The Limited-Access Highway

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TRANSPORTATION is one of the basic needs of mankind. It is of fundamental importance in the social and economic life of a people. From the dawn of civilization inventive minds have constantly been seeking to improve the methods of moving persons and goods from place to place.

Of all forms of transportation which have been developed during man's onward march, none has contributed more than the motor vehicle to the spread of civilization, the creation and diffusion of wealth, the expansion of industries, and improvements in the standard of living. But the comforts and advantages that have come to us through the development of high-speed automobile transportation have not been acquired without payment of a tremendous price.

Billions of dollars have been spent for the construction and maintenance of public roads in the United States since the turn of the century. Federal, state and local expenditures, which by 1940 exceeded two and a quarter billion dollars annually, have given us the best highway system in the world. Yet this system does not measure up to the requirements of modern highway transportation.

The inadequacies of the present highway system are evidenced by ever increasing operating costs, more and more traffic congestion, and the mounting toll of motor vehicle accidents. Forty thousand deaths, a million and one-half injuries, and two billion dollars worth of prop-

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1 Annual Report, U. S. Bureau of Public Roads, Board of Investigation and Research 22 (1940).
erty damage each year\(^2\) demonstrates the gravity of the problem confronting public highway authorities.

In the state of Washington it is estimated that our highway system today is 52 per cent deficient.\(^3\) This critical condition is becoming even more acute with the rapid increase in vehicle registrations\(^4\) and in yearly mileage per vehicle.\(^5\) Still another complicating factor is the unrestricted ribbon or roadside development that spreads unimpeded along the main traffic arteries of the state.\(^6\) Numerous entrances to the highway, the frequent drawing in and out of the traffic stream, the parking, and the increased pedestrian traffic, all engendered by commercial use of the roadside, jointly conspire to reduce substantially the traffic capacity of the highway and to promote congestion, and to cause a large proportion of the highway accidents.

With a full appreciation of present highway inadequacies, public authorities the country over have been working to develop a type of facility for the expeditious movement of traffic that would be safe, efficient, and economical. Of many recent advances in highway engineering one of the most important and revolutionary has been the limited-access highway. The first law authorizing limited-access facilities in the state of Washington was enacted in 1947.\(^7\) When amendments appeared desirable in 1951, the legislature took the occasion to make the following declaration of policy:

Unrestricted access to and from public highways has resulted in congestion and peril for the traveler. It has caused undue slowing of all traffic in many areas. The investment of the public in highway facilities has been

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\(^2\) Levin, Public Control of Highway Access and Roadside Development 3 (Public Roads Administration, 1943).

\(^3\) Proceedings, Northwest Conference on Road Building 13 (1950).

\(^4\) The Washington State Department of Licenses registered 918,851 vehicles in 1949. For 1948 the total registration was 850,638, showing for 1949 an increase of 8 per cent over 1948. 1948 shows an increase over 1947 of 6.9 per cent, and 1947 vehicle registration shows an increase of 11.1 per cent over 1946 figure, which is 715,906. The average annual rate of increase of vehicle registration for the postwar years is 8.3 per cent.

\(^5\) Proceedings, Northwest Conference on Road Building 67 (1950).—“The number of miles traveled by each vehicle per year has gradually crept up from about 7,000 only a few years ago, to nearly 10,000 now.”

\(^6\) Bugge, The Highway Problem in 1950 18.—“Ribbon development along highways is the most difficult problem the highway planner has to cope with. There are numerous instances where the traffic capacity of a four-lane arterial highway has been reduced to the status of an urban business street by ribbon or roadside developments. This condition results in losses to road users and loss of the investment in the arterial highway. A further loss is incurred in the cost of constructing a new arterial to relieve congestion as well as the loss to roadside commercial enterprise when traffic is rerouted. The above described cycle of relocating and constructing new arterial highways may recur with the increasing frequency as traffic volumes multiply unless roadside interference with the free movement of traffic is eliminated by complete control of access and of commercial development along our multiple-lane highways.”

impaired and highway facilities costing vast sums of money will have to be
relocated and reconstructed. It is the declared policy of this state to limit
access to the highway facilities of this state in the interest of highway safety
and for the preservation of the investment of the public in such facilities.\(^8\)

Although there has not been time for Washington road users to have
much experience with limited-access, in other places this type of
facility has proven to be a most effective remedy for traffic congestions
and delay. Whereas only 400 vehicles per lane per hour can be accom-
modated on an ordinary urban street, 1500 vehicles can be handled in
each lane of a limited-access urban highway every hour.\(^9\) The Davidson
Limited Highway has reduced driving time through metropolitan
Detroit from twenty to thirty minutes to a mere three or four min-
utes.\(^10\) It has been estimated that approximately 5,000,000 man-hours
each year will be saved by Detroit motorists using the Willow Run
Expressway System. Travel time between Pasadena and Los Angeles
was cut 25 minutes by construction of the Arroyo Seco Freeway.\(^11\)

Even more impressive has been the sharp reduction in motor vehicle
accidents where the principle of limited-access has been employed. On
the Arroyo Seco, for example, accidents dropped 75 per cent. Accidents
on Chicago's Outer Drive totaled only eight for every ten million
vehicle miles traveled compared with 189 on ordinary roads in the
area.\(^12\) After limiting access on a five-eighths-mile section in Milwau-
kee, there were only 5 per cent as many accidents as the average of
four other comparable unlimited-access sections.\(^13\) Experience through-
out the United States indicates that with limited-access highways we
will have less than 15 per cent of the accidents that occur on an equal
mileage of ordinary roads.\(^14\) With such spectacular success it is inevi-

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\(^8\) Wash. Laws 1951, c. 167 § 1.
\(^9\) *American Road Builders' Association, Highway Economics and Design Principles*
(Bull. No. 67, 1940).
\(^10\) *Id., at note 2 at 25.*
\(^11\) *Id., at note 2 at 25.*
\(^12\) *Id., at supra note 2 at 25.*
\(^13\) *Id., at supra note 2 at 25.*
\(^14\) *Cunningham, “A Lawyer Looks at the Limited-Access Highway,” Address de-
livered before the American Association of State Highway Officials, 1947;*

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Taking the portion from the east city limits of Tacoma to the south city limits of
Seattle, a distance of 23.7 miles, it had a 1949 annual average daily traffic volume of
16,430 with an accident rate of 6.8 per thousand vehicle miles. There are 927 access
table that there will be a far wider application of limited-access design in future road development. At least 22 states, including Washington, have sanctioned by legislation this new type of facility.\(^{16}\)

As limited-access construction increases, a considerable amount of litigation and judicial confusion can be expected. Since these highways are so constructed that the owners of abutting land cannot directly enter the roadway from their property or enter their property from the roadway, there is an interference with the owner's ingress and egress.\(^{16}\) Thus it will be seen that certain rights of property are affected adversely.

The courts have the difficult task of determining the weight to be given the conflicting public and private interests. While fundamental and traditional property rights must be preserved, the reasonableness of legal rules should be measured in the light of today's requirements and of public necessity.

It is generally recognized that owners of abutting property have certain rights in existing streets and highways, the deprivation of which even for public use must be compensated for under the "just compensation" clauses of our federal and state constitutions. The rights include the right of access, i.e., the right of ingress to and egress from property which abuts upon an existing street or highway; the right of visibility, i.e., the right to have goods which are displayed on locations on this section, or 39 per mile, and the accident rate is 1.6 times the 1949 rate for rural highways in this state of 4.2 MVM.

If we break it down into shorter sections we find that the five mile portion from the south city limits of Seattle to the junction of SSH. No. 1-L has 51 access locations per mile and an accident rate of 9.2 MVM which is 2.2 times the 1949 state average. Of this 9.2 MVM we find that 67.7 per cent of the non-intersection accidents (which are 55 per cent of the total) are within the types of rear end (stand and move), left and U-turns, or entering or crossing highway.

Accidents of these types are connected with the traffic movements which are generated by roadside businesses. If we include the accidents of the same type at intersections, the per cent becomes 79. If we eliminate the 67 per cent referred to above by limited access construction we reduce the accident rate by 36 per cent. If we eliminate the 79 per cent we reduce the accident rate by the same figure (79 per cent) or to approximately 1.9 MVM. Complete control of access with all cross traffic separated by grade separations should approach that figure.\(^{15}\)


\(^{16}\) Wash. Laws 1951, c. 167 § 2.—"For the purpose of this chapter a 'limited access facility' is defined as a highway or street especially designed or designated 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 limited right or easement of access, light, air, or view by reason of the fact that their property abuts upon such limited access facility, or for any other reason to accomplish the purpose of a limited access facility. Such highways or streets may be parkways, from which trucks, buses, and other commercial vehicles shall be excluded; or they may be freeways open to use by all customary forms of street and highway traffic."
abutting property viewed from the streets; and the right to the flow of light and air from the street to the property.\textsuperscript{17}

**The Right of Access**

By far the most important private right involved in limited-access cases is the right of access to and from the highway. Unfortunately, this is a subject upon which there is a mass of bad and confusing law. The United States Supreme Court described the condition in the following language:

The right of an owner of land abutting on public highways has been a fruitful source of litigation in the courts of all the States, and the decisions have been conflicting, and often in the same State irreconcilable in principle. The courts have modified or overruled their own decision, and each State has in the end fixed and limited, by legislation or judicial decision, the rights of abutting owners in accordance with its own view of the law and public policy.\textsuperscript{18}

An abutting owner's right of access is a type of property or property right known in law as an "easement appurtenant."\textsuperscript{19} It not only enables the owner to enter and leave his premises by way of the public road, but also establishes the accessibility of his premises for his patrons, clients, and customers.\textsuperscript{20}

The real source of the right of access is difficult to determine although it is believed to have arisen by way of consequence from the basic purpose of a public road. As stated by the California Supreme Court, "The precise origin of that property right is somewhat obscure

\textsuperscript{17} 18 AM. JUR. Eminent Domain, §§ 181-185; 49 A. L. R. 330; 93 A. L. R. 639.  
\textsuperscript{19} Van Buren v. Trumbull, 92 Wash. 691, 159 Pac. 891; 28 C. J. S. Easements, §§ 1-4; 25 AM. JUR., Highways, § 154; 39 C. J. S., Highways, § 141. RESTATEMENT, SERVITUDES:  
"Sec. 450. An easement is an interest in land in the possession of another which  
"(a) entitled the owner of such interest to a limited use or enjoyment of the land  
in which the interest exists; ...  
"Comment: a . . . the land in which an easement exists constitutes a servient  
tenement."

"Sec. 453. An easement is appurtenant to land when the easement is created to  
benefit and does benefit the possessor of the land in his use of the land."  
"Sec. 507. . . Comment: a . . . Easements are property rights and when the  
ownership of them is in private hands they are subject to extinguishment as other property  
rights are through the exercise of this power (of eminent domain).  
"b . . . The rights themselves are not appropriated; they are merely extinguis hed . . .  
"c . . . For there to be an extinguishment it is only necessary that the use permitted  
under the condemnation shall be inconsistent with the continuance of the use authorized  
by the easement existing prior to the condemnation."  
but it may be said generally to have arisen by court decision declaring that such right existed and recognizing it. However, in the Muhlker case Mr. Justice Holmes asserted that if at the outset the courts had decided that, apart from statute or express grant, the abutters on a street had only the rights of the public and no private easement of any kind, it would not have been amazing.

By what legal logic the courts in the first instance arrived at the conclusion that a property right of access was justified is one of the mysteries of jurisprudence. An entertaining and enlightening dissertation on the subject is to be found in 13 Missouri Law Review 19, 31 (1948) which we take the liberty of quoting:

Back in the horse and cart days of early English or Colonial history, neighboring landowners cleared or opened passage-ways through their woods and fields so they could haul their produce to the nearest village, or perhaps ride, instead of walk, to the village church or inn. I can remember the early years of this century in the Ozark hills of Missouri when a farmer located, constructed and maintained a country road as if it were wholly his private road or property, to which, however, the public was always welcome — just as any stranger was always welcome to drop in for a free meal or night’s lodging. Under such conditions it was naturally taken for granted that the landowner who had contributed all construction and maintenance labor, as well as right-of-way, should have the right of access to “his” road at any place he pleased. Common understanding and common custom eventually became common law.

But suppose all the costs of locating, designing, acquiring right-of-way, constructing, and maintaining a highway are paid by the Pennsylvania Turnpike Company, a private corporation engaged in selling transportation service for a toll charge. Should Farmer Jones, who has contributed nothing, have some right-of-access property in the tollroad, and the legal right of toll-free access to, and use of that highway just because his farm happens to abut on it?

Again, suppose all the costs of providing the highway were contributed exclusively by another limited group — motor-vehicle-users. And suppose Mr. Jones does all his farming and traveling with teams or road-tax-free tractors and fuel. Did the motor-vehicle-users, turned Santa Claus, give Mr. Jones a property right in the abutting road as a Christmas present, and insist that he sue them for damages if he should fail to realize the fullest possible enjoyment and use from his present?

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21 Bacich v. Board of Control, 23 Cal. 2d 343, 144 P. 2d 818, 823 (1943).
22 Muhlker v. New York and Harlem R. R. Co., 197 U.S. 544 (1905). Also, Stanwood v. City of Malden, 157 Mass. 17 (1892)—“It would have been intelligible for the Legislature to say that, when a benefit conferred upon a landowner, the value of which he does not pay for, he takes it upon the implied condition that he shall not be paid for it when it is taken away.”
23 Cunnyngham, The Limited-Access Highways From a Lawyer’s Viewpoint.
Or, suppose two adjoining farms with a division fence between, one owned by our old friend, Mr. Jones, and the other by Mr. Smith. A new highway is located all upon Smith's land, but with its right-of-way line coming just to Jones's land. Jones, of course, had no right to access across the division fence to Smith's land before the highway was opened up. But the day after the highway is opened, Smith finds he has suddenly become the owner of a new property right. If he is thereafter denied access to the highway on Jones' land, he can go to court, and may recover several thousand dollars—from Highway Users, of course, not from Mr. Smith—because his property has been taken or damaged for public use, the exact amount of his recovery depending upon plaintiff's service demands upon the highway—what use he might be making of his land at the time.

What a far cry one of our modern "superhighway" is from the old horse and cart road. And often there is just as great a difference between the abutter's contributions to, and equities in, the two kinds of highways. Except as an abutter has contributed something because he is an abutting landowner—as distinguished from contributions to motor-vehicle-tax trust funds for construction and maintenance of highways—how does he get, and why should he have this legal right which attaches automatically because his land abuts on a highway? Likewise, how does the legal duty become saddled upon motor-vehicle-users (1) to give him this property right and (2) to pay "just compensation" if it is later withdrawn or limited?

It may not be too late for some enterprising lawyer with a pioneering urge to convince a state court that no construction-given right really belongs to abutters to demand this gift of property; and that there is no corresponding duty upon motor-vehicle-users to either give, or pay for, any such property right on all highways.

In all probability the idea of access rights originated with the so-called "elevated railway cases." Under the New York statutes establishing streets, it was held that a trust was created for the benefit of the public at large as well as for the owners of abutting property. The exclusion of the public, and diversion of the streets to private use, violated the rights of the abutters, authorizing them to recover all property-value losses they could trace to the breach of trust.

But a few years later, the Supreme Court of the United States in ruling that abutters' rights are subordinate to any reasonable use of the street made by public authorities to facilitate general travel, said:

The New York elevated railway cases ... hold that the construction and maintenance on the street of an elevated railroad operated by steam, and which was not open to the public for purposes of travel and traffic was a perversion of the street from street uses, and imposed upon it an additional servitude, which entitled abutting owners to damages. ...  

... It is clear that, under the law of New York, an owner of land abutting on the street has easements of access, light and air as against the erection of an elevated roadway by or for a private corporation for its own exclusive purpose, but that he has no such easements as against the public use of the streets, or any structures which may be erected upon the street to subserve and promote that public use.  

The case of Adams v. Chicago B. & N. Ry. Co., also involved an abutting owner who had long enjoyed a right of access to the street upon which his property abutted. A steam railroad was constructed in the center of this street and this action was brought, not for impairment of access, which was admittedly still safe and convenient, but for the throwing of steam, smoke, dust, and cinders upon the plaintiff's premises and into his house. The plaintiff in the Adams case and his predecessors in title not only actually abutted upon the street in question before the construction of the railway, but had actually enjoyed and used the consequent right of access for 30 years. Although the right of access was not involved in the case, the court did discuss the origin of rights of access and their limitation. The court found one basis for the right of access to be in the nature of fraud or estoppel, stating, in effect, that when an offer of dedication is made and is accepted and acted upon by the public to such an extent that to permit the offer to be withdrawn would operate as a fraud, the abutting lot owners are presumed to act with respect to their lots on the faith of it. As the court states: "Suppose one buys a piece of land fronting on a public street, or suppose he improves it, say by erecting buildings with reference to use in connection with the street, would it not be a fraud on him to afterwards close the street?" The court also states that since the abutting lots only are assessed for the construction and maintenance of the street, it would be hard to justify the imposition of such taxes for construction and maintenance on the abutting owners instead of on the public at large if the owners did not have some other advantage in the street beyond the public at large.

The court in the Adams case cites the "elevated railway cases" and points out that, like New York, in Minnesota the construction of a commercial railroad on a street is a perversion of the street to a use for which it was not intended.

While a commercial railroad was involved in the Adams case, the court recognized the reasoning of the Sauer case, stating:

\[26\] 39 Minn. 286, 39 N.W. 629.
The private right in a street is of course subordinate to the public right. The latter right is for use as a public street, and the incidental right to put and keep it in condition for such use, and for no other purpose. Whatever limitation or abridgement of the advantages which the abutting lot is entitled to from the street, may be caused by the exercise of the public right, the owner of the lot must submit to. If putting it to proper street uses causes annoying noises to be made in front of his lot, or the air to be filled with dust and smoke, so as to darken his premises, or pollute the air that passes from the street upon them, he has no legal cause of complaint.

Therefore, the principle has evolved that the easement of access which the judiciary has declared to exist is subject to the fullest exercise of the primary right of public travel out of which it sprang and that any change in the street for the benefit of public travel is a matter of public right. The Washington Supreme Court has consistently recognized right of access as property since the early case of Brown v. Seattle. In accordance with the general rule, the abutting owner's private right in the highway has been treated as subordinate to the easement and servitude in favor of the public.

The extent and limits of the right of access cannot well be defined. In general, it includes the right to use the street as an outlet from the abutting property to a connecting highway, by any mode of travel or conveyance appropriate to a highway; also, the right to use the street in front of the property, in connection with the use and enjoyment of the property, in such manner as is customary and reasonable.

Curtailment of the Right of Access

The basic problem in every case involving impairment of the right of access is to reconcile the conflicting interests—i.e., private versus public rights. Two methods have been employed to resolve these opposing interests. In some instances it has been accomplished through the exercise of the police power and in others under the power of eminent domain. The police power is the power of government to act in furtherance of the public good, either through legislation or by the exercise of any other legitimate means, in the promotion of the public health, safety, morals and general welfare, without incurring liability for the

27 State ex rel. Smith v. Superior Court, 26 Wash. 278, 66 Pac. 385; State v. Seattle, 57 Wash. 602, 107 Pac. 827; Also 5 Wash. 35, 31 Pac. 313; Elliott, Roads and Streets 961 (2d ed.).
resulting injury to private individuals. Eminent domain, on the other hand, is the power of the sovereign to take or damage private property for a public purpose on payment of just compensation.

Determination of whether damages are compensable under eminent domain or noncompensable under the police power depends upon the relative importance of the interests affected. The court must weigh the relative interests of the public and that of the individual, so as to arrive at a just balance in order that government will not be unduly restricted in the proper exercise of its functions for the public good, while at the same time giving due effect to the policy in the eminent domain clause of insuring the individual against an unreasonable loss occasioned by the exercise of governmental power.

Whether it is the police power or the right of eminent domain that is being exercised in a particular case is sometimes difficult to determine. However, it is well settled that limitation or regulation of highway traffic comes under the police power. It makes no difference how or where any part of the traffic gained access to the road—whether from a nearby or a distant point, whether from abutting land or from another highway.

The regulation of traffic without liability for the payment of compensation has included, among other things, prohibiting left turns, prescribing one-way traffic, prohibiting access or cross-overs between separated traffic lanes, prohibiting or regulating parking, and restricting the speed, weight, size and character of vehicles allowed on certain highways.

Similarly, almost all states under their police power have sanctioned traffic controls and road design that limit the abutter's freedom of movement upon the street adjacent to his property. This has been in the form of divided streets and highways, grade separations and one-way streets. These modern traffic and engineering devices have resulted in some "circuity of travel" as the courts have chosen to identify the concept. For example, if an owner of property abutting upon a one-way

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31 WASH. CONST., Art. I, § 16.
32 See Lenhoff, Development of the Concept of Eminent Domain, 42 Col. L. Rev. 596 (1942).
street for southbound traffic only, desires to travel to a destination on the same street a few blocks to the north, he must necessarily travel several blocks farther than if the abutting street were open to traffic in both directions. In the absence of arbitrary action the courts have said that such circuity of travel is noncompensable. This has been the ruling because mere circuity of travel does not of itself result in substantial impairment of ingress and egress. Any resulting interference is but an inconvenience shared in common with the general public, and is necessary in the public interest to make travel safer and more efficient.36

In the Jones Beach case37 an ordinance provided that no U-turn should be made on a parkway, except around a plaza, and that no left turn should be made except where specifically allowed by an officer or a traffic direction sign. This prevented an abutter from entering the parkway and required him to travel a distance of 5 miles before a left-hand turn could be made, so he could proceed in the opposite direction. This was held not to unreasonably restrict the abutter's access, the ordinance being uniform in its application and the owner of the abutting property, once upon the highway, being treated no differently from any other member of the traveling public.

In general, it is safe to say that the use of streets and highways may be limited, controlled, and regulated by public authority in the exercise of the police power whenever and to the extent necessary to provide for and promote the safety, peace, health, morals, and general welfare of the people, and is subject to such reasonable and impartial regulations as are calculated to secure to the general public the largest practical benefit.38

But where does the police power end and the power of eminent domain begin? This is the baffling question that has caused so much judicial confusion in right of access cases. Some courts have attempted to generalize by declaring that the police power ends when the injury to the property owner in not being paid for his property is greater than the injury to the public in having to pay for the property.39 If this is the criterion, the widely varying results are rather surprising.

The uncertainty and confusion in the law is most apparent in the cul-de-sac cases where construction of a freeway blocks up streets which formerly had intersected the highway but which now terminate

37 Supra, note 34.
39 Bacich v. Board of Control, 23 Cal. 2d 343, 144 P. 2d 818 (1943).
in a dead end. Some jurisdictions have declared that the creation of a cul-de-sac is compensable, although access still exists in the opposite direction to an intersecting street. Many other courts, however, have steadfastly refused to award compensation under such circumstances, maintaining that injury, if any, differs only in degree but not in kind from the damage suffered by the public.\textsuperscript{40}

Some courts recognize the damage of one owner as compensable while at the same time refusing to make good the injuries of another owner a block further removed from the obstruction.\textsuperscript{41} Diminution in value of the properties involved in both instances is occasioned by the same public act, and may be of like magnitude. The mere inconvenience of traveling any additional distance necessitated by the obstructed street is not a compelling distinction, for it is difficult to justify the denial of compensation to one whose property is located directly beyond the first intersecting street while permitting recovery to the abutter owning the lot on the corner of the block in which the cul-de-sac exists. The ultimate test in cul-de-sac cases, as in all other cases involving access rights, should be whether there has been any substantial impairment of ingress and egress to the premises, considering its use and environment. That a property abuts upon a street which is closed at one end should not, \textit{per se}, entitle the owner to damages, for, in fact, he may not have been damaged.

Let us consider next several situations in which highway officials constructing limited-access facilities will find themselves legally involved because of the property right of access.

\textbf{Construction of a New Limited-Access Highway}

Since an abutter's right-of-access property does not come into legal existence until the highway is opened to public travel, it would seem that construction of an entirely new limited-access facility should present no particular problem. If the state purchases a new right-of-way running through a man's property it pays for the land taken and "severance" damages for the separation of the property. But it should

\textsuperscript{40} See cases collected in 49 A. L. R. 330; 93 A. L. R. 639; City of Lynchburg v. Peters (Va.) 133 S.E. 674 (1926); New York, Chicago & St. Louis R.R. Co. v. Bucci (Ohio) 190 N.E. 562 (1934); Dantzer v. Indianapolis Union Ry. (Ind.) 39 N.E. 223; McQuillen, \textit{Municipal Corporations}, 2d ed., Vol. 4, \S 1425 et seq.

An interference with the owner of abutting property's right of access in one direction, leaving a less convenient means of egress in another direction, has been held not to be a taking of private property within the prohibition of due process clause of the Federal Constitution. Meyer v. City of Richmond, 172 U.S. 82.

\textsuperscript{41} Freeman v. City of Centralia, 67 Wash. 142, 120 Pac. 886; Bacich case, supra, note 39; New York, C. & St. L. R.R. v. Bucci (Ohio) 190 N.E. 562
not have to compensate the owner for the loss of a right of access which he never had. Similarly, if you sell to the public, for a freeway, a strip of land extending along the boundary of your land, your next door neighbor should not be entitled to compensation. He has never had right of access across your property line before. In such cases the abutting owner suffers only the loss of an unearned increment in land value. The restriction to access merely takes away the value which the construction of the road created. Although it seems academic that a property owner should not be compensated for the loss of such an unearned speculative profits, some courts consider it as an element of damage. Most jurisdictions, however, adhere to the principle that there can be no detriment to a right which never existed and no compensation for a loss not sustained.

In the case of City of Los Angeles v. Geiger,\(^42\) the court states:

While the recovery of damages is not limited to instances of actual invasion of the land itself, yet damages can be justified only by evidence of direct physical disturbance of an existing right, either public or private, which the owner possesses in connection with his property and which gives an additional value to it and by evidence that through such disturbance he has sustained a special damage with respect to his property or to a right appurtenant thereto different from or in excess of that suffered by the public in general.

A collateral problem that sometimes arises with the construction of a new limited-access facility has to do with the diversion of traffic from existing highways. It is now established doctrine in most jurisdictions that an abutter has no right in the continuation or maintenance of the flow of traffic past his property. Compensation is not allowed for diminution in land values occasioned by a public improvement diverting the main flow of traffic, either vertically or horizontally or both.\(^43\) There is, however, some authority in support of the contrary view.\(^44\)

**Conversion of an Existing Highway into a Limited-Access Facility**

When highway authorities convert existing roads or streets into limited-access facilities, abutting owners suffer special injuries in varying degrees. If there is a total blocking of access, obviously the landowner is entitled to compensation. The amount which the state will

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\(^{42}\) Cal. App. 2d 180.

\(^{43}\) City of Chicago v. Spoor (Ill.) 60 N.E. 540 (1901); Rose v. California (Calif.) 123 P. 2d 505 (1942); City of Stockton v. Marengo (Calif.) 31 P. 2d 467 (1934).

\(^{44}\) See 118 A. L. R. 921.
have to pay is determined by considering the market value of the prop-
erty before the access right is taken and after it is taken. The differ-
ence in value is the damage for loss of access rights. If the property is
left completely inaccessible by any public roads, the damage can be
so severe it will approach the actual value of the property. As a prac-
tical matter, highway officials endeavor to reduce or avoid special dam-
age by allowing some access. If the freeway passes through a sparsely
settled rural area this may be accomplished without defeating the
underlying purpose of the facility by allowing each abutter one point
of access. But in densely settled urban areas such a procedure would
be incompatible with the basic objectives of a limited-access highway.

Moreover, there is a recognized distinction between a road in the
country and a street in a municipality as to the mode and extent of use
and enjoyment of public facilities, the urban servitude being much
more comprehensive than the rural. Streets within the limits of munici-
pal corporations are put to many uses by the public to which highways
in the rural areas are not subject. As a small town grows into a city
the rights of the public in its streets are correspondingly broadened.
When this doctrine is applied to the right of access, a very reasonable
result is obtained, namely: that in a city or suburban area, where
through traffic is heavy, greater limitation on access rights of abutters
is justified than in the case of a rural road, where traffic may be of a
much lighter character.

To meet the special problems of suburban areas, where abutting
land values are frequently high, the practice is to construct outer
service roads that parallel the freeway and connect with it at design-
nated points. If such a facility affords reasonable ingress and egress to
the property, there is no impairment of the right of access. It may

45 Bohm v. Metropolitan Ry., 129 N.Y. 576, 29 N.E. 802; United States v. Welch,
217 U.S. 333; People v. Al G. Smith Co., Ltd. (Calif.) 194 P. 2d 750 (1948); 29
46 See cases cited in 25 Am. Jur. 462, § 167; Elliott, Roads and Streets, 299
et seq.

This legal conclusion is disputed by 1 Lewis, Eminent Domain, 173 (3d ed.)—
"According to Mr. Elliott the moment a country road is brought within the jurisdicti-
on of a town or city, the public easement forthwith becomes enlarged and extended
by operation of law. If this is so, then something has been subtracted from the private
property of the abutting owner and added to the public easement, without compensation.
This is clearly contrary to the constitution and, therefore, cannot be the correct view.
The public can no more take, without compensation, an easement for the urban uses
of highways, than it can take, without compensation, an easement for the rural uses of
highways. It follows, either that the public must have a very limited control and ease-
ment in country roads after they become city streets, or else that the easement is the
same in both cases, and that the same principles are to be applied to both in determining
what is a legitimate use."
cause some circuity of travel, but, as previously noted, this is non-compensable.

Although admitting that no actionable interference with the right of access results from circuity of travel, the Supreme Court of California, in the Ricciardi case, held that an owner is entitled as a matter of law to direct access to the through-traffic portion of a freeway.\footnote{47 People v. Ricciardi (Calif.) 144 P. 2d 799 (1943).} Since the owner was provided with a 30-foot outer highway which did give him access to the freeway, by a slightly more circuitous route than before, it would appear that compensation was allowed for circuity of travel, notwithstanding the denials in the majority opinion. It is hoped that the Supreme Court of Washington will never be persuaded to follow the dangerous precedent of the Ricciardi case. It would mean in effect that every abutter could demand an opening through the central median or dividing strip both between the outer highway and the through-traffic lanes, and through the center dividing strip of the through lanes. It is obvious that any such concession to abutters would defeat the underlying purpose of the limited-access facility. Yet the only alternative under such a rule of law is payment of unconscionable tribute by the public to adjacent owners. This tribute could be so great in the aggregate that the cost of freeways would, in fact, be prohibitive.

The preponderance of authority does not permit an abutter to ask for more than reasonable access to the general system of streets in the vicinity. To recover he must show special damages, differing in kind, not merely in degree, from those sustained by the public generally. If the improvement results in some inconvenience to his access, or compels a more circuitous route, or a diversion of travel in front of his premises—these elements are considered as damnum absque injuria. Such is the price paid for the great benefits and accommodations supplied by public enterprises.

In addition to the rights of abutting owners the courts have been called upon to define the rights, if any, of property owners near by but not adjacent to a limited-access facility. This was the question involved in the recent case of Schnider v. State of California, decided February 21, 1952.\footnote{48 — Cal. —, 241 P. 2d 1 (1952).} In converting Olympic Boulevard, in the city of Los Angeles, into a freeway it became necessary to acquire additional land for widening. Accordingly, the state purchased an entire tier of lots fronting on the boulevard. The property of the plaintiff adjoined the property acquired. Damages were sought based upon the theory
that a right or easement of access appurtenant to plaintiff's lots had been taken away by the state. The trial court held as a matter of law, or mixed question of fact and law, that the plaintiff's properties being two separate inside lots, that is, never having fronted on Olympic Boulevard, had never enjoyed or acquired a right or easement of access to the boulevard. The Supreme Court, in unanimously affirming the trial court, states: "Where a property owner has no right of direct access to a highway before it is converted into a freeway abutting upon his property, nothing is taken from him by the failure to give him such a right when the conversion takes place. The allowance of compensation in such a case would amount to a gift rather than payment for the destruction of a right." This is not only a reasonable but also a necessary rule of law. If, every time the state acquired parcels abutting on a conventional highway which is converted to a freeway, there suddenly rose up a second tier of access rights which also must be acquired to preserve the integrity of the freeway, the cost and its effect on highway construction can well be imagined. The door of the public treasury should stand open to those who have suffered actual compensable damages to existing rights. But it would be a strange ruling indeed which would open that door to their neighbors to the rear who, having suffered no loss, were disappointed because they did not receive a gift,

**History of Limited-Access in Washington**

The authority to condemn and appropriate privately-owned lands for highway purposes was first given to the Director of Highways in 1937. Since the statute merely provided for the acquisition of "lands" and made no direct reference to the property right of access, the question of the state's authority to construct limited-access highways was unsettled. When the problem was presented in the *Veys* case, the Supreme Court stated: "It is our opinion that, in the enactment of this statute, the legislature did not have in mind the acquirement of access rights when establishing and constructing primary state highways, and that the word "lands" was used as applying only to the rights of way and easements and other purposes specifically mentioned. . . ." Notwithstanding the foregoing language, we believe the 1937 act is sufficiently broad to permit the construction of limited-access highways where it can be done without interfering with existing access rights.

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50 State *ex rel.* Veys v. Superior Court, 33 Wn. 2d 638, 206 P. 2d 1028 (1948).
As previously discussed, an abutting owner has no right of access until the highway is built and opened to public travel. Therefore, if the state acquires title to the tracts bordering on the proposed highway before construction, the question of access rights should never arise. Acquisition of property abutting on a proposed highway would seem entirely proper under the director's general authority to condemn lands for highway purposes, including lands needed "... so as to afford unobstructed vision therefor toward any railroad crossing or another public highway crossing... or any site for other necessary structures or for structures for the health and accommodation of persons traveling or stopping upon the primary state highways of this state, or for any other highway purpose..." (Italics ours)

Perhaps in anticipation of the ruling in the Veys case, the 1947 legislature enacted a specific limited-access highway law. When the proposed enactment came up for consideration, there was extensive debate and controversy in both the Senate and House of Representatives over the question of whether the authority to acquire access rights should extend to existing highways or be limited to those to be established and constructed in the future. As finally enacted, the power to condemn rights of access was clearly limited to "new locations." This term was defined as "... a new highway or new street and for the purposes of this act shall not apply to existing highways and streets."

The foregoing definition so limited the authority of the Director of Highways that the 1947 law became virtually meaningless. It is improbable, however, that the legislature intended to restrict the Director of Highways to the extent indicated by State ex rel. Troy v. Superior Court. This was a case where the state planned to relocate a portion of Primary State Highway No. 1 and construct a limited-access facility. The relocated route was to be several hundred feet from the existing location which was to be retained for local use. The majority reached the conclusion that since the lands sought to be condemned for limited-access purposes were to be used as a part of Primary State Highway No. 1, they were not for a "new highway." The practical effect of this decision was to stop all limited-access construction. Such a facility is justified only when the traffic over an existing highway becomes so heavy it cannot be handled safely and expeditiously with the conventional type road. Accordingly, a limited-access highway is almost

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always a relocation, if not a replacement, of an existing highway.

In a well reasoned dissent, Justice Hamley points out that a highway is a "new highway" if (1) the property or right of way is acquired after the effective date of the 1947 Act; and if (2) it is so located that there is no substantial interference with the access rights of abutting owners on and to the then existing highway. Giving the new highway the designation formerly held by the old one—Primary State Highway No. 1—should not change the basic facts.

To overcome the adverse effect of the majority opinion in the Troy case, the 1951 legislature defined the term "existing highway" with the following clear and unmistakable words: "For the purposes of this act, the term 'existing highway' shall include all highways, roads and streets duly established, constructed, and in use. It shall not include new highways, roads or streets, or relocated highways, roads or streets, or portions of existing highways, roads or streets which are relocated." Thus there should no longer be any question as to the authority of the Director of Highways to construct limited-access facilities in relocating existing highways.

The longer we postpone the extinguishment of access rights on existing highways, the greater the eventual cost of such extinguishment becomes, and the more public trust funds must be needlessly dissipated. In recognition of this obvious fact, the 1951 legislature established a procedure by which any existing highway may be converted to a limited-access facility. Briefly, the law requires that abutting property owners must be given notice of the proposal and an opportunity to be heard thereon at a public hearing presided over by the Highway Authority. At the conclusion of the hearing and after consideration of the evidence, the authority is required to make "specific findings in the case of each abutting ownership as to whether such proposal to establish such existing highway, road or street, or portion thereof, as a limited-access facility is required by the public convenience and necessity." The act further provides that the findings of the Highway Authority shall be final unless an appeal is taken within a specified time in the Superior Court of Thurston County.

Notwithstanding the worthy objectives of the 1951 limited-access highway law, it is reasonable to expect that it will be vigorously assailed on several grounds. For instance, is it an attempt to turn over

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judicial functions to the Highway Authority by empowering it to determine "public convenience and necessity"? How can the law be reconciled with Art. I Section 16 of the Washington State Constitution on eminent domain? Is the abutting property owner entitled to a trial *de novo* in the superior court or will a review of the Authority's record suffice? We refuse to speculate as to how such questions will be answered. We merely predict that the courts will be confronted with these inquiries in the very near future.

**CONCLUSION**

No one can doubt any longer that we need to limit access to some of our streets and highways, to accommodate the free movement of large numbers of motor vehicles safely and conveniently. Because of the newness of the concept, the courts will be confronted with increasing litigation involving the conflicting public and private interests. The course of future highway development will be profoundly influenced by judicial determination of the basic issues. It is hoped, therefore, that the judiciary will not expand abutters' rights of access so unreasonably as to discourage or obstruct these much needed public improvements.