff*, 164 Neb. 560, 575, 83 N.W.2d 76, 85 (1957). "It is generally for municipal authorities, in the exercise of the police power delegated to the city in reference to its streets, to determine what action is required for the safety, convenience, and welfare of the people . . . the test in such a case is whether or not the action proposed is a good faith, reasonable exercise of the police power or an arbitrary and unreasonable interference with the rights of the person or persons affected thereby." *Id.*, at 576 and 85. See also *State Highway Commission v. Smith*, 248 Iowa 869, 82 N.W.2d 755 (1957).

⁷³ *Alexander Co. v. City of Owatonna*, 222 Minn. 312, 24 N.W.2d 244 (1946); *Village of Elmhurst v. Buettgen*, 394 Ill. 248, 68 N.E.2d 278 (1946).

⁷⁴ *Man v. Vockroth*, 94 N.J.Eq. 511, 121 Atl. 599 (1923). In this case, an easement in a deed conveying summer residence property which restricted the use of an adjoining private road to dwelling house purposes, for which it was used at the time of conveyancing, was held to be valid, and prohibited the use of the road by guests, tradesmen, and others, to a boardinghouse established by the purchaser.

vent further unregulated roadside development in the existing roadside pattern.

Finally, existing access points in those areas or under those uses which are unreasonable or dangerous to the highway must be extinguished. The regulation of existing access, if it merely restricts the existing access to reasonable access, is a non-compensable police power regulation;⁷⁵ but if the regulation completely denies existing access or destroys its total usefulness, then the access must be either purchased by agreement or condemned.⁷⁶

A controlled access highway is created and protected by an interplay of police power and eminent domain control powers. This control device involves only moderate cost to the state in condemnation awards, but in turn it produces only a limited form of protection. While it leaves many access points on the highway, it nevertheless effectively regulates the pattern of future roadside development. Such control device is well suited to a moderately travelled primary road.

2. *The Freeway*

A freeway is a road planned "to give preference to through traffic by providing access with selected public roads only, and by prohibiting crossings at grade or direct private driveway connections."⁷⁷ This control device entirely eliminates all access to the roadway from abutting land. It is a roadway entirely isolated, often by physical barriers, from the abutting land. This is the type of road that will make up most of the 41,000 miles of the Federal Interstate Highway System.

A freeway can be laid on converted existing road or entirely on new alignment. Each can present a different problem of control devices.

(1) *On An Existing Road.* A freeway is sometimes built on the site of an existing road. Since the abutters have a right of

⁷⁵ *Supra*, note 72.

⁷⁶ *Jones v. City of Aurora*, 97 Neb. 825, 151 N.W. 958 (1915); *In re Condemnation of Land*, 178 Kan. 26, 283 P.2d 392 (1955); *Boxberger v. State Highway Commission*, 126 Colo. 526, 251 P.2d 920 (1952).

⁷⁷ Iowa State Highway Commission, Rules and Regulations Regarding Controlled Access Highways (Revised to Feb. 25, 1957), Rule II A. In Nebraska, the term "Freeway" is now defined by statute as ". . . a divided arterial highway for through traffic with . . . full control of access . . . and generally with grade separations at intersection . . ." Neb.Rev.Stat. §§ 39-1302(9), 39-1302(10) (Supp. 1957), (Combined of necessity).

access to the existing road that must be extinguished before the road can be converted to a freeway, the state must purchase or condemn all their access rights.⁷⁸ The cost of purchasing these rights often exceeds the cost of new right of way, with the result that freeways are not often laid on the location of an existing highway except in urban or highly developed areas.

In those areas where for engineering, development, or other reasons, a freeway is built on the location of an older highway three major legal problems arise: (1) valuation of the access rights taken on condemnation, (2) the effect of providing service roads or frontage roads to the abutting owners, and (3) the effect of creating a dead-end or cul-de-sac on a formerly intersecting street which is not carried under or over the freeway.⁷⁹ The valuation of access rights is a complicated problem and beyond the scope of this article. It is introduced here merely to alert the reader to the fact that such a problem is involved in converting an existing highway to a freeway.⁸⁰

The design of a freeway often includes service roads or frontage roads which provide the abutting owner with a means of local transportation and, at certain locations, provide a means of ingress to the express portion of the freeway. Where the abutting owner's access to the converted freeway is cut off but access to a frontage road is provided, has his right of access been impaired? Three possible solutions have been put forth by the courts:

(a) There is no damage for deprivation of access when an existing highway is converted to a freeway where a service road is supplied.⁸¹ This result is based on the reasoning that the abutter's right of access is only to the public road system and not necessarily the express portions thereof and that any circuitry of travel that results once on the roads system is non-compensable.

(b) There is no damage for deprivation of access when an existing highway is converted into a freeway when a service road

⁷⁸ Neb.Rev.Stat. § 39-1329 (Supp. 1957). See also *Department of Public Works v. Wolf*, 414 Ill. 386, 111 N.E.2d 322 (1953).

⁷⁹ This last problem, the cul de sac, also arises when a freeway is built entirely on new location and the roads that lie in its path are not carried over or under the freeway. The question will not be treated again under freeways built on new location.

⁸⁰ See generally Keefe, "Damages to Property Not Taken." 1957 U. Ill. Law Forum 296.

⁸¹ *Gilmore v. State*, 143 N.Y.S.2d 873 (Ct. Claims, 1955).

is supplied and none of the abutter's land is taken;⁸² but there are damages for deprivation of access under such circumstances when some of the abutter's land is taken in the conversion.⁸³ This result is reached on a constitutional basis. In both cases, the courts argue that the abutting land suffers consequential damages, *i. e.*, the property decreases in actual value by being placed on a frontage road. In the former case, however, there has been no "taking" within the constitutional eminent domain limitations so there can be no compensation; but in the latter case, since there has been a taking, the damage will be reflected in the before-and-after valuations and will be compensated.

(c) There are damages for deprivation of access when an existing highway is converted into a freeway in all cases even though a service road is provided, but the service road will act in mitigation of these damages.⁸⁴ This result is reached by holding that the abutter has a right of access to the express portion of the highway, but that some form of access mitigates his damages.

It is submitted that the first solution—no damages for deprivation of access where a service road is supplied—is the preferable result. The abutter who has access to the service road has access to the public road system, and any circuitry of travel or diversion of traffic that he experiences is not compensable. Moreover, under any other rule the Highway Commission would be providing the abutter with a service road to give him access and would in turn be required to pay him for impairing his access.

The 1955 Nebraska Legislature answered this question by choosing the first solution. It provided:

Upon the construction of any frontage road, any right of access between the controlled access facility and property abutting or adjacent to such frontage road shall terminate and ingress and egress shall be provided to the frontage road at such places as will afford reasonable and safe connections.⁸⁵

⁸² State v. Lynch, — Mo. —, 297 S.W.2d 400 (1956), held that defendants, who complained only that new construction would deprive them of direct access, were not necessarily parties to the condemnation action.

⁸³ State v. Meyers, — Tex. App. —, 292 S.W.2d 933 (1956), which held that owners of condemned land are entitled to the value of the land taken, as well as damages to the remaining property, and are entitled to show loss of profits from their business if they are able

⁸⁴ State v. Ward, 41 Wash.2d 794, 252 P.2d 279 (1953); People v. Ricciardi, 23 Cal.2d 390, 144 P.2d 799 (1943).

⁸⁵ Neb.Rev.Stat. § 39-1328 (Supp. 1957).

The design of the freeway often includes cutting off or "dead-ending" existing intersecting streets which, for design reasons or low traffic counts, are not to be carried over or under the freeway. Where an owner of property abutting on that "dead-ended" street seeks compensation for deprivation of his right of access by the creation of the cul-de-sac has he a legally cognizable claim? The courts have provided two divergent answers to this question.

Some courts have held that the right of access extends in both directions to the next intersecting street, with the result that abutting owners on a cul-de-sac created by a freeway must be compensated for the impairment of their access.⁸⁶ Other courts have held that the right of access extends only to reasonable access onto the system of public roads with the result that abutting owners on a cul-de-sac created by a freeway are not compensated as their access has not been impaired.⁸⁷ The Nebraska Supreme Court has held that the vacation of that part of a road leading toward the abutting owner's principal market area created a special damage for the abutting owner;⁸⁸ the Court has reached the same result where the "dead-ending" of a street is equivalent to vacation of the street.⁸⁹ When the abutter's land borders the closed area of the cul-de-sac, he has been held to be damaged and deserving of compensation.⁹⁰ But an owner having property abutting on an

⁸⁶ *Bacich v. Board of Control*, 23 Cal.2d 343, 144 P.2d 818 (1943); *Felton v. State Highway Board*, 47 Ga.App. 615, 171 S.E. 198 (1933); *City of Chicago v. Webb*, 102 Ill.App. 232 (1902). See *Lindley v. Oklahoma Turnpike Authority*, — Okla. —, 262 P.2d 159 (1953).

⁸⁷ *Weir v. Palm Beach County*, — Fla. —, 85 So.2d 865 (1956); *Smick v. Commonwealth*, — Ky. —, 268 S.W.2d 424 (1954); *New York, C.&St. L.R.Co. v. Bucsi*, 128 Ohio St. 134, 190 N.E. 562 (1934). See in re *5th Street*, 146 N.Y.S.2d 794 (1955), where the court indicates that while a statute controls, at common law no compensation would be granted.

⁸⁸ *Steck v. Platte Valley P.P. and I. Dist.*, 132 Neb. 822, 273 N.W. 268 (1937). The owner in the instant case was cut off from the town of Sutherland when defendants proposed to flood the existing road with a reservoir between plaintiff's property and town. The court held that this created a special damage not common to the community at large, and that this was true even though plaintiff had previously sold some land to defendants with knowledge that a reservoir was to be constructed.

⁸⁹ *Lowell v. Buffalo County*, 119 Neb. 776, 230 N.W. 842 (1930). The plaintiff's land was located on an island, and the road which crossed the island and river was his only means of access. Vacating part of the road created a cul de sac.

⁹⁰ *Jones v. City of Aurora*, 97 Neb. 825, 151 N.W. 958 (1915). Here the plaintiff's subdivided land was considered as one tract bordering the vacated portion of the street.

open street as well as the street "dead-ended" or closed, or who is merely using such a street, has not suffered a special or peculiar damage differing in kind from the general public and has suffered no compensable injury.⁹¹ In view of the particular facts in the cases recognizing this doctrine it is possible that compensation will be limited to the immediate abutters on the vacated portion of the street. Such a result is desirable,⁹² particularly in view of the Nebraska holding that an abutter is only entitled to reasonable access. In any case, the abutter's right extends no further than the next intersecting street, but not through it.⁹³ So that a street which is cut off but connects with a frontage road will not be considered a cul-de-sac and any alleged damage will be viewed as mere circuity of travel.⁹⁴

The conversion of an existing road to a freeway presents a cost problem with compensation for access rights that often makes it less expensive to build on an entirely new location. But in those situations where other factors make this impossible, these are the particular problems which will be faced.

(2) *On A New Alignment.* Generally, freeways in rural areas are built on entirely new locations. Some states have even restricted the power of building freeways to ones built entirely on new location.⁹⁵ Nebraska has specifically authorized the construction of freeways on either new alignment or pre-existing roads.⁹⁶ The problem of the cul-de-sac reappears here, but the principles discussed above are controlling. The major question raised by a freeway laid on new location is whether the abutter-to-be on the intended freeway has a right of access to the new road for which he must be compensated. Or, in short, can a roadway be dedicated as a freeway, or must it be dedicated as a road and the abutter's right of access then condemned to convert it to a freeway.

⁹¹ *Supra*, note 62.

⁹² See *Smick v. Commonwealth*, — Ky. —, 268 S.W.2d 424 (1954).

⁹³ *Dantzer v. Indianapolis Union Ry. Co.*, 141 Ind. 604, 39 N.E. 223 (1894).

⁹⁴ *Beckham v State*, 64 Cal.App.2d 487, 149 P.2d 296 (1944). Here, the construction of an improvement on the street intersecting the street on which plaintiff's property fronted was not compensable as the plaintiff could not show infringement of his right of reasonable use of the street fronting his property in either direction to the next intersection.

⁹⁵ "Expressway Law," Highway Research Board Special Report 26 (1957) p. 38 ff.

⁹⁶ Neb. Rev. Stat § 39-1327 (Supp. 1957).

This problem presented difficulties to the courts when first raised. Conditioned to think of all roads as land-service roads, the courts, when first concerned with entirely traffic-service roads, indicated that such access rights arose in the abutter and must be condemned.⁹⁷ However, starting in 1949 a line of California decisions held that where no highway previously existed the construction of a freeway gave the abutting property no right of access.⁹⁸ Since that time Kentucky, Oregon, Missouri, Wisconsin, Connecticut and Washington⁹⁹ have reached the same result.

. . . the abutter receives or reserves no grant of unlimited access, and the cases have held he is entitled neither to damages nor an injunction, when access is restricted by the conditions of the original dedication of the highway.¹⁰⁰

It would seem clear that where a highway is dedicated as a freeway that no right of access arises in the abutting owner. The principle of restricted dedication has long been known at the common law;¹⁰¹ this is merely its modern application. Moreover, any other rule would result in the highway commission having to condemn a right it had just created in order to put the intended highway into use. Such a result is both costly and ridiculous.

The 1955 Nebraska Legislature also answered this question. It provided that:

If the construction or reconstruction of any highway, to be paid for in whole or in part with federal or state highway funds,

⁹⁷ *Burnquist v. Cook*, 220 Minn. 48, 19 N.W.2d 394 (1945); *State v. Ward*, 41 Wash.2d 794, 252 P.2d 279 (1953). In the *Burnquist* case, seven years of unobstructed access-use had occurred from the dedication to the attempted restriction; in the *Ward* case, the court held that the limited access nature of the facility must be specially presented to the jury, thus implying that a right of access had accrued to the remaining land

⁹⁸ *City of Los Angeles v. Geiger*, 94 Cal.App.2d 348, 210 P.2d 717 (1949); *People v. Thomas*, 108 Cal.App.2d 832, 239 P.2d 914 (1952); *Schnider v. State*, 38 Cal.2d 439, 241 P.2d 1 (1952).

⁹⁹ *Smick v. Commonwealth*, — Ky. —, 268 S.W.2d 424 (1954); *State v. Burk*, 200 Ore. 211, 265 P.2d 783 (1954); *Carazalla v. State*, 269 Wis. 593, 71 N.W.2d 276 (1955); *State v. Clevenger*, 365 Mo. 970, 291 S.W.2d 57 (1956); *South Meadows Realty Corp. v. State*, 144 Conn. 289, 130 A.2d 290 (1957); *State v. Calkins*, 50 Wash.2d 716, 314 P.2d 449 (1957).

¹⁰⁰ Hutton, "Restricted Dedication of Rights of Way for New Expressways of Other Limited Access Facilities," *Highway Research Board Bulletin* 30 (1951) p. 38, 58.

¹⁰¹ *Home Laundry Co. v. City of Louisville*, 168 Ky. 499, 182 S.W. 645 (1916), where the court stated that the dedicators of a public way may impose any condition as to its use which they may desire, even to limiting a street to the use of pedestrians.

results in the abutment of property on such highway that did not theretofore have direct egress and ingress to it, no direct rights of access shall accrue because of such abutment. . . .¹⁰²

3. *The Parkway.*

A parkway is a road bordered by a broad expanse of land in public ownership on both sides of the highway that would make commercial exploitation impractical because the business establishment on the nearest private land would be either unseen, or too remote, or both, from the highway. Whether there is access to the road through the public land bordering on the road depends on the statute creating the road.¹⁰³ Such a control device is feasible only for scenic routes and is considerably more expensive than normal right of way purchases. When built on new location, if the dedication is restricted, the principles discussed above should apply.

B. CONTROL OF THE AMOUNT OF ACCESS.

A second means of restricting or controlling access to a highway includes the devices which seek to control the number and location of the access points onto the road. Where the access is concentrated into pre-determined areas special traffic-receiving facilities may be engineered to receive the increased traffic. The first device, subdivision controls, attempts to do this through the state's control over subdividers. The second device, official mapping, is based on the government's power of mapping future streets.

1. *Subdivision Controls*

Subdivision control generally requires that one who divides his land for sale file for record an accurately surveyed map or plat. This plat must be approved by one or more official bodies,

¹⁰² Neb. Rev. Stat. § 39-1329 (Supp. 1957).

¹⁰³ *Gleason v. Metropolitan Dist. Comm.*, 270 Mass. 377, 170 N.E. 395 (1930) where it was held that a denial of all access to an abutter should not be inferred without statutory language clearly conferring the power to declare such a denial. See also: *Anzalone v. Metropolitan Dist. Comm.*, 257 Mass. 32, 153 N.E. 325 (1926); *City of Atlanta v. West*, 60 Ga. App. 269, 3 S.E.2d 755 (1939); *Abrey v. Livingstone*, 95 Mich. 181, 54 N.W. 714 (1893). Note that Nebraska now defines a parkway within the statutes as ". . . an arterial highway for non-commercial traffic, with full or partial control of access, and usually located within a park or a ribbon of park-like development." Neb. Rev. Stat. § 39-1302(16) (Supp. 1957).

varying with the individual state. When a tract of land is subdivided, the subdivider comes under official regulation in such matters as lot size, sewerage facilities, and provision for streets; and such regulations are a legitimate exercise of the police power.¹⁰⁴ Subdividing land abutting on a highway intensifies the land use and generates more traffic. Under these circumstances, a subdivider should also be required to provide a satisfactory relationship between the subdivision layout and the abutting highway.

For any subdivision control to be effective as a form of highway protection, all subdividers must be required to file approved subdivision plats, and all plats abutting on a state trunk highway, or any other classification found desirable, must be approved by the State Highway Commission. Among the items that might be required for plat approval are reduction of entry points onto the highway, dedication of buffer strips between the highway and the projected development, and provision of service roads.¹⁰⁵ The existing case law has approved the following subdivision control: a requirement that the subdivider dedicate a ten foot strip of land one-quarter of a mile long as a buffer strip on two roads that abutted the land;¹⁰⁶ a requirement that the subdivider dedicate a ten foot strip 2,400 feet long for widening and another ten foot strip as a buffer and access barrier;¹⁰⁷ and a requirement that the subdivider dedicate a sixty foot strip as half of a projected road rather than a thirty-three foot strip.¹⁰⁸

Only two states have required approval on the state level by the highway commission of plats of land abutting state trunk

¹⁰⁴ *Halsell v. Ferguson*, 109 Tex. 144, 202 S.W. 317 (1918); *Town of Windsor v. Whitney*, 95 Conn. 357, 111 Atl. 354 (1920); *Mansfield & Swett, Inc. v. Town of West Orange*, 120 N.J.L. 145, 198 Atl. 225 (1938).

¹⁰⁵ "Roadside Protection," American Automobile Association (1951) p. 65.

¹⁰⁶ *Newton v. American Securities Co.*, 201 Ark. 943, 148 S.W.2d 311 (1941). Here, the subdivider refused to dedicate the two strips and brought a mandamus proceeding to compel the circuit clerk to record the plat which was disapproved by the city and county planning boards. The trial court granted the petition because no provisions were made for compensation of the subdivider for the loss of the use of the strips. But the Arkansas Supreme Court reversed and remanded on the basis that they felt unable to set aside the judgment of the planning boards without evidence that the boards had acted arbitrarily.

¹⁰⁷ *Ayres v. City of Los Angeles*, 34 Cal.2d 31, 207 P.2d 1 (1949).

¹⁰⁸ *Ridgefield Land Co. v. City of Detroit*, 241 Mich. 468, 217 N.W. 58 (1928).

highways: Wisconsin¹⁰⁹ and Michigan.¹¹⁰ Under the Michigan statute the highway commission may require adequate widths and adequate provision for traffic safety in laying out drives which enter or leave a state trunk or federal-aid highway.¹¹¹ Under the Wisconsin statute the highway commission must approve all plats which border on a state trunk highway or connecting street. Approval requires a layout providing either a minimum number of access points onto the highway or the provision by the subdivider of service roads.¹¹²

This subdivision control device provides a means of securing adequate highway width and some means of access control on all subdivided lands. Nebraska has no enabling statute comparable to the Wisconsin or Michigan subdivision controls acts.

2. *Official Mapping*

Official mapping is a comparatively simple device; it is a legally effective layout of the future location of streets and roads.¹¹³ Urban areas have long mapped their streets, allowing land owners to make the necessary adjustments to them long in advance and reducing the cost of construction by denying compensation for any improvements made in the bed of the mapped street after the official map is placed on public record.¹¹⁴

The purpose of official mapping is two-fold: to establish the ultimate right of way lines on a highway and to plan future intersecting street locations. The establishment of ultimate right of way lines will prevent the growth of improvements in the highway bed and prevent the highway-strangulation that results from too close economic development.¹¹⁵ The benefits here will run to both the state and the landowner. The state will benefit from

¹⁰⁹ Wisc. Stat. §§ 236.01 et seq. (1957). Especially § 236.02(7).

¹¹⁰ Mich. Stat. Ann. §§ 26.463 et seq. (1957). Especially § 26.466.

¹¹¹ Beuscher, "Protection of Highways and Feeder Streets Through Subdivision Controls," Highway Research Board Bulletin 101 (1955), pp. 52, 57.

¹¹² Wisc. Stats. § 236.13(1)(e); Wisc. Admin. Code, Hy-33.01 et seq.

¹¹³ Kucirek and Beuscher, "Wisconsin's Official Map Law." 1957 Wis.L.Rev. 176.

¹¹⁴ Scattergood v. Lower Merion Tp. Comm'rs., 311 Pa. 490, 167 Atl. 40 (1933).

¹¹⁵ "Roadside Protection," American Automobile Association (1951) p. 7 et seq; Miller v. Manders, 2 Wis.2d 365, 86 N.W.2d 469 (1958).

the lower right of way acquisition costs and prevention of highway strangulation; the landowner will benefit from security for his improvements.

The planning of future intersecting street locations will present a means of indirect access control. When a highway is mapped, those areas at which access will be allowed will be indicated. The abutting owner may then plan his development to make use of the access areas which, in turn, will be specifically designed to handle this increased traffic. Official mapping will reduce the cost of right of way acquisition and allow access to the road at specially designed and designated areas with a minimum of hardship on the abutting owners.

In Nebraska statutory authorization for official mapping was granted in 1955 to first class cities or cities having a greater population than required for a first class city.¹¹⁶ The act provides that these cities ". . . shall develop and adopt a master street plan cooperatively between the department [of Roads] and the municipal officials, which shall insure the proper location and integration of the highway connections in the total city street plan . . ." One of the objectives of the mapping act is ". . . to insure a system of streets upon which traffic can be controlled and protected, in such a manner as to provide safe and efficient movement of traffic within a municipality. . . ." The act further provides sanctions by means of withholding further highway appropriations from the city if such a master street plan is not completed within a designated time. This act, while limited to a narrow class of cities and not covering the whole road system, should provide an effective means of roadside protection within its sphere if the Department of Roads requires a well-planned official map from the cities.

C. CONTROL OF THE TYPE OF ACCESS

A third means of restricting or controlling access to a highway consists of the devices which control the type of access to the road. Certain types of access are more frequent and more dangerous than others. Residential access presents nowhere near the control problem that commercial access does. The devices available to control the type of access to a highway are restricted use highways, roadside zoning, and master planning. The first device, the restricted use highway, controls the type of access by entirely excluding certain kinds of traffic from the highway or from the use of access to it; the latter two devices, roadside zoning and

¹¹⁶ Neb. Rev. Stat., § 39-1312 (Supp. 1957).

master planning, control the type of access in an area by controlling the land use and restricting commercial and industrial development to specified portions of the highway.

1. *Restricted Use Highways*

The use made of a highway can be controlled by two means—restricting the use of the road itself or restricting the use of the access by which ingress and egress are had to the highway.

The most common form of restricted use highway is the boulevard or parkway. These have long been held valid as an exercise of the police power.¹¹⁷ On such restricted use highways only a designated class of traffic, e. g., automobiles, may use the street for more than one block. As a practical matter this device is of little value except in urban areas since it requires the building of another traffic facility to service the traffic not permitted on the restricted use highway and the undesirable access uses are not prohibited but merely made somewhat more difficult.

A much more practical approach to the restricted use concept is the restriction of the use of access. An easement of access which is restricted to a residential use cannot be used for commercial use.¹¹⁸ Thus by regulating the use that can be made of access, a great degree of highway protection may be achieved.

Since the number of vehicular movements at an approach to a highway bears a direct relationship to the kind or purpose of use that is made of the approach, controlling the kind or purpose of use effectively controls the frequency of use.¹¹⁹

The use of the right of access may be controlled through eminent domain, either on an existing highway or in the condemnation provision for acquiring land for a new highway.¹²⁰ In Nebraska, the Department of Roads is expressly empowered to reasonably “. . . provide and define . . . the location, width, nature, and extent

¹¹⁷ E. g., *Illinois Malleable Iron Co. v. Commissioners of Lincoln Park*, 263 Ill. 446, 105 N.E. 336 (1914); *Barnes v. Essex County Park Commission*, 86 N.J.L. 141, 91 Atl. 1019 (1914).

¹¹⁸ *Man v. Vockroth*, 94 N.J.Eq. 511, 121 Atl. 599 (1923). See *Cornell-Andrews Smelting Co. v. Boston & P. R. Corp.*, 215 Mass. 381, 102 N.E. 625 (1913).

¹¹⁹ *Enfield and Mclean*, “Controlling the Use of Access,” *Highway Research Board Bulletin* 101 (1955), p. 70.

¹²⁰ *State v. Superior Court*, 47 Wash.2d 335, 287 P.2d 494 (1955).

of any right of access . . ." in the purchase agreement or condemnation proceedings when land is acquired for the purpose of widening, improving, or building a highway.¹²¹ It is also possible that such use control could be achieved under a police power measure. It clearly could be controlled by zoning.¹²² It is also possible that mere use of access, rather than land use, could be similarly restricted. Such use restriction would be less severe than zoning, since, when access is restricted to residential purposes, there is nothing to prevent the use of the land for other purposes if other access is available. If such access use restriction were to be instituted ". . . to the extent that a court holds to the proposition that access rights are subordinate to the rights of the traveling public, and existing use of access can be restricted whenever it impinges on these rights—and this without regard to whether or not the use constitutes a nuisance."¹²³ By legislation passed in 1955, the Nebraska Department of Roads is empowered to restrict the use of access through a permit system.¹²⁴ This is a readily administered form of access use control, so long as the control is reasonable.¹²⁵

The restricted use highway presents an access control device of some use in urban areas. The restricted use of access, however, presents an access control device that has a great effect on highway safety and in the construction of new highways makes available a means of modified access control.

2. *Roadside Zoning*

Municipal zoning in the United States can be traced back as far as 1892 when building height regulations were adopted in Boston and 1910 when such restrictions were applied in Washington,

¹²¹ Neb. Rev. Stat. § 39-1330 (Supp. 1957).

¹²² *City and County of San Francisco v. Safeway Stores*, 150 Cal.App.2d 327, 310 P.2d 68 (1957).

¹²³ Erbe, "Highway Laws Relating to Controlled Access Roads," 36 *Title News* 6, 11 (1957).

¹²⁴ Neb. Rev. Stat. §§ 39-1332 to 39-1336 (Supp. 1957).

¹²⁵ *Alexander Co. v. City of Owatonna*, 222 Minn. 312, 24 N.W.2d 244 (1946), where the refusal of the city council to grant a permit to cut the curb and construct a driveway to serve a private business, after the council had received testimony that such driveway would create a traffic hazard was held to be a legitimate and proper exercise of police power in that the regulation had a ". . . substantial relation to public safety."

D.C.¹²⁶ Rural zoning was introduced in the 1920's,¹²⁷ but the development of highway zoning has been even more recent.

Zoning powers include the regulation of the use of land and buildings, the height of buildings, and the size of yards and open space. Zoning may be used to control the location of buildings adjacent to the highway right of way.

The objectives of roadside zoning are to:

(1) Confine roadside commercial uses to designated commercial districts. The remainder of the highway frontage is limited to uses which are characteristic of the general area through which the highway passes (*e. g.*, residential use, agriculture, forestry, etc.).

(2) Require that roadside buildings be set back from outer boundaries of the highway right-of-way.

(3) Control the appearance of certain aspects of roadside commercial development relating to safety, health, and general welfare.¹²⁸

Where a highway passes through an urban area it normally falls under the metropolitan comprehensive zoning pattern. Certain areas abutting upon the highway will be zoned for industrial or commercial use; other areas will be divided into various classes of residential uses. When the highway passes through rural areas it is subject to no zoning protection. A program of highway zoning would provide strip zoning along the highway in the rural areas and provide recognition of the peculiar character of property abutting upon a main thoroughfare in the urban areas. Modern zoning enabling acts are inadequate for this task since even extra-territorial zoning powers can not cover the whole highway system¹²⁹ nor are they oriented to highway protection problems. Highway zoning would have the following major results:

(a) *Location of Land Uses.* By restricting roadside commercial and industrial uses to specific zoned areas, such land uses could only occur within those areas. These heavy access use areas could be designed to handle safely increased ingress and egress from the road through acceleration lanes, service roads, and designed angles

¹²⁶ Zoning and Civic Development, Chamber of Commerce of the United States (n. d.), p. 8.

¹²⁷ Wehrwein, "County Zoning and Consolidation," 11 Wis. L. Rev. 136 (1936).

¹²⁸ "Roadside Protection," American Automobile Association (1951), p. 52.

¹²⁹ Bouwsma, "The Validity of Extraterritorial Municipal Zoning," 8 Vanderbilt Law Rev. 806 (1955).

of entrance. The less frequent farm and non-farm access in the rural areas presents no substantial problem; the urban residential access could be controlled through such allied control devices as subdivision controls.

(b) *Setback Requirements.* Many of our highway problems stem from the crowding of highways by the abutting developments. The choking of the highway by close-in development also prevents the modernization of existing highways by making it too expensive. The ultimate result of this close-in development is the relocation of the highway resulting in great loss to the state and the abutting owners who had invested in reliance on the continuation of the highway on its prior location.

Zoning could require setbacks in rural areas where none now exist and in urban areas based on functional differentiation of the abutting streets, *i. e.*, ". . . not width but intimacy between the traffic way and the abutting land use."¹³⁰ The setback requirement should be based on the nature of the abutting street or highway and should be expressed in feet from the center line or outer edge of the roadway. The setback requirement should not be confined solely to the zoned commercial or industrial districts, but should apply to all buildings adjacent to the highway.¹³¹

The basic principles of zoning law are well established; their application to the roadside area, while novel, would be entirely within the logical extension of these principles.¹³² It has, however, been suggested that zoning is a less desirable legal basis than control of access use.¹³³ Highway strip zoning would clearly require explicit statutory authorization.

The 1957 Nebraska Legislature repealed the statutes creating the State Zoning Agency and granted all counties the power to zone all areas of the county not within an incorporated village or a city's territorial or extra-territorial zoning district.¹³⁴ The same Legislature also expressly empowered counties in which military establishments are located to issue zoning regulations. "Such regulations shall be made in accordance with a comprehensive

¹³⁰ Pomery, "Bringing Zoning Up to the Automobile Era," Highway Research Board Bulletin 101 (1955), pp. 40, 44.

¹³¹ "Roadside Protection," American Automobile Association (1951), p. 55.

¹³² Levin, "Highway Zoning and Roadside Protection in Wisconsin," 1951 Wis L. Rev. 197, 216 et seq.

¹³³ Erbe, "Highway Laws Relating to Controlled Access Roads," 36 Title News 6, 10 (1957).

¹³⁴ Neb. Rev. Stat. § 23-114 (Supp 1957).

plan . . . and designed to lessen the congestion in the streets, roads, and highways. . . ."¹³⁵ An intelligent administration of these various county zoning powers could provide the roadside protection sought, but experience in Wisconsin, where county zoning has a long history, indicates that county zoning action alone is too slow in coming and too ineffective when applied.¹³⁶ The operation of the former Nebraska Zoning Agency¹³⁷ might provide the basic experience necessary for some form of cooperative state-county zoning.

While arguments can be made for either state or county zoning in the area of highway protection, a form of state-county cooperative zoning would prove the best. Without local participation in the decision making process, highway zoning would tend to be an outside influence imposed without due regard for local interests and plans. Without some state control, zoning would tend to be uneven, unduly slow, and unreliable. A cooperative state-county zoning program would entail these basic features:

- 1) The State Highway Commission [in Nebraska, the Department of Roads] would be empowered to request any county to zone the land abutting upon a highway.

- 2) If the county does not act within a specified period, the Highway Commission could then zone a 500 foot strip on either side of the center line of the highway.

- 3) If the county does act, and the Highway Commission is satisfied with its zoning, an annual zoning aid would be paid to the county to help administer the zoning controls.¹³⁸

Where uses have become established zoning is little more than a palliative, but for future development it is a very potent control device. Roadside zoning has the advantage of being a police power measure.¹³⁹ Coupled with other control devices it presents a read-

¹³⁵ Neb. Rev. Stat. § 23-163 (Supp. 1957).

¹³⁶ For example, by October 1957 only four Wisconsin counties had adopted highway set-back requirements under their zoning powers. However, an unascertained number of counties have adopted some form of set-back requirement as a part of their over-all zoning ordinances.

¹³⁷ Formerly authorized by Neb. Rev. Stat. §§ 81-830 to 81-838 (Reissue 1950), as amended. These sections, however, were repealed by the 1957 Legislature; Neb. Laws c. 381, p. 1324 (1957).

¹³⁸ Beuscher, "Protection of Highways and Feeder Streets Through Subdivision Controls," Highway Research Board Bulletin 101 (1955), pp. 52, 59.

¹³⁹ Levin, "Public Control of Highway Access and Roadside Development" (1947), p. 68 et seq.

ily available, inexpensively administered form of roadside protection.¹⁴⁰

3. *Master Planning*

In the previous discussion we have distinguished several means of access control and roadside protection: the freeway, the controlled access road, roadside zoning, official mapping, and subdivision controls, among others. This last tool, master planning, brings all these devices together in a unified pattern. Master planning, of course, is broader than highways. It encompasses the whole pattern of societal living. It is concerned not only with the traffic circulatory system, but also with land use districts and the location of parks, public facilities, and utilities. Our concern, however, is with the master plan and highways.

Master planning can predetermine the location of streets, their widths and points of intersection. It can regulate the use of land and of access as well as determine the nature and composition of traffic generators. Finally it can determine the nature of the access, if any, to be allowed on any street or road.

In general it will establish the pattern for those elements of community development that can be classified as land use, both public and private.

A coordinated outline of the future land use areas of the community is thus the basic and most important single function of the Comprehensive Plan.¹⁴¹

Master planning is a relatively new device in American land use control. Many of the major urban areas are authorized to make such plans or have already engaged in making them.¹⁴² The authority to plan and the acts of planning land use have been sustained under court attack as exercises of the police powers.¹⁴³

Master planning is a device for over-all development control for a city or county. Its effect on highway protection is direct; it can predetermine locations, widths, and access points. Since

¹⁴⁰ For a review of the existing legislation see, Solberg, "Roadside Zoning," Highway Research Board Bulletin 55 (1952), p. 49.

¹⁴¹ City Planning and Urban Development, Chamber of Commerce of the United States (1952), pp. 23-34.

¹⁴² See generally Segoe, "Local Planning Administration" (1948), p. 90 et seq.

¹⁴³ E. g., *Magilner v. Metropolitan Plan Commission*, 236 Ind. 398, 140 N.E. 2d 220 (1957); *Kozernik v. Montgomery Township*, 24 N.J. 154, 131 A.2d 1 (1957). See Haar, "In Accordance With a Comprehensive Plan," 68 Harv. L. Rev. 1154 (1955).

it predetermines the nature and location of traffic generators and land uses it is a potent tool in over-all highway protection.

V. CONCLUSION

The construction of the Interstate Highway System will present two levels at which access controls will be needed. On the first level, on the system itself, access control will be achieved mainly through the controlled access road and the freeway. Much of this mileage will be laid on new location with a restricted dedication. Access control on this level will be a requirement for federal participation in costs.

The next level of access control that will be necessary to the efficient functioning of the Interstate Highway System will be on the state primary roads that will serve the dual function of acting as feeder roads for the Interstate System and carrying eighty percent of national highway traffic that will not be served by the System. On these roads access controls will not be required by the federal government, but they are nonetheless essential to the safety, efficiency, and economy of those roads and in turn to the Interstate System which they serve and complement.

It is on these roads that the amount and type of access should be controlled. Creating a limited access road on state trunk highways would be effective, but, in other than highly developed areas, it would be too expensive to justify. A notable exception is the relocation of an existing road or construction of a new one where access limitation can be achieved under a police power measure.¹⁴⁴ Therefore, control of access on these roads must depend primarily on the police power controls, *i. e.*, subdivision controls, mapping, restriction of access use, roadside zoning, and master planning. Nebraska has existing statutory authorization for county zoning,¹⁴⁵ official mapping in first class cities,¹⁴⁶ and state level control of access use.¹⁴⁷ The other control devices await legislative action.

The particular control device used must be chosen to fit the section of the road to which it is being applied. What is an ap-

¹⁴⁴ Neb. Rev. Stat. § 39-1329 (Supp. 1957), provides that if a highway is located “. . . abutment of property on such highway that did not theretofore have direct egress and ingress to it, no rights of direct access shall accrue because of such abutment. . . .”

¹⁴⁵ Neb. Rev. Stat. § 23-114 (Supp. 1957); Neb. Rev. Stat. § 23-163 (Supp. 1957).

¹⁴⁶ Neb. Rev. Stat. § 39-1312 (Supp. 1957).

¹⁴⁷ Neb. Rev. Stat. §§ 39-1332 to 39-1336 (Supp. 1957).

appropriate access control device in a rural area, *e. g.*, access use control, may not be appropriate in downtown Lincoln, where a freeway may be required. All of these access controls, however classified, are extensions of the government's powers to preserve the road system for the good of the citizens and to protect the state's economic investment. The control devices should not be viewed as separate powers. They are all expressions of the same power seeking the same end, but are subject to different constitutional limitations based on their effect upon the abutting landowner.

The problem of highway protection has another facet: inter-governmental relations. For example, in Nebraska the zoning powers rest in the counties and urban areas. When the state designates a road as an Interstate System feeder, what guarantee is there that the county will provide or maintain adequate setback requirements or appropriate land use districts along that road? To determine the amount of roadside protection actually available, as opposed to the black-letter law, we must ask: how have the various governmental units integrated their protection powers and activities? Has the availability of local highway protection been considered in determining the location of state trunk roads or Interstate System interchange? Does adequate cooperation exist between highway planning on the state level and comprehensive planning on the local level, *e. g.*, as between the Department of Roads and the City of Omaha?

Freeways, controlled access, and control of access use are powers vested at the state level. Official mapping powers, while exercised cooperatively, are vested at the county or city level. Only with intelligent and effective intergovernmental relations and with a free flow of information and cooperation in both directions can these diverse political units administer an effective and unified program of highway protection. Certainly control of access under a master plan is important enough to demand such cooperation.