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Eminent Domain - Regulations Relating to Highways and Streets - Compensation for Loss of Access

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An early Dakota case held the same way¹³ But more recent analogous decisions indicate a shift toward the presumption of validity unless the contrary affirmatively appears in the journals.¹⁴

The practice and problem of stopping the clock would vanish without the limit on the length of sessions. As the volume of business grows with every year, there remains little reason to deny the legislature the full time to perform its duties which the executive and judicial branches have always had.¹⁵

RICHARD BOARDMAN

EMINENT DOMAIN — REGULATIONS RELATING TO HIGHWAYS AND STREETS — COMPENSATION FOR LOSS OF ACCESS — In a condemnation proceeding by the New Mexico Highway Commission the District Court entered a judgment which compensated an abutting property owner for the depreciation in market value of undeveloped property caused by the loss of direct access to a highway, which was the result of being placed upon a frontage road of a limited access highway. On appeal, the State Supreme Court *held*, one justice dissenting, that owners of land abutting a highway did not sustain a compensable loss by action of the State in removing their direct access and in providing a frontage road. *State v Danfelser*, 348 P.2d 241 (N.M. 1963)

As early as the second half of the 19th century, New York decisions clearly established a compensable interest in the right of access of abutting property owners.¹ It is now generally recognized that abutting owners have a right of access to and from public roads which may not be cut off or interfered with unless justly compensated for²

13. *Treadway v Schnauber*, 1 Dak. 227, 46 N.W. 464 (1875).

14. *State ex rel. Sorlie v. Steen*, 55 N.D. 239, 212 N.W. 843 (1927). *State v. Schultz*, 44 N.D. 269, 174 N.W. 81 (1919). *Woolfolk v. Albrecht*, 22 N.D. 36, 133 N.W. 310 (1911). *Power v. Kitching*, 10 N.D. 254, 86 N.W. 737 (1901).

15. Orfield, *Improving State Legislative Procedure and Processes*, 31 MINN. L. REV. 161 (1946). See also Lloyd, *Judicial Control of Legislative Procedure*, 4 SYRACUSE L. REV. 6 (1952).

1. *Kane v. Metropolitan El. Ry. Co.*, 125 N.Y. 164, 26 N.E. 278 (1891). *Lohr v. Metropolitan El. Ry. Co.*, 104 N.Y. 268, 10 N.E. 528 (1887). *State v. New York El. R.R.*, 90 N.Y. 122 (1882).

2. *E.g.*, *People v. Lipari*, 28 Cal. Rptr. 808 (1963). *State v. Ensley*, 240 Ind.

Two distinct powers have been used to control the rights of access; the police power and the power of eminent domain. Police power is the right of reasonable regulation by the government clearly necessary to preserve the health, safety, or morals of the people.³ Eminent domain is the power to take property for public use.⁴ Property taken, injured, or destroyed under the doctrine of eminent domain is compensable while the police power is non-compensable even though it amounts to an actual taking or destruction of property.⁵ Under the Fourteenth Amendment property is protected from any taking not accomplished by due process of law, but regulations arising from the proper exercise of the police power⁶ do not violate the due process clause.⁷

The rights of access of an abutting owner are subject to two other serious restrictions. An abutting owner has no right to compensation by reason of the diversion of traffic away from his property⁸ or the fact that he may be forced to travel a more circuitous route, so long as that route is reasonable.⁹ Furthermore, where no highway, conventional or otherwise previously existed, no right of access is created or exists in an abutting owner's property when a highway is constructed.¹⁰

Only ten states have clearly passed upon the questions of whether an abutting owner should be compensated for injuries due to the loss of access suffered from being placed upon a frontage road, and these cases fall into three major categories.¹¹

472, 164 N.E.2d 342 (1960) *Fougeron v. County of Seward*, 174 Neb. 753, 119 N.W.2d 298 (1963) *Tubular Serv. Corp. v. Com'r of State Highway Dept.*, N.J. Super. 556, 187 A.2d 201 (App. Div. 1963), *Affirmed*, 40 N.J. 331, 191 A.2d 745.

3. *Appeal of White*, 287 Pa. 259, 134 A. 409 (1926).

4. *Ibid.*

5. *Ibid.*

6. See, e.g., *Gear v. City of Phoenix*, 93 Ariz. 260, 379 P.2d 972 (1963). Regulation to avoid the danger of collision with vehicle or pedestrians created by automobiles backing into traffic from off-street parking places held legitimate and non-compensable. *Rayburn v. State*, 93 Ariz. 54, 378 P.2d 496 (1963) Conversion of street abutting property from two-way access road and construction of traffic island divider preventing left turns into property was held not compensable. *Cities Serv. Oil Co. v. City of New York*, 5 N.Y.2d 110, 154 N.E.2d 814 (1958) *cert. denied* 360 U.S. 934. Where the establishment of bus stops hampered the ingress and egress to a filling station it was held to be a reasonable traffic regulation.

7. *Appeal of White*, *supra* note 3.

8. *Rose v. State*, 19 Cal. 2d 713, 123 P.2d 505 (1942).

9. *State v. Silva*, 71 N.M. 350, 378 P.2d 595 (1962).

10. *People v. Thomas*, 108 Cal. App. 2d 832, 239 P.2d 914 (1952).

11. *Covey, Frontage Roads To Compensate Or Not To Compensate*, 56 NW U. L. Rev. 587 (1961).

I. Any loss resulting from being placed on a frontage road should be compensated in eminent domain, but the existence of the frontage road should be considered in mitigation of the loss suffered.¹²

The decisions so holding find that the right of ingress and egress attaches to the lot and is a right of property as fully as the lot itself.¹³

II. Any loss resulting from being placed on a frontage road should be compensated in eminent domain only when accompanied by an otherwise compensable taking of land, and the existence of the frontage road should be considered in mitigation of the loss suffered.¹⁴

The courts reaching this result appear to argue that if no land has been taken from the abutting owner there can be no taking within the doctrine of eminent domain.¹⁵

III. Any loss resulting from being placed on the frontage road should not be compensated in eminent domain whether land is taken or not.¹⁶

The decisions which refuse compensation in all cases reason that the abutting owner's right of access is to the public roads system, but not necessarily to express portions of it.¹⁷ Therefore, no award is necessary to fulfill the requirement of just compensation when the abutting owner has given up nothing of value.¹⁸

It is suggested that the construction of controlled access highways, with frontage roads which grant the abutting owner access, produce no compensable injuries. Therefore, any decline in the value of the abutting owner's property is merely the non-compensable result of a proper exercise of the police power. The damages that the abutting owner suffers are the same suffered by all public highway users and differ only in degree.

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12. *Id.* at 603.

13. *People v. Ricciardi*, 23 Cal. 2d 390, 144 P.2d 799 (1944) *McMoran v. State*, 55 Wash. 2d 37, 345 P.2d 598 (1959).

14. *Covey*, *supra* note 11, at 603.

15. *State v. Thelberg*, 87 Ariz. 318, 350 P.2d 988 (1960) *State Highway Comm'n v. Finch*, 237 Miss. 314, 114 So. 2d 673 (1959).

16. *Covey*, *supra* note 11, at 603.

17. *Iowa State Highway Comm'n v. Smith*, 248 Iowa 869, 82 N.W.2d 755 (1957) *Darnall v. State*, 108 N.W.2d 201 (S.D. 1961) *Nick v. State Highway Comm'n*, 13 Wis. 2d 511, 109 N.W.2d 71 (1961).

18. *Department of Pub. Works & Bldgs. v. Filins*, 411 Ill. 304, 104 N.E.2d 214 (1952).