

LEGAL ISSUES

Throughway and Access Laws

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LEGAL ISSUES

Throughway and Access Laws

EXECUTIVE SUMMARY

It is the policy of the Oregon Department of Transportation to control access to the highway facilities of the state to the degree necessary to maintain functional use, highway safety, and the preservation of public investment.

One of the major roles of the Oregon State Highway Division is to provide interstate and intercity transportation facilities for rubber-tired vehicles. These highway facilities form a network linking population concentrations and major attractions throughout the state. During the development of the Interstate System, the effect of highways on land use received considerable attention. For the long term, with new construction declining, our attention is turning to the effects of land use on highways in an effort to make the best use of the highways we have and to preserve load carrying capacity of our investments for their intended duration.

Access control and management can play a critical role in achieving the Transportation Commission goal of preserving and maintaining the functional use of the present highway system. Without effective access control and management, the state is in effect committing itself to a policy of by-passing the by-passes that have become clogged through inappropriate land use planning, inadequate or insufficient access control policy and management.

The engine that frequently drives access control consideration is the cost of the acquisition of access rights. It is our conclusion that the Department understates its police powers to manage access through regulation, not only as expressly authorized in the current statutes, but as implied through the case law. That is significantly based on the Department's embedded eminent domain philosophy which views access rights as property rights that have to be acquired before they can be effectively regulated. Re-examination of this legal assumption provides a basis for reversal of that policy and to limit the purchase of access rights to those situations required by law, thereby making access control and management more cost efficient.

Access control in Oregon is a patchwork of informal arrangements and understandings, some regulatory definitions, a permitting process and seemingly adequate but confusing statutory authority. The 1947 Throughway Law as a part of the access control system is in general disuse and hardly understood or referred to by anyone. The administration of access control is broadly decentralized in that it not only differs from region to region, but also from district to district within a region. While there are sufficient grants of authority for ODOT to administer an aggressive access control program, there is no question that both administratively and politically the system would benefit from legislative clarification and regulatory expansion.

Access Law is based on the state's power to regulate for safety and welfare, frequently described as police power. Analysis of Oregon law and the recent United States Supreme Court decisions on "taking", or the need to compensate owners for regulating or limiting their property rights, lead to a general conclusion that the Throughway Law as interpreted by the Department imposes burdens and obligations which have resulted in its *de facto* disuse and ought to be replaced by an amended Access Control Law, soundly and explicitly grounded on police power justification and administered through a program of access control based on highway classification.

Our basic premise is that while it is undeniable that a person should receive adequate compensation when his property or property rights are taken by the state, it is submitted that the public interest in promoting a highway program of access limitation demands a judicious effort to prevent the dissipation of public funds in the acquisition of access rights which would result from any unwarranted extension of the abutting landowner's right to access.

Summary of Research Conclusions. Statutory comparison of Throughway and Access laws indicates that Access Law gives the State a capacity for constructing and designating highways designed primarily for through traffic, without some of the limitations, either encompassed or so assumed, in the Throughway Law and at a lower acquisition cost to the taxpayers. What should be retained from the Throughway Law is a corridor management concept with its potential efficiency to accomplish all the access control objectives along a designated corridor in one action. The Department has interpreted the Throughway Law for the proposition that there is no absolute right to control access, at least on existing right of way, until access rights have been purchased from the owners. That interpretation is more restrictive than required by the statutes and Oregon Supreme Court decisions and ought to be abandoned for a regulatory concept, the basis for which already exists in the Access Law.

Case law analysis leads to a conclusion that the rule in Oregon is that so long as some access remains or is provided to the property owner, where existing access was diminished or taken in order to improve a highway, there is no compensable taking. In police power terms the result can be stated as, if some value remains to the owner where access rights have been restricted or taken for highway improvements, there is no taking. The Courts cut off right to compensation based on regulation designed to prevent harm to public facilities, such as destruction of public investment in the highway system. Exceptions to these rules are not mandated by police power limitations, but by specific legislation requiring compensation or damages to the owners. In absence of such legislative mandates, or contractual rights no compensation is due for regulating and managing the highway system for the benefit of the motoring public. The key to reform is the willingness to use police power to the extent available to control and manage access for the benefit of citizens of Oregon, the motoring public, and for prolongation of the useful life of facilities and better faster communication between cities.

Conclusion. We believe there is greater latitude in the "police power" approach by the state than the Department uses. The issue of assertive pro-active access control program utilizing regulatory powers of the state is one of policy decision for the Department. The Oregon land use system offers an important additional and important opportunity for systematic, long term, work with local governments to preserve and encourage access control sought by the state. Limitations to this twin approach, regulation and land use, are not in the law, at least not to the extent thought.

A comprehensive approach would combine elements of Approach Permit Law and Throughway Law into an Access Control Code supported by a clear regulatory framework, based solidly and unequivocally on police power. Such legislation should utilize highway classifications based on functions or levels of importance and broad access objectives rationally related to those functions and levels of service. The basis for this approach already exists in the Oregon Highway Plan and it is usefully expanded in the proposed draft revisions of that plan. The program should be integrated with the state's land use system as a way of systematically building partnerships with local governments for long term access control and management.

INTRODUCTION

Problem statement. Traditionally the Oregon highway system has served two types of travel: high speed through travel and land access. Both traffic movement and land access are necessary but often conflicting functions of the road system. A variety of facilities are used to carry out these two functions. Arterials are primarily intended for the movement of through traffic. Local streets provide access to abutting land at the expense of through traffic movement. Collectors are intended to give relatively equal service to both functions.

While arterials are designed for long travel distances and for high speeds, they often become popular for short distance trips as well. This heavy use of arterials makes them desirable for business to locate. This in turn attracts additional development often resulting in strip development.

With one or more accesses for each business or residence, the resulting turning movements onto and off an arterial can impede the flow of traffic. As the number of accesses and the intensity of roadside development increases, the accident rate also increases. Before long, an arterial may be doing a poor job of either serving through traffic or providing safe, easy access to abutting properties.

Until the late 1930's the land access function was given the greatest importance. As the number of travellers and the speed of auto travel increased steps were taken to reduce or limit the conflicts between through travel and access. ¹

Oregon in 1947 was one of the earlier states in the nation to pass a statute allowing access control, the Throughway Law, seemingly committing itself to creating efficient and safe inter urban highway linkages. With the advent of the federal Interstate program in the mid-50's, the focus of that effort shifted. Now, with population and highway use growing and the federal program completed, the focus is shifting again to preserving and enhancing capacity of existing highways.

One of the major roles of the Oregon State Highway Division is to provide interstate and intercity transportation facilities for rubber-tired vehicles. These highways form a network linking population concentrations and major attractions throughout the State. During the development of the Interstate System the effect of highways on land use received considerable attention. Now with new construction declining, our attention is turning to the effects of land use on highways in an effort to make the best use of the highways we have. ²

Frequently, the orderly economic and land use development of cities and counties has been altered by the presence of a state highway. State highways are designed primarily for longer travel distance and for higher speeds. Because the public can normally expect to travel at higher speeds on the state highway system, highways become popular for travel other than intercity. Frequently, a state highway is the fastest route to cross, enter, or leave town.

¹ The above discussion is taken from Oregon Transportation Commission ACCESS CONTROL POLICY FOR OREGON STATE HIGHWAY SYSTEM, predecessor to Rule 731, now Or. Admin. R. 734-50-075

² Internal ODOT, DISCUSSION PAPER, ACCESS TO STATE HIGHWAY, April 21, 1978 (a background document leading to the adoption of 1980 regulations).

Traffic increases rapidly when a highway through town is improved or a new route built. Sometimes businesses expand and development pressures intensify hoping to take advantage of the state investment. Frequently there is an expectation that state funded improvements will ameliorate resulting congestion. Local zoning ordinances often do not discourage this practice. Particularly in smaller cities, growth patterns orient toward the highway and strip development emerges. In some cities there are several "downtowns" because the routing of a major highway has changed. The ultimate result is that highways become congested with local traffic and soon exceed their capacity.

In the past, such highways might have been widened, a bypass built or some other improvements made. This has always been expensive due to the change in land use along the highway over time. What were once vacant properties at the time of initial construction are now business sites. Frequently structures are close to right-of-way lines forcing expensive condemnations and relocations. Usually after the section is reconstructed travel resumes at a faster pace encouraging business development even further from the center of town creating more travel and congestion. This enables quick, low cost development which may relieve local tax burdens and in case of annexation, absorption of this new development will increase the local tax base. This kind of development also threatens the central business districts. Cities looking to ODOT for help will find that ODOT simply may not have funds to correct local mistakes in land development.³

Residential development poses some related problems. Both major residential developments and incremental development add to local highway congestion. Incremental development slowly erodes some controlled access facilities and turns other facilities into local land service roads.

Transportation Commission Priorities. The Transportation Commission has determined that Oregon's state highway system is largely already in place, and that there will be few, if any, major new construction projects between now and the end of this century.

Because of that, the Commission's highest priority is to preserve and maintain the present 7,600 mile system, and the majority of available funds will be dedicated toward that purpose. The Commission realizes, however, that as Oregon's population grows and the economy diversifies, the state highway system cannot remain static in the years ahead. Consequently, funds will be used for improvements to the present system, especially in areas where development exists now and where growth in the future will put unusual demands on the transportation system.⁴

Access control and management can play a critical role in achieving the Commission goal of preserving and maintaining the present system. With funds needed for improvements, it is important to preserve the load carrying capacity of the existing highway network whenever possible. The engine that frequently drives access control consideration is the cost of the acquisition of access rights. Re-examination of the basic assumptions about acquisition of access rights, and access control through regula-

³ See Note 4.

⁴ The Oregon Highway Plan, Oregon State Highway Division, Planning Section, p. 4 (1985).

tions is an opportunity to limit the need to purchase access to those situations that the law may actually require, thereby making access control more efficient.

This paper will take a fresh look at the law. The nature and emphasis placed on different sections of access control law has shifted historically with the emphasis on access placed by the Commission. As will be seen, the Commission has shifted its emphasis from providing access for development to one of maintaining the public investment in highways. The draft of the revised Oregon Highway Plan places even greater emphasis on maintenances and "investment protection."⁵ We will look carefully at the language of the statutes, court decisions and evolving concepts of constitutional law to test the limits of the State's authority to control, deny and manage access. We acknowledge, from the start, that policy choices to be made may look beyond the issue of legal power available to the State, but this paper will allow those decisions to be made in the context of the latest developments in the legal doctrine.

History of the Department's Access Policy. The 1978 Highway Access Study⁶ conclude that ODOT now holds control of access on all interstate, most primary, and some secondary highways. That control was acquired through purchase.⁷ The control exercised on the interstate highways,⁸ however, is quite different than that on primary and secondary highways where access has been reserved for almost all abutting properties. On major highways with little existing access, access grants are rarely given because of potential hazards of high speed traffic. Where many access grants already exist and local traffic is slow-moving, additional access grants are more likely to be allowed. Access-related congestion increases most rapidly on highways which are already congested.⁹

In 1945 the Commission provided for purchase of all rights of access on nine Oregon highways along with acquisition of land for relocations and widenings ". . . except at such points or places as may be agreed upon by the Commission and said owners."¹⁰ In 1974 the Pacific Highway was added to this list.¹¹

In 1948 after the passage of the Throughway Law, the wording of the 1945 resolution was changed to include authority to purchase access control on all primary state highways whenever it is necessary to

⁵ Draft Oregon Highway Plan, March 1989.

⁶ See Note 5.

⁷ As this paper will make clear there existed all along legislation and court cases which would have permitted a good deal of control to exist through regulation, without purchase. Purchase, however, resulted frequently in grants of access to reduce price, thus creating contractual rights to access where none might have otherwise existed and riddling the system with access points which will be entitled to compensation as a matter of contract law.

⁸ Federal standards dictate that no access be permitted directly to interstate highways.

⁹ Highway Access Study, p. 10.

¹⁰ Resolution 2 (1945).

¹¹ Resolution 2a (1974).

acquire new or additional right of way.¹² This policy appears unchanged by the 1951 law which made many of these acquisitions unnecessary, as will be discussed later.

In 1958 the Commission endorsed the position that the major function of non-interstate highways was to serve land.¹³ The land service function of such highways having "limited access control should under certain circumstances¹⁴, be increased in order to advance the economic interest of certain localities". The resolution spells out the Commission's willingness to change "restricted use" access grants to "unrestricted use" and for payment of construction costs and donation of land for acceleration or deceleration lanes, if needed, to issue unrestricted use grants.

In 1962 the same resolution was applied to County roads.¹⁵

In 1963 #4a and #4b were superceded and the following changes were made. Federal approval was provided for when access control changed on federal-aid highways. In addition to changes in use, changes in "numbers and location of access points for service of abutting land" were allowed. The changes were now for the economic interest of "abutting owners" not "localities" if, as in #4a, safety considerations allowed it.¹⁶

In 1964 there was an attempt to pass resolution #4d, which would have rescinded #4c.¹⁷

As the 1978 Highway Access Study pointed out, in recent years, access has generally not been allowed to new highways constructed in urban areas. Ten or 15 miles outside the urban areas some restricted access has been negotiated where properties become landlocked by new facilities.

The Department has purchased much access control on older highways and highways which have been reconstructed. This gave the Department the authority they thought they needed to limit access points to adjacent properties. But because of reservation of access granted to owners as part of negotiated acquisition process, this action has had little effect. These reservations left the owners with contractual access points. Likewise the "frontage road clause" which reserved to the Department right to replace direct access with frontage road access was discontinued because of cases that will be discussed later.

¹² Resolution 4 (1948).

¹³ Resolution 4a (1958).

¹⁴ "only where it will not unreasonably endanger the travelling public"

¹⁵ Resolution 4b (1962).

¹⁶ Resolution 4c (1963).

¹⁷ Proposed 4d had the following language: "The applicant shall pay to the Commission such sum of money as the Commission determines to be just and equitable for the release of said restriction. Said determination by the Commission shall include, but is not limited to (1) due consideration of all the factors involved in State's acquisition of the property and access rights and (2) the benefits accruing to the remaining abutting lands of State's grantor which are attributable to the release of the access use restriction and location and construction or the relocation and reconstruction of the highway." Commission minutes report Chairman Jackson's objection to "the State . . . trying to participate in increase in property values along the highway."

In 1977 the Commission policy reaffirmed its local economy emphasis by "retain[ing] operating conditions that will not be detrimental to the economy of the community and the public well-being".¹⁸ The policy document also states that "use of transportation to stimulate economic development has been a factor in Oregon's development since pioneer days."¹⁹ The 1978 Highway Access Study concludes:

Apparently, we have often viewed the economic contribution to the community as one of providing access directly to the highway, thereby making new, desirable development sites available. This position encourages strip development and, in the long run may be detrimental to the local economy and costly to highway users. An increasingly accepted view is that state highways serve the local economy best by providing arteries for the flow of goods and services between communities, and by supporting planned growth. This view, which emphasizes the transportation function of highways and large scale access issues (access between communities), is nearly the opposite of small scale access function described above. The two views conflict with one necessarily taking precedence over the other.²⁰

Access Control and the Throughway Study. Today access control in Oregon is a patchwork of informal arrangements and understandings, some regulatory definitions, a permitting process and seemingly adequate but confusing statutory authority. The 1947 Throughway Law as a subspecies of the access system is in general disuse and hardly understood or referred to by anyone. The administration of access control is broadly decentralized in that it not only differs from region to region, but also from district to district within a region. While there are sufficient grants of authority for ODOT to administer a more aggressive access control program, there is no question that both administratively and politically the system would benefit from legal clarification and regulatory expansion. Furthermore, depending on policy choices to be made in the future, additional statutory authority may be needed.

For purpose of this analysis we will be working with two sets of laws. We will refer to ORS 374.005 to 374.095 as the Throughway Law and we will call APPROACH ROADS, PRIVATE CROSSINGS AND OTHER FACILITIES UPON RIGHT OF WAY, ORS 374.305 TO 374.990 as the Access Law. Conceptually, the Throughway²¹ system is a category of access control, allowing for access control along an entire highway corridor. Those same general objectives can be accomplished under the Access Law, perhaps less efficiently in theory.

Our basic question was originally phrased as: Do we need the Throughway Law in view of the

¹⁸ Transportation Commission Policies, at 13 (1977).

¹⁹ Id. at 13.

²⁰ Id. at 12.

²¹ ORS 374.010 states: "'throughway' means a highway or street especially designed for through traffic, over, from or to which owners or occupants of abutting land or other persons have no easement of access or only a limited easement of access, light, air or view, by reason of the fact that their property abuts upon the throughway or for any other reason."

fact that we have the Access Law? Variations on that theme were: What does the Throughway Law do for us? Can it be resurrected to serve a function useful to the State and the Department?

In the interview process we were given some specific questions: What is the authority to deny access? Do we have authority to cancel all access in a stretch of road and start all over again? Do we have authority to require that owners revise or improve access? Do we have authority to require that adjacent owners combine access? These questions underscore our point about confusion and are at the heart of the basic distinction stemming from different understanding as to the basis of the two laws.

A short answer to these questions is yes, given adequate findings relating to safety or necessity or highway capacity. ORS 374.310(2) allows the department to do anything that can be rationally attributable to be "in the best interest of the public for the protection of the highway or road and the travelling public." (Emphasis provided.) A long answer is that comprehensive regulations would be very useful in making clear, what, how and when those objectives could be best achieved.

The most telling aspect of our investigation can be found in the fact that almost no one we interviewed was familiar with the terms and operation of the Throughway Law, although everyone knew about Access Law and supported its objectives. It was clear to us that the Throughway Law has fallen into disuse. The real question as we saw it turned on what can ODOT require from property owners without having to acquire or pay for taking of the right of access.

There are some conflicting opinions as what the law seemingly says, ie: plain meaning and court decisions on one hand and opinions formal and informal from different departmental counsel which place different emphasis either on police power (regulatory taking) or eminent domain, as will be more fully discussed. To be absolutely fair, the issues are complex, and given the Commission's past access policy, might have appeared to be somewhat academic. The courts are sometimes inconsistent or unclear, as they themselves acknowledge, and finally the United States Supreme Court has issued three major rulings in 1987 that have relevance to this topic and whose implications are still being analyzed.

In the course of our research and study the basic issues evolved from what was authorized in the Throughway Law that might retain some utility for a comprehensive access control program, to whether the Throughway Law does more harm than good. Finally, we focused on the proposition that by combining elements of the Throughway Law with Access Law and adding other elements which the police powers decision of the courts permitted, the State could, if it chose to do so politically, embark on a more assertive and economical approach to access management and control.

So that when we ask if the Throughway Law does more harm than good we mean, in view of the evolution of the law since 1947, whether it now presents the best bargain to the State and the tax paying public? In other words, whether through its policy the State was committing itself to unnecessarily compensating property owners? This question is meant from a point of view of legal necessity, rather than political choice. Oregon courts have several times found that compensation for diminution of access was not compensable, only to have the legislature declare in effect that it wanted to pay for it anyway. Similarly, the Department was steeped in Eminent Domain thinking, rather than regulatory thinking, to the

point of conceding a good portion of its police power initiative in this area to local governments.

Elements of Current Access Policy. The Department acknowledges the importance of access control:

It is the policy of the Oregon Department of Transportation to control access to the highway facilities of the state to the degree necessary to maintain functional use, highway safety, and the preservation of public investment. The Department recognizes that access control management varies for each of six existing access management conditions.

In 1979 ODOT issued a GUIDEBOOK FOR ACCESS MANAGEMENT (Guidebook) and PERMANENT ADMINISTRATIVE RULE ON ACCESS POLICY (OAR 734 Division 50) in 1980. These reflect the policy today. Unlike the discussion in the 70's, the focus has shifted from primacy of inter city communication as a tool of economic development to simply reflect the growing fiscal need to preserve and "maintain functional use" of existing highways. The least expensive way to preserve the useful life a facility is to control access. The shift in emphasis has worked to increase consciousness of access issues.

The OAR Division 50 rules list considerations for granting access and for outright denial of access. One basis for absolute denial is failure to abut, or to have failed to purchase reservation of access. Another basis is the absence of practical alternatives and the ability to meet geometric design standards. While congestion, overcapacity and delay by themselves are not standards for denial, unless they can be strapped on to geometrical safety standards, they often result in conditions being placed on permits.²³ That process relies on local administrators and encompasses a high degree of discretion. The policy otherwise assumes that an access permit will be given unless there is a problem. There appears to be a working presumption that access is to be granted as a matter of right, unless the Department proves that it need not.

The justification for this approach is a statutory reading that the powers granted to the Department "shall not be exercised so as to deny any property adjoining the road or highway reasonable access."²⁴ The Department policy has not yet come to an official regulatory conclusion that preserving capacity is a "reasonable" basis for denying a permit, because the Department reads the "reasonable" denial as the need to approve access except for safety deficiencies, or where it has purchased rights of access.

As will be seen in later discussion the Guidebook and the regulations (Chapter 734, Division 50)

²² Or. Admin. Rules 734-50-075 (1980), old Real Property Administrative Rule 731.

²³ Paraphrasing the rules, the OARs say that conditions and restrictions may be placed on a road approach permit. They also say that if highway improvements are necessary due to traffic using a private road approach, the Division may require highway improvements as necessary, at the property owner's expense. For example, if left-turning traffic at a private access required a left-turn refuge and a signal, the payment by the property owner for construction and the signal could be a condition of the road approach permit...The rationale behind this is that whoever directly causes a traffic problem, pays to mitigate it. Source EXHIBIT C, ACCESS PLAN FOR US 101, p 4

<Comment - this is still an issue of diminishing returns. How many more traffic lights should 101 have.>

²⁴ ORS 374.310(3); for full discussion read below.

take the narrowest possible reading of the Department's authority to be:

In general, the degree of authority which the Department has in controlling access to a state highway or any portion thereof depends on whether or not the Department has acquired all of the rights of access or limited rights of access from the abutting property to the highway. A right of access is a property right allowing the owner of property abutting the highway to get to the travelled portion of the highway from his property.²⁵

The cautiousness of the Guidebook as to the state's regulatory capacity is reflected in the way it understates certain conclusions about the Department's authority and overstates the rights of landowners.

The Department, realizing the value and the need for access control to prolong the useful life of the facilities, has increasingly looked to local governments to assist it in the tasks of access management.

The State has certain specific authorities regarding access along state highways, but much of the authority to manage access on both state and local arterials lies with local government. For the most part the local authority is found in the comprehensive planning, zoning, subdivision and site review powers of cities and counties. These city and county powers are the primary focus of the guidebook.²⁶

This statement is correct as far as it goes. It reflects a past policy choice not to press the State's own police power. In fact the State has more authority, more police power and more ability to be really strong in protecting state highways than it has chosen to exercise to date. The Guidebook while excellent and full of good examples for local governments to use in planning for access control, is an expression of ODOT's policy to concede its police power authority, especially to better control land use impacts along state highways, to local governments.

We rely on the Guidebook for good examples of local access control policies in our Land Use paper. It is imperative to engage and use powers of local governments to assist in access management, for both political and practical reasons, but ODOT can do more to guide both the regulatory and land use policy development. Local jurisdictions will be able to do a better job in access control planning and management along state highways with more policy guidance and regulatory leadership from the Department.

In the Land Use portion of our study we will focus on how to use Oregon's land use system to more actively engage local governments in access control planning and management. It is our conclusion that the Department understates its police powers to manage access along facilities it owns and has jurisdiction over, not only as expressly authorized in statutes, but as implied through the case law. That is significantly based on the Department's imbedded eminent domain philosophy. The differences between eminent domain and police power, which has dominated a portion of legal debate in this century - where the two limitations

²⁵ Guidebook for Access Management, Oregon Department of Transportation, Policy and Program Development Strategic Planning Section, 1-1 (July 1979).

²⁶ Id. at i.

cross and what the courts will actually allow - is sometimes unclear. A number of commentators urge abandonment of the distinction and question the value of the distinctions; however, our reading of Oregon cases leads us to believe that the Department can advance a considerable distance toward greater police power based regulation.

The Department's approach to the law may have been colored significantly by the Commission's policies favoring liberal grants of access. The legislature has also reflected some desire to compensate landowners for loss of access where courts and common law would not have done so. At the very least we hope to show that these results are not inevitable in the law. They reflect a balancing of interests and policies of the Commission and the Department, but the range of choices which the law would allow the Department if it chose to pursue an aggressive access control policy is much greater than has been utilized.

Finally, we will make clear, if the Department proceeds down the path of greater use of its police powers to manage and control access, the taxpayers and the Department will be able to "maintain and preserve" existing highways more economically and efficiently. The Department's policy is already evolving in this direction and the draft of the new Highway Plan opens up additional opportunities to strengthen the regulatory and land use approaches we recommend.

March 1989 Draft Oregon Highway Plan. In the Land Use paper we examined the opportunities for integrating the Highway Plan into the Oregon land use system in ways which encourage long term access control planning. Long term access control plans will make day to day administration of access permitting a better, goal driven process. In this paper we will review the proposed Draft of the Oregon Highway Plan with a view toward the direction it may provide for access management policy development and a regulatory framework.

The draft plan and the current plan, are driven by two findings and two assumptions. The findings are: 1) that while the overall condition of Oregon's State Highway System (System) has improved, increasing use, inflation and cuts in federal funds threaten the recent gains; and 2) almost half of the System will need some type of modernization in the next 20 years, and the projected needs far exceed revenue projections. The assumptions are: 1) there will never be enough revenue to maintain the System in perfect condition; and 2) highways, and segments of highways cannot be treated equally.²⁷

The emphasis of the new draft plan is to guide the State Highway Division in making maintenance, operation, preservation and construction decisions for the next ten years and into the next century. The plan, unlike the Six-Year Highway Improvement Program, is not specific about individual projects. Instead, it is an update which refines the policies and guidelines established in the first 1985 Plan, to be used in evaluating improvements to the System and to assist the Transportation Commission in charting direction of the highway program.²⁸

²⁷ Draft Oregon Highway Plan, March 1989, at 1.

²⁸ Id. at 2.

The draft plan was developed to guide allocation of funds to the basic Highway Division programs of maintenance, operations, preservation and modernization. Access considerations are present in three of the programs - maintenance issues approach road permits, operations is often involved with access management - the primary importance of access policy and its most useful application relates to modernization. Modernization is any addition or improvement to the system that results in a facility of greater width, wider lanes and/or shoulder, or an increase in number of lanes. It also includes rebuilding a deteriorated highway to current geometric standards. This category includes new highways or interchanges, projects to relieve congestion, and projects to rebuild obsolete roadways and bridges.²⁹

The draft plan foresees that half of the current system (3,600 miles) will need to be modernized to bring the State up to a point where traffic congestion and alignment problems on all highways have been addressed. ODOT assumes that all modernization needs will never be met.³⁰

Access management policy is a critical component of modernization. Modernization improvements will be rendered obsolete in fairly short order without access control and the cycle will start over. In this paper we recommend a regulatory emphasis on access control in order to conserve funds that might otherwise be required to purchase access rights. In the Land Use paper we are recommending an approach to land use which will make local jurisdiction benefiting from these investments active partners in planning to preserve the carrying capacity of these improvements through locally developed access management plans.

Because, the draft plan finds there will never be enough revenue to maintain the state highway system in perfect condition, expenditure of funds requires prudent judgement. To assist in that, the draft plan adds two additional tools to the 1985 Plans level of importance (LOI) and levels of service (LOS), namely pavement preservation goals and variable right of way standards.³¹

Levels of Importance. The draft plan proposed that the present system be reclassified into four levels of importance: interstate, statewide, regional and district. The system is based on the function each type of highway performs, its traffic character and its sphere of influence. The LOI classification system is similar

²⁹ Id. at 5. The draft plan explains: Narrow lanes and shoulders, excessive curves, steep grades, and other restrictions that reduce the ability of traffic to flow freely exist on many segments of the state highway system. Such obsolete features, combined with increasing traffic volumes, are the major cause of congestion. Almost half of the state's highways (3,600 miles) will need some type of modernization treatment in the next 20 years. The state separates modernization needs into three categories: Class 1, Add Lanes; Class 2, Add Width; Class 3, Reconstruction.

Class 1 and Class 2 are capacity-deficient needs. Capacity deficient needs are created by increasing demand, causing congestion. Class 3 Reconstruction needs require widening and straightening to meet Oregon State Highway Division 3R standards. Class 1 and 2 needs are higher priority than Class 3.

³⁰ Id. at 6.

³¹ Id. at 8.

to the federal functional classification system, but reflects the true functions these routes perform.³²

Functional classifications form a critical underpinning to police power based regulations. They also serve a critical role in formulating access goals, standards and guidelines to the permit issuance process. Such regulations should describe general access policy and broad access standards and should provide an exception process based on approval of mitigation measures. The decentralized form of access management would work better with this kind of direction.

Since highway modernization will allow greater volume of traffic along developable land, there will be increasing pressure from business to have access to that traffic volume. The primary objective of access control policy should be to manage access demand in such a way so as not to alter the function of the highway. For example, regulatory designation that a highway is of statewide importance should result in same access limiting consequences as a designation of a highway as a throughway under the 1947 law.

Levels of Service. Level of service is a traffic engineering term used to describe the degree of congestion on the roadway. It is based on traffic volume, pavement width, and alignment. Each segment of highway is analyzed and classified into one of six levels of service, A through F. Level A describes a highway that is free from congestion and that has unlimited passing opportunities. Level F denotes heavy congestion and no passing opportunities. As traffic volumes increase, segments of highways drop to lower levels, some becoming functionally obsolete. Opposite circumstances apply when modernization efforts improve a segment of a highway.³³

Levels of service tied to levels of importance form a necessary regulatory nexus for access control that will increase ODOT's authority beyond site specific safety concerns, and advance it to concerns over function and functionality of highways. This approach can be made to significantly affect long range land use planning based on a highway capacity, in such a way that grants of access resulting in a highway or a segment of a highway being congested beyond a level of service acceptable for its level of importance would be incompatible with any comprehensive plan that had addressed these new state standards. ODOT regulation denying access permits incompatible with local comprehensive plan would implement this policy. Interplay of levels of service with level of importance is critical and is covered next in the draft plan.

Variable Modernization Standards. The draft Highway Plan combines the levels of importance (LOI)

³² Id. at 8.

Interstate = high volume 'lifelines' of Oregon's economy that link the state with adjacent states and, beyond, to the rest of the nation. Oregon's major urban areas are serviced by highways in the interstate category. Their major function is to facilitate through traffic movement.

Statewide = major connectors between geographic areas in Oregon and adjacent states. These highways will also carry some local trips, but their major function is also to move through traffic. (US 97, 101, 26, OR 58).

Regional = critical to the economy and well-being of a particular area and serve as feeder routes to interstate and statewide highways. These highways handle many more local trips and have less of a through traffic function than the previous classifications. (US 197, 395, OR 6).

District = serve the economy and mobility needs of small areas, and also as feeder to regional or statewide routes. These routes handle mainly local traffic. (OR 66, 214, 244).

³³ Id. at 10.

and levels of service (LOS) into a matrix to determine a reasonable or threshold level of service for each highway.³⁴ The more important the route, the higher level of service it is accorded. Interstate routes, for example, should have less congestion than regional or district routes. Modernization improvements to relieve congestion would be justified to the higher level of importance before lower classified highways.³⁵ The same modernization matrix below can be the basis for access control and access management regulatory and planning standards or guidelines, as suggested above.

Variable Right-of-Way Standards. This concept, introduced for the first time in the draft plan, is closely allied to access control. Variable right-of-way standards have been added to this plan update to coordinate state transportation planning with local land use policies. They are designed to be used in developing land use plans and policies consistent with future highway improvements. Use of these standards along with more emphasis on access control and improvements to the local road systems will help protect the functional integrity of the state system. Land use policies such as setback ordinances and access control plans will be influenced by these standards. Increased state and local government coordination will be an indirect additional benefit.³⁶

The right-of-way width standards and variable modernization standards, both use levels of importance classification system. Highways of higher LOI are connectors to other states and provide more through traffic functions for citizens. Right-of-way requirements will, therefore, generally be greater on those highways because traffic volumes are greater.³⁷

Once incorporated into the plans of local jurisdictions, right-of-way standards could be used to require present and future donations or reservations of the designated right-of-way in exchange for discretionary land use permits.³⁸ In that way, in fast developing areas where issues of modernization become accelerated, with a properly administered program, the State may find itself with substantial portion of right-of-way costs reduced.

As we will discuss later in more detail, any grant of access that is discretionary (need not be

³⁴ Id. at 10.

³⁵ Id. at 10. In the 1985 plan, this matrix was called the stair-step approach. Reclassification of the system has raised statewide highways to the same LOS thresholds as the interstate classification. Regardless of LOI, once a highway or segment of highway reaches a level of service below its threshold, it needs a capacity-related improvement. Under this method, regional or district routes that fall below their threshold level of service, will qualify for improvements and be considered on an equal basis with statewide or interstate routes. Safety and operational improvements are not influenced by the LOI concept.

³⁶ Id. at 11-12.

³⁷ Id. at 12.

³⁸ See Nollan v. California Coastal Commission, 107 S. Ct. 3141 (1987) below for a discussion of why and under what circumstances such exactions for discretionary land use permits (those that the local jurisdiction need not grant) are not compensable. To get the full measure of benefit of this method of acquiring future right-of-way needed for modernization, ODOT ought to tie in these standards formally into the land use process, in the manner similar to the one that will be recommended here for access. Exactions and conditions, however, go beyond the scope of this study.

granted) and which will contribute to the reduction of level of service as previously discussed, could carry with it a condition of a donation of right of way needed to widen the facility to future standards consistent with the table below. Such a donation need not be compensable, as will be discussed later. Location of future improvements (20 years) will be defined in corridor studies and preliminary project development analysis and the plan suggests, would be part of the Commission's Investment Protection Strategy.³⁹

<u>Classifications</u> <u>for</u> <u>Variable Standards</u>
Interstate Urban
Interstate Rural
Statewide Urban
Statewide Rural
Regional Urban
Regional Rural
District Urban
District Rural

The classifications for these variable standards, lend themselves to access guidelines as well.

Idaho for example has adopted a simple matrix which lists the degree of access under different conditions of access control. Inclusion of an access matrix in the Highway Plan could be a basis for a regulatory scheme which this paper advocates. Guideline recommendations and various techniques are identified elsewhere.

Access Oregon Highway Program and The Corridor Studies Program are referenced here only as opportunities for creating access control plans for these facilities, which would provide opportunities for access control along important highway segments even if ODOT does not adopt a more comprehensive approach.⁴⁰

Six-Year Highway Improvement Program (6 YR H.I.P.) This program guides the Highway Division's modernization activities. It directs, schedules and implements the construction program and is a key to any ODOT's integration of access planing into the land use system.⁴¹

Creation of a future requirement that comprehensive plans address the issue of access based on the level of importance/level of service basis, when coupled with the requirement that no projects can be placed on the 6 YR H.I.P. unless they are in conformity with the local comprehensive plan, could create a powerful tool for access management.

³⁹ Id. at 12. Right-of-way reservations or exactions based on discretionary permits, whether by the state as in road approach permits, or by local governments as in conditional uses, variances, zone changes, revocable permits or comprehensive plan changes need not be tied to specific corridor studies or project, but could proceed on the basis of standards contained in the table.

⁴⁰ These programs are referenced on page 13 of the draft plan.

⁴¹ Id. at 14. The guidelines and goals from the Highway Plan are used to establish project priorities. Every two years, the Transportation Commission updates the Program through a series of public meetings conducted throughout the state. The update process begins by identifying needs of the state highways and requesting projects from local governments. New projects, plus those in later years of the current program, are then ranked according to technical criteria such as adequacy of road widths, and non-technical considerations such as a long-standing commitment to a project. When a draft program update is completed, the Commission conducts 15 to 20 public meetings around the state to get public and local government comments. The information gained at these meetings is analyzed and prioritized by the Commission before it approves a final 6 YR H.I.P.

Investment Protection. This is the last element of the draft Highway Plan with applicability to access. Investment Protection is designed to protect the integrity of the state highway system to keep traffic flowing. It is essential to keep local development from destroying the highway's ability to move through traffic between geographical areas. Oregonians have a large investment in our highway system. As costs of building new highways continue to increase, we cannot afford to build bypasses to bypass old bypasses because of uncontrolled local development.⁴²

The draft proposes three steps:

- . increased coordination and planning with local governments on both corridor and project levels;
- . increased use of access control authority and access management plans; and
- . creation of public/private development partnerships designed to pocket development rather than encourage its continued sprawl.

The draft notes some recent successes in implementing this strategy along US 101, on both a corridor and project specific basis. Another US 101 by-pass in Warrenton also emerged in our study as an example to be avoided. Here a new by-pass was immediately subjected to access demand from a large developer and the land use decision by the local jurisdiction did not take into account the intended function of the by-pass.

The Commission should undertake the task of formalizing land use involvement of local jurisdictions by adopting access guidelines based on the level of service and/or level of importance matrix similar to the right-of-way standards. It should also work towards a more comprehensive regulatory scheme for access control based on its inherent police power to protect the state's investment.⁴³

This paper recommends strengthening access control authority to plug in regulations and standards or guidelines, to read like this:

- . increased use of regulatory authority to manage and control access and to promote access management plans.

Whether or how that regulatory authority may be constrained by the need to purchase rights of access will occupy the remainder of this paper.

⁴² Id. at 15.

⁴³ That Land Use paper recommends that The Highway plan should add another element:

- . work toward land use planning requirements that will involve local governments in access control management designed to protect the levels of importance and the levels of service of state facilities.

LEGAL ISSUES

Eminent Domain v. Police Power: to pay or not to pay

For the purpose of this discussion Throughway and Access laws will be scrutinized under two different approaches to the state's power. An important 1951 legal note, which influenced Oregon Supreme Court decisions in this area, summarized the debate in this way:

Two methods are available for curtailing the right of access - the police power and the power of eminent domain. Eminent domain is the power of the sovereign to take or damage private property for a public purpose on payment of just compensation. Police power is the power which the State inherently has to restrict property rights without paying compensation by regulations tending to promote the public health, safety, morals, and general welfare.⁴⁴

Despite a number of commentators urging either the abandonment of this distinction or identifying it as a poor predictor of judicial results, we believe that this distinction and its analysis is still useful. Oregon Supreme Court has staked out a position on the side of decisional spectrum which is willing to go quite far in permitting state regulation of property rights without need to compensate. The key questions are how far can the public proceed under the police power? Where does the police power end and eminent domain begin?

Eminent domain is the power to appropriate a property right because it is useful. Police power is the power to restrict a property right because it is necessary. Public utility and public necessity inevitably shade off into each other.⁴⁵ The problem is to determine whether the right of access has been merely *regulated* for the public welfare or safety by an exercise of police power, or whether the regulation amounts to a

⁴⁴ Freeways and Rights of Abutting Owners, 3 Stan. L. Rev. 298, 302 (1951).

See also *Warren v. Iowa State Highway Comm'n.*, 93 N.W. 2d 60, 63 (1958) ("Two methods may be used by the state to prevent access to a controlled--access facility: police power or eminent domain.") Generally, a taking through eminent domain is compensable while through police power is not.

⁴⁵ Freeways and Rights of Abutting Owners, 3 Stan. L. Rev. 298, 302 (1951). "A strong argument can be made for the proposition that it is necessary, under the police power, to curb rights of access." *Id.* at 304. "It is quite possible for the public to completely destroy the right of access through an exercise of the police power." Citing an Oregon case for that proposition, *Barrett v. Union Bridge Co.*, 117 Or. 220, 243 P. 93 (1926). The case leaves unclear whether some access remained through another street.

compensable taking.⁴⁶

The Department documents see both the Throughway Law and Access Law as governed by eminent domain principles,⁴⁷ (need to compensate). This Throughway Law interpretation is based on a reading of its eminent domain authorization section as an expression of the legislative intent that access rights have to be acquired. Such a reading of the authorization is not required⁴⁸ and courts have evaded it by finding that there is no property right in direct access to a highway. Eminent domain is limited by the just compensation provision of Article I, section 18 of the Oregon Constitution.⁴⁹

Access Law is based on state police power⁵⁰ to regulate for safety and welfare, or general plenary power to enact laws and regulations not otherwise prohibited by the State or federal constitutions.⁵¹ Analysis of Oregon case law, attorney general opinions, access cases in other jurisdictions, and the evolving Supreme Court decisions on "taking" lead to a general conclusion that the Throughway Law as interpreted by the Department imposes burdens and obligations which have resulted in its *de facto* disuse. The only way out may be through a new Access Control Law, soundly and explicitly grounded on police power authority and administered through a program based on highway classification.

⁴⁶ Access to Highways - Compensable Limitation, 42 A.L.R. 3d. 13, 21-22 (1972).

"The courts have had great difficulty in resolving this question other than on an ad hoc basis, and it has been cogently argued that the police power - eminent domain dichotomy should be dispensed with, and that courts should simply say that there is no compensable taking unless 'property' is 'substantially' diminished. In practice many courts appear to have done this."

See also, E.D. McKirdy, Compensation for Impairment of Rights of Access, Inst. On Plan. Zoning & Eminent Domain. 13.1 - .23 (1988)

⁴⁷ Unpublished AG's opinion #181 to the Oregon State Highway Department, Letter from C.W. Enfield to J.M. Dever, p. 4 (December 10, 1948), argued that the legislature changed the common law of the state to require that compensation be paid for impairment of access. "The Throughway law does not purport to be an exercise of the State's police power; in fact, the act, as a whole, is an exercise of the power of eminent domain."

⁴⁸ 42 A.L.R. 3d 13, 65 (1972).

⁴⁹ Or. Const. Art. 1 § 18: "Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation; nor except in the case of the state, without such compensation first assessed and tendered . . ."

Arizona Supreme Court interpreting an identical provision said: "We hold - in agreement with the ever-increasing trend of authority--that direct access to a highway is not a private property right within the contemplation of Article 2, Section 17 of the Arizona Constitution." State Ex Rel Herman v. Schaffer, 105 Ariz. 478, 481, 467 P.2d 66, 42 A.L.R. 3d 1 (1970) citing Brock v. State Highway Commission, 195 Kan. 361, 404 P.2d 934 (1965); see also Corey, Frontage Roads: To Compensate or Not to Compensate, 56 N.W.U.L. Rev. 587, 589 (1961) and Stoebuck, The Property Right of Access Versus the Power of Eminent Domain, 47 Tex. L. Rev. 733 (1969).

⁵⁰ "Where a permitting system exists, right to access may be judged by regulatory criteria." Narlock v. State Dept. of Transportation, 115 Wis. 2d 419, 340 N.W. 2d 542 (1983).

⁵¹ See Linde, Without "Due Process", 49 Or. L. Rev. 125 (1970) for the proposition that there is no such thing as police power in Oregon, merely general plenary power to enact laws not otherwise prohibited.

A Brief History Of Access Jurisprudence

Throughway Law based on Police Power. When the 1947 legislature passed the Throughway Law it was clear as to the need, and blessed it in explicit police power terms:

To the end that human lives may be saved, property damage minimized, transportation by motor vehicle promoted and highway travel in general safeguarded, the legislature finds, determines and declares that ORS 374.005 to 374.095 is necessary for the preservation of public safety, the improvement and development of transportation facilities in the state, the protection of highway traffic from the hazards of unrestricted and unregulated entry from adjacent property, the elimination of hazards due to highway grade intersections and in general the promotion of public welfare.⁵²

When the 1954 Oregon Supreme Court first interpreted the law in a landmark decision it did not hesitate to state the justification of the law in the clearest police power terms:

The congestion of population in the cities, the amazing increase of rapid automobile transportation, the delays and perils incident to the use of the conventional two-way unrestricted-access highways have rendered imperative the establishment of non-access or limited-access highways or freeways in the interest of the public convenience and necessity. . . .

It is reliably reported that travel upon our inadequate highways results in 40 thousand deaths, a million-and-a-half injuries, and property damage of 2 billion dollars a years, and that these staggering losses have been materially reduced wherever modern non-access highways have been established.⁵³

The Department's assumption has been that the Throughway Law requires or authorizes

⁵² ORS 374.005 Policy and purpose of ORS 374.005 to 374.095. The first paragraph reads: The kind, character and volume of traffic now moving over public highways, the speed at which such traffic moves, the prime and essential factors such as speed, safety and convenience to which transportation of persons and property over public highways is entitled, the relation which such transportation bears to the transportation systems of other states and of the nation as a whole, the ever increasing toll of injury to and death of persons and the destruction of and damage to property caused by and resulting from accidents on public highways constitute and are conditions and elements which demand of highway officials a program of highway designing, highway regulations, highway use and operation, highway controls and highway safeguards which will make possible and insure a degree of safety and convenience and a type and class of service not possible under existing law.

⁵³ State Highway Commission v. Burk, 200 Or. 211, 231, 265 P.2d 783 (1954).

acquisition of access rights.⁵⁴ As mentioned previously, the Oregon Supreme Court in a later decision sidestepped this debate by finding that direct access to a state highway, where alternative access is provided, is not a property right.⁵⁵

Property Rights. Since access control is regulation or taking of a property right, it might be useful to discuss the concept of property before we proceed. There are two property concepts which give content to the question "What is a Taking". Speaking metaphorically, an owner of property is said to have a "bundle of sticks" that describes the rights, privileges, powers and immunities that the owner has in relation to other persons as a result of ownership of a particular piece of property.⁵⁶ Commonly identified "sticks" include the duration of ownership, which may be for any period of time from potentially infinite in duration (fee simple) to sufferance, the power to transfer by gift, sale, or will, the power to exclude other persons from the property for lawful purposes, and the right to exploit the property for economic gain.

Physically, the owner of land is said to own not only the surface area described in the ownership records, but also a column of air extending "all the way to the heavens" and a column of dirt extending "down to the depths." These "sticks" assume value as "air" rights and "mineral" rights which may be used, exploited, or transferred separately from the "surface" rights in land. Right of access to a street or highway, where it exists, is such a "stick" in the bundle of property rights.

Literal application of the bundle of sticks concept may lead to the conclusion that a property owner

⁵⁴ Unpublished AG's opinion 181 to the Oregon State Highway Department, Letter from C.W. Enfield to J.M. Dever, 2 (December 10, 1948) began by first stating what the common law rule in Oregon was: "[s]o long as the improvement or restriction is entirely within the confines of the highway, and so long as some reasonable means of access is preserved, (to either the highway involved or some other public road), the public may restrict or destroy the access of an abutting owner to a particular highway by any means designed to maintain, improve or preserve the highway for highway purposes, without paying compensation for the loss of access."

The opinion stated how the legislature has changed the common law by passing the Throughway Law: By either directly or impliedly directing that compensation be paid for impairment of access. "In the construction or establishment of throughways, the legislature has evidenced its intention that the State shall pay for limiting access on an existing highway" and perhaps, new highways. Id. at 3.

The opinion interpreted ORS 374.055(2) to suggest that damages must be paid for deprivation of right of access to any highway constructed, established or maintained as a throughway. There is seemingly no doubt in the Opinion that the legislature meant to compensate for loss of access to an existing facility. But, the Opinion makes a point that "There is inherent limited police power in the State to regulate an abutter's access to a public highway, when such is necessary to render the highway safe for public travel. McGowan v. City of Burns, 172 Or. 63, 137 P.2d. 994 (1943)." Id. at 4.

The Opinion interpreted ORS 374.030 as giving an absolute power to control access on a throughway, except for compensation: "The Throughway law does not purport to be an exercise of the State's police powers; in fact, the act, as a whole, is an exercise of the power of eminent domain." Id. at 4. It concludes that regulation, control or prevention of establishment of access is not permitted until condemnation proceedings are initiated. Consequently, the Highway Commission resolution does not control access until access rights have been acquired.

<NOTE: Author assumes that the Guidebook statement that access can be controlled only when acquired derives from this source.>

⁵⁵ State Highway Commission v. Central Paving, 240 Or. 71, 399 P.2d 1019 (1965).

⁵⁶ Hohfeld, Some Fundamental Conceptions as Applied in Judicial Reasoning, 23 Yale L.J. 16 (1913).

may do whatever she may wish with her bundle, short of causing harm to others, and that any prohibition on full utilization of any of the sticks is constitutionally proscribed. That is not so. The sticks merely represent a way of thinking about legal relationships that can be created by the notion of property.

The Supreme Court of New Jersey stated in a way that finds favor with legal commentators when it said: "Property rights serve human values. They are recognized to that end, and are limited by it. Title to real property cannot include dominion over destiny of persons the owner permits to come upon the premises. Their well-being must remain the paramount concern of a system of law."⁵⁷ Ownership of land carries with it certain responsibilities such as keeping the premises safe, avoiding uses that will harm others and preserving the land for future generations.⁵⁸

Regulations and statutes to control and manage access to highways and streets are an attempt by government to discharge this public welfare obligation, amply demonstrated in the justifications quoted above, frequently referred to as police powers. There are constitutional limits on government's interference with private property and it is the extent and the application of these limits that we will explore.

Origins of Access Rights. The development of access rights, or appurtenant easement of access, developed from the historic nature of highways. "The nature of a highway in the early common law was quite different from what it generally is today. The title to the soil of the highway was established to be presumptively in the abutting landowner. The public had merely an easement or right of passage over the highway. Lord Mansfield characterized the nature of the right as follows: 'The King has nothing but the passage for himself and his people, but the freehold and all profits belong to the owner of the soil'. . . . [P]roperty in the highway remained in the owner of the soil and that only a right of passage was given to the public."⁵⁹

"[T]he English courts have [since] generally held that, where the act complained of as an interference with access is expressly or impliedly authorized by statute, no action for damages will lie. . . ." unless such is provided in the statute.⁶⁰

In colonial America road building was generally the private undertaking of each farmer who desired a way to the nearest town. Where a property owner contributed land and materials to road construction or was otherwise assessed for road or street, the issue of right of access or easement was undisputed.

Several early cases recognized appurtenant easements of access in lots adjoining platted streets where the lots had been bought in reliance upon the plat. Abutting owner was allowed damages in cases of

⁵⁷ State v. Shack, 58 N.J. 297, 302, 277 A.2d 369, 372 (1971).

⁵⁸ See example Keystone Bituminous Coal Ass'n. v. DeBenedictis, 490 U.S. 470, 107 S. Ct. 1232 (1987) and Mugler v. Kansas, 123 U.S. 623, 665, 8 S. Ct. 273 (1887).

⁵⁹ Duhaine, Limiting Access to Highways, 33 Or. L. Rev. 16, 19 (1953).

⁶⁰ Id. at 20.

interference when such was for non-highway purposes. Early New York cases which defined and framed access rights jurisprudence based their conclusion on a covenant theory; thus, access arose when the abutter either paid for or was liable to be assessed for, the benefits which the street presumably would afford his property. His rights arose by express or implied covenant to maintain the street for street purposes, and it ran with the land.⁶¹

A leading commentator in this field defined the rule as follows:⁶²

But as all streets are established primarily for the public use and general good, the right of the public is paramount to the right of the individual. And so the private rights of access, light and air are held and enjoyed subject to the paramount right of the public to use and improve the street for the purposes of a highway. And as these private rights are thus subject to the right of the public to use and improve as a highway, it follows that, when such uses or improvements are made no private right is interfered with and consequently no private property is taken.

The first Oregon cases dealing with right of access also agreed that the right of public is paramount, and reflect the rule above: Willamette Iron Works v. Oregon Ry. & Nav. Co., 26 Or. 224, 37 P. 1016 (1894) and McQuaid v. Portland & V.R. Co., 18 Or. 237, 22 P. 899 (1899). In other words there was and is a right of access to highways as highways, but the courts from early on recognized that generally highway improvements which did not invade the abutting land did not interfere with rights of access and no compensation was due for diminution of access which resulted from the highway improvements. Another way of stating this rule is that as against the public's right to use the highway as a highway there was no right of access.

As can be seen, the legal underpinnings for rights of access based on covenant theory are largely absent today. Today, the costs of rights of way and of highway construction and maintenance are not paid by abutting owners, but by highway users in the form of gasoline and vehicle taxes. The highways belong to the general public and are maintained by that public for various uses.

The 1900 Brand case established the rule in this state that damages need not be paid to an abutting owner whose access has been changed by a change in grade, and the rule was reaffirmed in Barrett where a

⁶¹ This analysis is found in Sauer v. City of New York, 206 U.S. 536, 547, 27 S. Ct. 686 (1907) which held that no easement existed 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.

⁶² Duhaine, Limiting Access to Highways, 33 Or. L. Rev. 16, 24 n.36 (1953) citing 1 Lewis, Eminent Domain 120, 179-81 (3d ed. 1909).

bridge approach cut off access to a street.⁶³ The court found that the rights of abutters were subject to the rights of the public to use the street for highway purposes.

As Duhaine states the argument:

[R]egulation limiting access to a primary highway is clearly intended to promote the use of the highway as a highway - to promote the safety of the public and the traffic capacity of the road. Since such regulation contemplates the promotion of the public safety and welfare, and the protection of the interest of the public in its highway system, it is a legitimate subject for the exercise of the state's inherent police power. Mugler v. Kansas, 123 U.S. 623 (1887); Savage v. Martin, 161 Or. 660, 91 P.2d 273 (1939); State v. Bunting, 71 Or. 259, 139 P. 731 (1914).⁶⁴

[D]enial of all access would constitute a destruction of the common and necessary use and enjoyment of the property under the rule of Morrison v. Clackamas County, 141 Or. 564, 18 P. 2d 814 (1933). An interference with an abutting owner's right of access to one street, which leaves a means of access to one or more other . . . streets, has been held not a "taking" of his property within the meaning of the 14th Amendment, Meyer v. Richmond, 172 U. S. 82 (1898); nor is it a taking of his land under the Oregon Constitution, Cooke v. Portland, 136 Or. 233, 198 P. 900 (1931).⁶⁵

The common law rule in Oregon, where the cases are decided under police power analysis, continues to be that if some means of egress and ingress remains there is no taking of private property right as a matter of constitutional law. The legislature has frequently thought to override the court decisions and

⁶³ In Brand v. Multnomah County, 38 Or. 79, 60 P. 390, 62 P. 209 (1900), the plaintiff was denied recovery although his access to Madison Street was destroyed when the grade of that street was substantially raised to serve for a bridge approach. The court relying on Northern Transportation Company v. Chicago, 99 U.S. 635, 25 L.Ed. 336 (1879), said:

Acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be taking within the meaning of the constitutional provision.

Brand, 38 Or. at 92.

This is an example of doctrine modified by statute. After the Barrett v. Union Bridge Co., 117 Or. 220, 243 P. 93 (1926), the legislature provided for compensation for diminution of access through change of grade of any city street (not highway) O.C.L.A. § 100-125 (1940).

⁶⁴ Duhaine, Limiting Access to Highways, 33 Or. L. Rev. 16, 28 (1953).

⁶⁵ Id. at 30.

to provide for compensation where the courts found no such necessity⁶⁶, and as we already discussed, some have interpreted the Throughway Law as just such an abrogation of common law. As Duhaine points out:

While it is possible to regulate the right of access through the exercise of police power, legislatures have chosen generally to base their highway-access legislation on the power of eminent domain, a practice which of course tends to eliminate the occasional cases of extreme hardship often associated with police-power regulation. Thus, while it may not be necessary to pay an abutting owner for restricting his right of access (when the regulation is for promoting the use of the highway as a highway), many legislatures have apparently determined that compensation is good policy, at least with respect to existing highways.⁶⁷

Duhaine concludes his argument with the same proposition that we will conclude ours. Our basis for reemphasizing the police power underpinnings for access control will be the same as his: "While it is undeniable that a person should receive adequate compensation when his property or property rights are taken by the state, it is submitted that the public interest in promoting a highway program of access limitation demands a judicious effort to prevent the dissipation of public funds in the acquisition of access rights which would result from any unwarranted extension of the abutting landowner's right of access."⁶⁸ (Emphasis provided.)

THROUGHWAY AND ACCESS LAWS

As we stated before, the justification section of the law is phrased clearly and explicitly in the police power language, to protect the public and to control or eliminate nuisance type hazards and conditions. The informal 1948 AG opinion on this subject began the process of analysis placing interpretation of the Throughway Law under the aegis of eminent domain limitations.

In another 1985 memo, an assistant Attorney General concluded that Throughway Law grants broad powers, but they have not been used that way and therefore the power of the statutes is more limited than their text suggest.⁶⁹

⁶⁶ ORS 105.755 and ORS 105.760 create rights of actions based on change of grade. A cause of action for damages for injury caused by a change of street grade did not exist prior to legislative action, since such consequential damage was not a taking of property in condemnation. This statement of the change of the rule is found in Northwest Ice & Cold Storage Co. v. Multnomah County, 228 Or. 507, 365 P.2d 876 (1961).

ORS 105.850 - ORS 105.870 authorizes action for reduced commercial property value resulting from street use restrictions, a response to the decision in Oregon Investment v. Schrunck, 242 Or. 63, 408 P.2d 89 (1965), more fully discussed below. Note that ORS 105.855 states in part "The fact that other access to the property from a public way is available shall relieve the city or mass transit district from liability if the other access is reasonably equal to the access prohibited or materially restricted."

⁶⁷ Duhaine, Limiting Access to Highways, 33 Or. L. Rev. 16, 37 (1953).

⁶⁸ Id. at 40.

⁶⁹ Dale Hormann, 10/16/85 INTEROFFICE MEMO, Discussion Paper Relating to Throughway Law.

In an internal outline of the law for the Department, its counsel wrote: "The main purpose of the throughway law was to provide that when a new highway was built or a highway was relocated as a throughway that no person had any right of ingress or egress to or from or across the highway to or from abutting lands except at such points as may be designated by the department."⁷⁰ In an interview, he added that the Throughway Law is not needed as an authorization to buy access and that using cities and counties to accomplish access control through their police power would be more efficient for the State. The points made by these two attorneys are valid and we do not disagree with them. In fact the point of Mr. Hormann's observation leads us to recommend a redrafting of the statutes, combining elements of the Throughway Law and Access Law, as the best way to proceed. The emphasis of this paper, however, is to examine the issues surrounding more assertive state policy of access control by shifting to a state police power emphasis.

The distinction between what has to be compensated when the state takes property for a public purpose (eminent domain) as opposed to what has to be compensated when the State regulates conduct, which may effect the use of property (police power), is to be kept in mind during this analysis. Throughway as defined in ORS 374.010⁷¹ "means a highway or street especially designed for through traffic, over, from or to which owners or occupants of abutting land or other persons have no easement of access, light, air or view, by reason of the fact that their property abuts upon the throughway or for any other reason." With these caveats, we shall look at the two laws:

⁷⁰ Jack Sollis, Highlights of Chapter 374, Control of Access to Public Highways.

⁷¹ But see Unpublished AG's opinion 279 to the Bureau of Labor, letter from R.L. May to N.O. Nelsen (January 25, 1956): "A Throughway is what the Highway Commission says it is."

Throughway

374.015 Department of Transportation's authority concerning throughways; conversion of portions of "relocated" highways into throughways; extent of authority

(1) [ODOT]. . . may lay out, locate, relocate, adopt, establish, construct, designate, maintain and supervise the use and operation of new highways known as throughways.

(2) Any relocated section of an existing highway and such portions of existing highways, which at the time they are designated as throughways have less than 10 commercial businesses abutting thereon catering to the motoring public in any one mile of such existing highway, may be designated and constructed as or converted into a throughway by the Department. As used in this subsection, "relocated" means a highway or section thereof so located that for its construction an entirely new right of way is necessary.

(3) The authority and power of [The Department] extends to and includes state highways within the corporate limits of cities, and with the approval of municipal authorities may extend to and include city streets.

Access

[366.220 et. seq. provides authorization to perform same acts, ie: to locate a highway etc.]

374.410 Department of Transportation to prescribe access rights of abutting property

In connection with any acquisition of real property for right of way of any state highway, [Oregon] Department of Transportation shall prescribe and define the location, width, nature and extent of any right of access that may be permitted by the department to pertain to real property described in ORS 374.405.

374.405 Accessing Rights of Property Abutting on State Highways No rights in or to any state highway, including what is known as right of access, shall accrue to any real property abutting upon any portion of any state highway constructed, relocated or reconstructed after May 12, 1951, upon right of way, no part of the width of which was acquired prior to May 12, 1951, for public use as a highway, by reason of the real property abutting upon the state highway. **[Ch 373 covering state roads and highways through cities]**

The Guidebook asserts: "In 1951 [referring to ORS 374.405] legislation was enacted that changed an abutting property owner's access rights to a state highway. When right-of-way was purchased prior to 1951 the owner of abutting property automatically had right of access to the highway unless this right was obtained by the Department."⁷² As we discussed the law in Oregon, it is clear that the Guidebook overstates the case prior to 1951. There was in fact nothing "automatic" about abutting owner's right to access. As we discussed before, absent an invasion, there was no common law right of access that required compensation for diminution of access caused by improvements within the right of way, including raised grade, ramps, dividers, one way streets etc. Additionally, the owner's use of access had to be reasonable in relation to the general public. It could not constitute a nuisance or a safety hazard.⁷³ What was automatic was that cutting off a vested use from any access was, and is, compensable.

⁷² Guidebook for Access Management, Oregon Department of Transportation, Policy and Program Development Strategic Planning Section, 1-1 (July 1979).

⁷³ See Origins of Access Rights, supra.

The Guidebook continues: "The 1951 legislation provided that for right-of-way purchased on totally new alignment after May 12, 1951, the owner of the abutting property does not have an "automatic" right of access. Thus, the property owner is not entitled to damages for loss of access."⁷⁴ This time the Guidebook understates the case. The owner has no right of access to a new highway, automatic or not, to any road constructed, relocated or reconstructed after 1951. While "reconstructed" is not defined, a regulatory definition encompassing widening is suggested by a number of opinions and seems reasonable. Consequently, major improvement utilizing ORS 374.405 after 1951, would find that no right of access existed, or was taken, and that no compensation was due. If Throughway Law is used solely to cut off right of access for new right-of-ways, as also suggested in the Sollis memo, it is not needed because of the passage of ORS 374.405.⁷⁵

ORS 374.410 allows ODOT to control access to property acquired, presumably where right-of-access was cut off by 1951 law. In other words, for new right of ways, ODOT has complete discretion in granting access. Since, no one can access a state highway without a permit, ODOT can regulate and deny access on new roads through permit management sections of the Access Law. One difference might be that where rights were cut off by 374.405 ODOT has absolute discretion to deny access, but under Access Law it would have to act "reasonably". In point of fact, it would be reasonable to deny access on a new road constructed and designated as non-access road, so the two statutes authorize the same level of control by ODOT.⁷⁶

Access Law applies to any state highway, including within city limits. Because Throughway Law requires city approval for certain actions by the State, and since cities could give approval under their own police powers⁷⁷, cities do not need this specific authorization to cooperate with the State. Chapter 373 amply regulates city - state relations and the Throughway Law is not needed for that purpose.

Finally, Access Law, unlike the Throughway Law, allows the State to control access whether or not there are 10 or more commercial business establishments catering to the motoring public within any one mile. Access Law allows the State greater flexibility of fixing an access control problem area caused by density of auto-related uses, precisely where Throughway Law application is excluded. For example, no new access permits might be allowed on so described one mile stretch precisely because of saturation, or owners requesting changes might be asked to combine access points under these circumstances as a condition of granting a permit, or to contribute land needed for future widening, caused by their increased use.

What emerges from the many memos and interviews is some discomfort with the power for access control that ORS 374.405 provides. As late as 1987 the disbelief that actually 374.405 cuts off rights of

⁷⁴ GUIDEBOOK, at 1-1, supra.

⁷⁵ See Sollis Memo, Highlight of Chapter 374, Note supra.

⁷⁶ ORS 374.310(3).

⁷⁷ ORS Ch. 373 regulates governs relations between ODOT and cities and provides for notice, hearings, and powers of cities to consent to construction, maintenance, change of grade, closure etc.

access is palpable.⁷⁸ This discomfort may have a real basis given prior Commission policy that the function of state highways was to create development opportunities through easy access and the legislative history of granting compensation for access rights when courts alone would not have, and finally because circumstances of hardship that might be created from time to time.

While the statute cuts off rights of access to new right-of-ways after 1951, it does not grant access rights when none existed prior to that time. As previously discussed, there never was a total right of access to a highway in Oregon when the highway was improved for highway purposes. Rights of access in cases of highway improvements, were only those expressly granted by the statutes in derogation of the common law of the State.⁷⁹

374.020 Interference with railroad facilities [No comparable limitation in the Access Law] prohibited.

This statute indicates that where there is an interference with access to railroad facilities or with the facilities themselves agreements with railroads are needed. Otherwise, as has been pointed out, ODOT has to petition PUC, which starts the administrative law process rolling which could delay a project through appeals. If this section was eliminated, the Access Law preserves the powers of the Public Utility Commission (PUC) in 374.325. ORS 374.020 provides for ODOT and railroads to resolve their problems through an agreement with ODOT or petition the PUC on the basis of public convenience and necessity.⁸⁰

Whether under Access Law or Throughway Law, the process of building any highway across or over railroad tracks would remain the same. Access Law in its present form is more neutral in not singling out railroads for special treatment.

⁷⁸ Cynthia Carter, assistant AG memo:

"The intent and understanding of the legislators in 1951 is the same as our current interpretation of ORS 374.405. No landowner has a right of access to a new highway. Further, there are no damages for loss of access on new highway alignments. The courts no longer assume that landowner whose property abuts a highway has any right to access" and "anyone who claimed that a right of access was created in his property on or after May 12, 1951 would be out of luck."

⁷⁹ See Origins of Access Rights, supra

⁸⁰ Sollis Memo, Ibid,

"There were some problems with this in the 1960's; however, through cooperating with the railroad all of these have been eliminated. However, if the railroad really kicks up a fuss, the Highway Division would be required to build an overcrossing over the railroad so that at-grade crossing would not interfere with their operations....petition for a certificate of public convenience and necessity to construct across railroad track ...would not work too well because even if the order ...was issued the railroads could appeal..., and by that time it would be too late to build the project."

374.025 Change from throughway to highway.

Any state highway or section thereof which has been located, established, designated and constructed as a throughway may, in whole or in part, be changed from a throughway to an ordinary highway by the Department of Transportation if in its judgement such action will best serve public needs.

374.310 The [Oregon] Department of Transportation Rules and regulations; issuing permits.

(1) [ODOT] with respect to state highways and the county court or board of county commissioners with respect to county roads shall adopt reasonable rules and regulations and may issue permits, not inconsistent with law, for the use of the rights of way of such highways and roads for the purposes described in ORS 374.305. However, the department shall issue no permit for the construction of any approach road at a location where no rights of access exist between the highway and abutting real property.

(2) Such rules and regulations and such permits shall include such provisions, terms and conditions as in the judgement of the granting authority may be in the best interest of the public. . . .

(3) the powers granted by this section and ORS 374.315 shall not be exercised so as to deny any property adjoining the road or highway reasonable access

If there is a duty to purchase access on a highway designated as a throughway as the only way to control access, then the ability to remove Throughway designation may be important. Fiscal obligation created by such a duty would make it too expensive or impractical to buy access rights. This interpretation is reflected in the Guidebook and Division 50 rules and can be found in Opinion #181 (1948) and is probably a reason why conversions of existing highways to throughways has stopped. The other reason we alluded to was the Interstate program. If such an interpretation, as an expression of legislative intent, was to be upheld then we would conclude without hesitation that the Throughway Law does more harm than good and ought to be repealed.

Our reading of the Oregon Supreme Court cases which found no damages for conversion of an existing highway to a throughway where alternative access was provided to the owners leads us to believe that such an interpretation is not necessary. An amendment would eliminate a possibility of such an interpretation. Additionally, if the Throughway Law requires acquisition of access rights when same objectives can be accomplished through regulation it adds an unnecessary expense. Access Law gives ODOT authority to grant and deny access, which is a more flexible way of managing access than granting and removing Throughway designation.

The language in the 374.310(1) is problematic in that the last sentence appears not to permit ODOT to grant access where no right of access exists. If applied literally then no access could be given to any road constructed, relocated or reconstructed since 1951, or to any road designated as a Throughway.

Further, if the Department moves to the judicial view of access rights that there is no right of access when it comes to highway improvements except when there is no other access, or when specifically granted by another statute or department policy reflected in a classification scheme based on function, such a reading of the statute would eliminate a good deal of potential access rights now recognized by the Department. No right of access could be granted by the Commission to any new by-pass for example, or any existing road unless 1) no other access was available, or 2) there was a right of access previously granted by ODOT or 3) there was a situation such as change of grade or ramps that is specifically covered by statutes meant to change the common law. This is not an interpretation we recommend, but it demonstrates regulatory possibilities available in the current statutory language.

ODOT has operated as if subsection (3) of ORS 374.310 modified the seemingly emphatic prohibition on grants of access where no rights exist contained in subsection (1). The Guidebook reads the prohibition in sub (1) narrowly:

ORS 374.310(1) provides that: no permit can be issued "where no rights of access exist between the highway and abutting real property." This has been further clarified in the Department's "Rules and Regulations Governing Road Approach Permits" which provides that: "no approach road shall be constructed at points where rights of access to or from the abutting property have been purchased by the Department."⁸¹

The Guidebook stands for the proposition that the only way to eliminate rights of access is through purchase. A regulatory approach based on police power could deny access without purchase, except in landlocked cases. We read ORS 374.310 to create a broader cut off of access rights than solely through acquisition. We also read safety and preservation of facility, as giving ODOT clear, and reasonable basis on which to deny or condition an access permit.

We read "reasonable" in ORS 374.310(3) not as a mandate to grant access unless safety precludes it, but as a "due process" control on the Department, in which conditions and limitations have to support the purposes of the act. Those purposes are stated in 374.310(2) to be "in the best interest of the public for the protection of the highway or road and the travelling public." This authorization could justify denial of an access permit on the basis of safety, road capacity, congestion, or delay, and the "reasonable" limitation would prevent the department from reaching its conclusions in a capricious or arbitrary manner.

Another aspect of the "due process" or "reasonable" limitation could be understood primarily on the basis of economic consequences to the owner. Such a limitation could be mean that the Department should grant access if the economic hardship on the applicant is severe. The case law would most likely sustain a proposition that no direct access needs to be granted where alternative access exists, but if safety precludes grant of access even in land locked cases, the consequence may be damages or purchase. No Oregon case has found economic hardship of restricting direct access severe enough to prompt this interpretation, but such the reasonable limit, based on economic consequences, has been found in other

⁸¹ GUIDEBOOK at 1-3.

states.

374.030 Separation of throughways into separate roadways; ingress and egress.

(1) The Department of Transportation may so design a throughway and so regulate, restrict or prohibit access thereto and use thereof as to best serve the traffic for which the throughway is intended. In this connection and for such purpose the department may divide and separate any throughway into separate roadways or lanes by the construction of raised curbing, central dividing sections or other physical separations, or by designating separate roadways or lanes by signs, markers or stripes and the proper lanes for traffic by appropriate signs, markers, stripes or other devices.

(2) After any highway has been so marked or designed, no person has any right to ingress or egress to, from or across the highway to or from abutting lands, except as such points as may be designated by the Department.

These sections achieve similar objectives in slightly different ways. The Commission can designate, design and classify highways, including classification related to its function as a throughway. This is now done through access control regulations outlining three categories of highways for access control purposes, complete control, limited control and no control.⁸² These regulations are the principal method of managing access in the State. The category of "complete control" can accomplish the same objectives as the Throughway Law.

Subsection (2) of 374.030 allows ODOT to permit access, on new and old right of ways designated as throughways, at points of its choice.⁸³ No specific criteria is provided, although by implication one only egress and ingress consistent with the nature of throughway as a throughway should be allowed. Under

366.215 Creation of state highways. The Oregon Transportation Commission may select, establish, adopt, lay out, locate, alter, relocate, change and realign primary and secondary state highways.

374.305 Necessity of permission to build on right of way. (1) No person, firm or corporation may place, build or construct on the right of way of any state highway or county road, any approach road, structure, pipeline, ditch, cable or wire, or any other facility, thing or appurtenance, or substantially alter any such facility, thing or appurtenance or change the manner of using any such approach road without first obtaining written permission from the [Oregon] Department of Transportation with respect to state highways or the county court or board of county commissioners with respect to county roads.

⁸² Or. Admin. R. 374-50-070 (1980) (Real Property Administrative Rule #731, Adopted by Transportation Commission 10/22/1980):

Access control is divided into three categories:

(1) "Complete control" allows access only at specified public road at grade connections or at interchanges.
(2) "Limited control" allows public and private access at specified locations identified by legal agreements or deeds.

(3) "Uncontrolled" access is where there is no specified restriction of access. Future accesses could be allowed under the Road Approach Permit process subject to the appropriate Oregon Revised Statutes.

⁸³ Unpublished AG's opinion 140 to the Oregon State Highway Department, Letter from J.C. McLean to C.W. Enfield (January 25, 1954) states that ORS 374.030 does not distinguish between new throughways and existing highways converted to throughways in terms of effect on ODOT's authority to regulate access along throughways.

Department's interpretation in Division 50 rules, that is a limited authorization indeed, because it can be fully exercised (ie: denied) only as a result of purchase. The Department hardly needs a statutory provision allowing it to control what it owns.⁸⁴

Access Law's police power criteria does not depend on purchase to regulate access. ORS 374.310(2) allows access to be granted when "in the best interest of the public for the protection of the highway or road and the travelling public. . . ." Its clear authority allows denial of an access permit when it does not meet that criteria and no purchase is required by the statute in exercising that control.

374.035 Acquisition of real property; effect of resolution. (1) [authorizes ODOT to acquire for Throughway purposes]

(2) A resolution adopted by the [Oregon] Department [of Transportation] stating and setting forth that a proposed highway is to be constructed as a throughway is conclusive evidence that the highway when constructed is a throughway with all the characteristics and incidents prescribed by and provided for in ORS 374.005 to 374.095

366.320 Acquisition of Rights of Way and Rights of Access.

366.340 Acquisition of Real Property Generally.

ODOT has all the power it needs to acquire access rights in ORS chapter 366.⁸⁵ ORS 374.035(2) is not necessary for access limitation purposes since no right of access can arise to a highway constructed after 1951.⁸⁶ It is a useful reminder that authority to acquire an interest in land is necessary only when a

⁸⁴ Or. Admin. R. 734-50-010(1) "Applicant" means the person, firm or corporation having the legal right to apply for a permit. Such legal right is vested only in the owner or lessee of the property abutting the highway or the holder of an easement or similar right to construct and use a facility upon the abutting property; providing the Division has not acquired the rights of access from property. (Emphasis provided.)

⁸⁵ Guidebook for Access Management, Oregon Department of Transportation, Policy and Program Development Strategic Planning Section, 1-2 through 1-3, (July 1979):

Over the past several years the Department has acquired access rights to a significant portion (approximately 25%) of the primary and secondary state highway system. These rights of access are acquired when the facility is first constructed, at the time of reconstruction, or when necessary for safety purposes.... In construction or reconstruction projects, the Department's Design, Location, Right of Way and Region Office staff's determine the general degree of access control and the location of access points.

When the Department acquires rights of access on an alignment existing prior to 1951, it usually allows some reservations of access to abutting property owners in order to avoid or reduce damages to the remaining property. These access reservations reserve the right of access by location and width. A change of location or width called an indenture must be approved and executed by representatives of the Department and the property owner.

⁸⁶ A controlled highway may be subject to ODOT access control as a throughway under ORS Ch.374 or pursuant to ORS 366.320, which allows the Department to acquire all rights of access from abutting properties. 38 Op. Att'y Gen. 404 (1976)

property right exists.⁸⁷ Where no right of access exists, there is nothing to acquire, unless the person is deprived of all economic value.⁸⁸

ORS 374.035(1) states that the department may "acquire by agreement, donation or exercise of the power of eminent domain, fee title to or any interest in any real property, including . . . access." This section has been interpreted as the expression of legislative intent to purchase access rights, because the section is viewed as limiting ODOT's power to acquire to "agreement, donation ...or eminent domain" only. Since no other method is listed, the logic goes, nothing else is permitted, because department can only do that which is expressly permitted. Regulatory management of access is not listed, hence on a throughway access rights can be controlled only through the three methods identified.

What this kind of reasoning omits is the analysis of access rights as property rights in relation to improvements to highways as highways. As we discussed previously, the common law found no property interest in access rights when highways are improved for highway purposes, and Central Paving Co. decision likewise found no property interest in direct access to an existing road converted to a throughway. Burk decision found that the legislature might have included that section to limit the means of acquiring access rights to existing right-of-ways, a decision the Burk court did not have to make. The preferred and a narrower reading would be, that this is an authorization statute only, to be applied only where purchase is necessary, such as in cases where specific statutory grants, or contractual rights, or vested interest created property rights in access which require a purchase. As Burk will make clear nothing in this statute prevents such police power based regulation as one way streets, raised medians, u-turns etc. which may result in circuitry of travel or restrict direct access. Purchase through eminent domain or contractual arrangements, is not the only way of acquiring authority to regulate or restrict specific access points.

374.040 Acquisition of land not immediately needed

366.330 Acquisition of land adjoining right of Way.

These sections are not exactly comparable. ORS 374.040 is the only one that expressly authorizes acquisitions for future throughway corridor development. However, ORS 366.320(2) in effect grants ODOT the same authority to acquire property for future needs. ORS 374.045 authorizing ODOT to pay for the cost of acquisition, construction, reconstruction, relocation, location etc. is amply replicated in chapter 366. Likewise ORS 374.050 allowing eminent domain proceedings for acquisition of real property, is echoed in chapter 366. These Throughway Law provisions are redundant, since the passage of Access Law has provided ODOT with means to achieve its objectives through Ch. 366.

⁸⁷ In State Highway Commission v. Central Paving Co., 240 Or. 71, 75-6, 399 P.2d 1019 (1965), where direct access to an existing highway was cut off, the Court said:

ORS 374.035 provides in part that the state may acquire "any interest in real property including easements of air, view, light and access." As we have noted previously, the interest which defendants have in a more direct contact with the throughway is not an interest in land. Therefore, it is not within ORS 374.035. (Emphasis provided.)

⁸⁸ Duhaine, Limiting Access to Highways, 33 Or. L. Rev. 16, 34 (1953) and police power section below.

ORS 374.055 is important in that a reading of this statute has resulted in a construction of the Throughway Law least favorable to the public. No exactly comparable provision can be found in other sections of ORS. Analysis of opinions and cases suggest that there is sometimes inadequate attention to the preliminary determination, whether there is in fact an access right that needs to be condemned or acquired.

374.055 Evidentiary purposes of improvement plan. In any proceeding in eminent domain, evidence of the entire plan of improvement is admissible for the purpose of determining:

- (1) Value of the property taken.
- (2) All damages by reason of deprivation of right of access to any highway to be constructed, established or maintained as a throughway.
- (3) The damages which, if the property sought to be condemned constitutes a part of the larger parcel, will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned and by reason of the construction of the improvement in the manner proposed.

Damages in section (3) are for severance of land, not loss of right of access; however, the nature of the highway causing severance may affect the value of the remaining parcel in that a throughway or a limited access highway may leave less access to the remaining parcel and make it less valuable. Section (2) goes to the heart of our discussion, since little purpose would be served to provide damages for deprivation of access when none existed.

ODOT attorneys and Duhaine have agreed that even if the Throughway Law is ambiguous, ORS 374.405 eliminated all rights of access to all new highways.⁸⁹ If access to an existing highway was merely a right, but not used or vested before throughway designation, would anything be "taken" by improvements within the right of way belonging to the State? Our analysis is that nothing would be taken, since no use has vested. Request for access at a later date is a new use or request, not limited by a right not exercised or exercised differently, and is governed by Access Law and Division 50 administrative rules (See discussion of Spaght v. Dept. of Transportation, 29 Or. App. 681. 564 P.2d 1092 (1977) under Oregon Cases, below).

⁸⁹ Dale Hormann, 10/16/85 INTEROFFICE MEMO, Discussion Paper Relating to Throughway Law;

Cynthia Carter, 4/29/88, OPINION ON 374.405 ACCESS RIGHTS OF ABUTTING LANDOWNERS;

But see opinion #181, supra, for the proposition that Commission does not control access until it has acquired it and suggesting that damages be paid for deprivation of right of access to any highway, new or existing. That opinion reads 374.035, before Central Paving, to the effect that the legislature meant to compensate for taking of access to existing highway when designated as a throughway, in derogation of common law.

Subsection (3) was interpreted in the Burk case⁹⁰, also discussed under Oregon Cases below. In that case the measure of damages allowed were for diminution of value to the remaining property not taken for a throughway. It established the rule in Oregon that it's the value of property taken and diminution in value of property not taken is compensable in condemnation, and that loss of access goes into the analysis of damages to the land not taken.

The next statutes in Ch 374 find echoing authorizations in other chapters of ORS:

374.060 Power of Department of Transportation as to intersecting streets and roads.

374.065 Intersections of throughways and county roads.

374.070 Throughways in cities; intersecting streets.

374.075 Cooperation of municipal and county authorities with Department of Transportation.

374.080 Agreements with Federal Government, counties and cities.

373.030 Construction and maintenance of streets; consent of city for grade change.

373.050 Closing streets which intersect with state highways routed through city.

366.770 State highway agreements with local governments.

366.775 Road, highway or street agreements with local governments.

ORS 374.060 allows ODOT to close streets, create utility roads and build over and under passes, with City approval, duplicating requirements for City approval elsewhere.⁹¹ ORS 374.065 allows ODOT to close county roads intersecting with throughways and to provide for intersections with county consent.

⁹⁰ State Highway Comm'n. v. Burk, 200 Or. 211, 237, 265 P.2d 783 (1954) interpreting 374.055:

...Item (2) was appropriately inserted in the statute to cover cases in which an old conventional highway is "established" as a throughway and in which case, as we have held, there would be a "taking" of the preexisting easement appurtenant to the land not taken.... Any other construction would imply an intention on the part of the legislature to confer a gratuity on the owner over and above the limits of just compensation, and would impliedly authorize a duplication of the same element of damages under items (2) and (3)....

⁹¹ Interestingly enough ORS 373.060 allows the owner of real property abutting a city street that becomes a cul-de-sac by reason of an action of the State Highway Commission to recover damages, but not outside cities or if the City acted pursuant to its own police power. These damages may be recovered only if all the conditions of the statute are met. So that in case where the parties neglected to follow 373.050, and a cul-de-sac was created by a project that did not follow these procedures, no damages were recovered.

ORS 374.065(3) prohibits a County from intersecting with a throughway without ODOT approval.⁹² This duplicates other statutory statements giving ODOT absolute jurisdiction over state roads.⁹³ Access Law gives the state power to control access through the permit process over its own roads, and the county over county roads. The remaining matching provisions authorize these governmental entities to cooperate, and are comparable.

ORS 374.085 and 374.090 create special access rights for agricultural land affected by a throughway. ORS 374.340 provides comparable rights in the Access Law for cattle crossings. ORS 374.085 provides that when a parcel used as a farm or for other agricultural purposes is severed by a throughway, it shall be provided with a crossing or compensation for severance.

ORS 374.090, destruction by throughway of access to agricultural property, provides that when "all reasonable ingress or egress have been destroyed", ODOT shall provide access by a service road or directly or it shall buy right of access directly or through condemnation. Throughway law grants special rights of access, whether its a new or existing highway, for farmland. It allows ODOT to provide alternate access. Otherwise, as shall be seen, it restates a portion of the present common law rule, namely that compensation is due when the property is cut off, and not due when an alternative is provided. Compensation is triggered when agricultural uses have been disturbed.

⁹² A number of AG's opinions have dealt with relative rights of governments over state highways:

Unpublished AG's Opinion 32 to the Oregon Highway Department, Letter from T.J. Reeder to C.W. Enfield (December 14, 1955). If closing of municipal roads for throughway purposes can only be done with municipal or county consent, does that mean that consent can only be given through a vacation process? Answer was no. Closure is not the same as vacation, although vacation always involves closure.

Unpublished AG's Opinion 2 to the Oregon Highway Department, Letter from F.C. McKinney to C.W. Enfield (March 5, 1952). Can county close an unofficial county road under the Throughway Law? Answer was yes, counties have authority over public roads whether or not they are "official".

Unpublished AG's Opinion 447 to the Oregon Highway Department, Letter from T.E. Borberu to L.T. Lindus (April 25, 1959). This opinion tries hard to reach a desired answer. After deciding that the state can take over a city or county road without compensation, it struggles with the requirement that cities and counties need to consent when a throughway would close their streets. The opinion goes on to say that the law requiring consent could not possible mean what it said because cities and counties could act unreasonably in not giving consent and that would defeat purpose of the Throughway Law. Since an interpretation could not lead to an absurd result and it would be absurd to allow cities and counties to act unreasonably in thwarting a throughway, and besides the federal authorities could close city streets or county roads if they wanted to and do it on behalf of the State; therefore, city or county consent is not really required in this context. Subsequent opinion below settled for a plain meaning reading of the statute.

32 Op. Att'y Gen. 125 (1965) found that "because of the restricted access-nature of freeways or throughways and the powers reserved to cities [in ORS 374.060 and other statutes] with respect to closing of city streets and changes of the grade of city streets, the State Highway Commission is effectively prevented from constructing a throughway highway through city without the consent and cooperation of the governing body of the city when the construction of a throughway requires the change of grade or the closure of any city street."

⁹³ ORS 368.016(2)(a):
(2) A county governing body:
(a) Does not have jurisdiction over any public road that is a state highway.

The final section of the Throughway Law, ORS 374.095, has no equivalent in the Access Law. Because of its unequivocal nature this law establishes a basis of liability against the State:

374.095 Utility roads where access to abutting property affected. If under ORS 374.005 to 374.095 any existing highway or section of existing highway is converted into a throughway, by reason thereof real properties then occupied and used are affected and such abutting real properties are dependent upon the existing highway or section of highway for ingress and egress, The department of transportation shall provide a utility or service road to serve the properties. This utility or service road shall be constructed and maintained by the state at state expense and shall follow a location or route immediately parallel to and adjoining the throughway. After the service or utility road has been constructed the abutting land owner's right of reasonable view shall not be impaired. (emphasis provided)

This section has never been enforced as written, but seems to create an alternative right of access to frontage roads at a later date, even when other access is available.⁹⁴ ODOT has found it less expensive to purchase access easements whenever possible, rather than to construct utility roads. This section creates access rights, where actual access existed and was used at the time that the highway was converted to a throughway, but not after it has been converted. If the property is dependent on the existing highway for ingress and egress (it would be land locked otherwise) the owners rights are to a utility or service road constructed and maintained by the State. The rights are not to direct access to the highway after conversion. Failure to provide a frontage road access point would support a claim in inverse condemnation, ie: the Department would have to purchase the property. If alternative access existed at the time of conversion then the issue of whether the property was in fact "dependent" would have to be resolved.

There is no specific provision for granting direct access under the Throughway Law to a highway converted to a throughway. In fact a strong argument could be made that the only way to grant access under these circumstances is to remove Throughway designation for that segment of the road. "Dependent" is not a self evident term. We assume it means solely that alternative access or compensation is due in case the property is landlocked, restating the common law rule. It could also mean an economic dependency, as in a case of a unique commercial business access upon which the business was dependent as a business. The issue in the latter case would not be whether an alternative access point existed, but whether the business was dependent on the access that was cut off. Access Law is much more flexible, allowing granting of access, even when rights were cut off by ORS 374.405 (after 1951). Throughway law, on its face at least, seems to allow no exceptions, forcing purchase of property or provision of frontage road.

Finally the Access Law grandfathers access to those properties which had an actual access (not a mere right) prior to 1957 and 1967. Sections 305, 310 and 325 were amended in 1957. In 1967 additional amendments expanded state's requirements for control of access. If an access permit was not required prior to 1957, or prior to 1967, and if the use of the access has remained unchanged, no permit is

⁹⁴ Id. Sollis memo.

now required. After 1957 and in all cases after 1967 an access permit is needed. Since 1967 any change in use requires a new permit, unless the State had by contract granted an unrestricted access right. Even in that case, safety conditions can be imposed, and if safety concerns can not be satisfied at the location at issue, no change in use need be permitted. 1967 amendments also created authority to terminate access: "when the public safety, public convenience and the general welfare require alteration or change."⁹⁵

***Statutory Summary.** Statutory comparison indicates that Access Control concepts give the State a capacity for constructing and designating highways designed primarily for through traffic, without some of the limitations, either encompassed or so assumed, in the Throughway Law and at a lower acquisition cost to the taxpayers. What should be retained from the Throughway Law is a corridor management concept with its potential efficiency to accomplish all the access control objectives along a designated corridor in one action. The Department has interpreted the Throughway Law that there is no absolute right to control access, at least on existing right of way, until it has been acquired. That construction is too restrictive and ought to be abandoned for a regulatory concept, the basis for which already exists in the Access Law.*

OREGON CASES

The leading case in Oregon dealing with the Throughway Law is State Highway Comm'n. v. Burk,⁹⁶ decided in 1954. This case gives the fullest discussion of access rights law in Oregon, although its conclusions have been significantly extended by the State Highway Comm'n. v. Central Paving Co. case.⁹⁷

At issue in Burk was whether defendants acquired any right or easement of access to a relocated Salem-Dallas Highway. The State condemned part of the property for a throughway (non-access highway). Defendant's alleged that the property not taken was damaged by having its right of access extinguished. The court held in general that in determining the fair cash market value of all such owner's property, and in determining such value of their remaining property not taken the jury should not consider that they owned an appurtenant right of easement of access to an from such portion of the highway, because no such right existed and no damages for it were allowed.

The Court did allow, however, damages for the diminution of the remaining parcel, where an element of damage to be shown could be more restricted access to the remaining parcel.

[I]t appears that the state is authorized, in a single action, to do what it has attempted in the pending case, namely, to condemn a non-access highway and thereby to acquire the fee of privately-owned property, to the exclusion of any right or entry appurtenant to the land not taken. The provisions. . . ,indicate by implication, the view of the legislative body that the right of access may be a right for which compensation is to be paid, and that the

⁹⁵ ORS 374.305(2)

⁹⁶ 200 Or. 211, 265 P.2d 783 (1954), supra.

⁹⁷ 240 Or. 71, 399 P.2d 1019 (1965) supra.

damages, if any there be from the taking, are to be assessed and paid. However, the statute does not apply exclusively to cases in which the state seeks to acquire new land in fee for a non-access highway. The act is equally applicable to cases in which the state seeks to convert a conventional highway into a non-access highway by condemning only an easement of access. When a conventional highway is established, there is attached to the abutting land an easement of access in, and to, the highway. Such easement is a property right which cannot be extinguished without compensation. This is clear, and it is conceded by the state. Even where the fee of a conventional highway is in the state, it is subject to an easement of access appurtenant to the abutting land. . . . The rule is definitely settled in the recent case of Sweet v. Irrigation Canal Co., 198 Or. 166, 254 P.2d 700, 254 P.2d 200, 256 P.2d 252.⁹⁸

This passage presents several difficulties. First ORS 374.405, which does not play a role in this decision, but which was enacted in 1951, does not distinguish between access and non-access highways when it eliminates rights of access to new right-of-ways. The Court does not make any reference to that statute. More critically, however, the Court overstates the rule in Sweet v. Irrigation Canal Co., *supra*, on which it relies.

The Court disposes of language, in ORS 366.320 in a way so as to eliminate potential conflict between it and the Throughway Law. It infers that 366.320(2)⁹⁹ requires that acquisition of rights of access needs to be paid for. But then it concludes, that since the Throughway Law extinguished such rights for new right of ways, that implication can only apply to existing highways, or highways which are not throughways.

The court distinguishes the new rule from the one established in Sweet v. Irrigation Canal Co.: "Even where the fee of a conventional highway is in the state, it is subject to an easement of access appurtenant to the abutting land. . . . The rule is definitely settled in the recent case of Sweet v. Irrigation Canal Co.. . . ." ¹⁰⁰ The rule in that case is less than the Burk court implied. That court in Sweet found that the abutting owner is entitled to use of highway in front of his premises to its full width as means of ingress and egress and for light and air, and such right is as much " property" as soil within boundaries of his lot, and therefore any impairment of such right of interference with it caused by use of highway for other than legitimate highway purposes, is a taking within the meaning of the constitution, whether fee of highway is in the owner or not. ¹⁰¹

The court in Sweet v Irrigation, goes on to say that a ditch or canal is not a road improvement, but

⁹⁸ 200 Or. at 227-28.

⁹⁹ ORS 366.320(2): The department may acquire by purchase, agreement, donation or by exercise of the power of eminent domain, real property or any right or interest therein deemed necessary for rights of way, either for original location or for widening, straightening or otherwise changing any highway, road or street. The department may, when acquiring real property for right of way, acquire all right of access from abutting property to the highway to be constructed, relocated or widened.

¹⁰⁰ Burk, 200 Or. at 228.

¹⁰¹ Sweet v. Irrigation Canal Co., 198 Or. 166, 190-91, 254 P.2d 200, 256 P.2d. 252 (1953).

a nuisance. It is not a public use or a legitimate highway use. Thus, while this case declares rights of access as against a private or a non-highway use, the case makes clear that highway improvements per se do not result in taking of property rights, because as against such use there is no right of access. It quotes the line of cases previously referred to in section on Brief History, *supra*. The court in Burk continues its analysis to establish the fact that the Throughway Law excludes access rights at least for a new non-access highway:

Since the statute may be employed, either to extinguish conceded and existing easements in a conventional highway, or to take new land for a non-access highway, the statutory provision authorizing compensation for right of access carries with it no implication that an easement of access, which never existed before, is created by filing an action to condemn a non-access highway. . . .**The constitution requires compensation for the taking of an easement only if there is an easement to take. If there was none, then the statute which authorizes compensation for such easements does not apply.** (Emphasis provided)¹⁰²

The Burk court next tackles the issue of when the police power ends and the power of eminent domain begins. All activities listed below, no matter how they may effect ease of access, are not compensable. This is an excellent place to find answers to some very specific regulatory questions:

In general, the regulation of highway traffic is within the police power. This includes the establishment of one-way streets, the establishment of traffic lanes, regulations as to speeding and parking, regulations of abutting owners, along with the general traveling public involving circuitry of travel, as where one living on a southbound divided street desires to go north, regulations limiting permissible "U" turns, and changes in the highway system resulting in the reduction or increase of the volume of traffic on the highway fronting the property of an owner.¹⁰³

The Burk Court then establishes the purview of eminent domain and what needs to be compensated if taken by the State. Eminent domain rule in access cases would be as follows:

One of the traditional and prime functions of the conventional street and highway is, and will remain, that of a "land-service road" providing rights of ingress and egress to and from the property of abutting owners for the benefit of such owners, their invitees and the public. We have seen that where such rights have once become vested, it is almost

¹⁰² 200 Or. at 229. The court preceded the conclusion with this analysis: "But the fact that the establishment of a conventional highway creates in the abutting land the attributes of a dominant, and in the highway the attributes of a servient tenement, does not require the conclusion that such attributes are created when land for a new non-access highway is condemned. This action was brought to extinguish and compensate for all rights of the defendants in the property taken. It extinguishes the right of the defendant to enter, from his abutting land, the land which once belonged to him, but which now belongs to the state....It means merely that the statute authorizes the acquisition by condemnation of a fee which is essentially unlike the taking for a conventional highway, and is essentially like the fee which a private individual would acquire by purchase.... Burk, 200 Or. at 229."

¹⁰³ 200 Or. at 230.

universally held that they can be divested only by condemnation of the easement appurtenant to the abutting property. In direct contrast with the land-service function of the conventional highway is the purpose and function of the non-access freeway or throughway.¹⁰⁴

Did the Court clarify the rule of when police power begins? Burk does not say that vested rights exist as against the police power functions it enumerated: one way streets, dividers, u-turns, changes in the highway system and regulation of abutting owners, etc. The court's "land-service" road distinction does not address problems raised by ORS 374.405, which makes only new and old distinction, without reference to function. Neither does it make explicit the covenant theory upon which access rights are based and which is discussed above.¹⁰⁵ Police power justification built into the Court's understanding would apply whether or not the throughway was converted from an existing highway or newly constructed. The court reserves the answer to that question for another day:

We conclude that there is no "taking" of an easement of access when a new non-access highway is established by condemnation. . . . Our conclusion that there was no easement of access and that none was condemned is not decisive of the further question as to whether the non-access character of the highway was relevant on the issue of consequential or severance damages to the remaining property.

The Court leaves open the issue whether the non-access nature of the highway is dispositive, or how it would decide the issue in case of a conventional highway. Likewise we do not know how the Court reading of ORS 374.405 would have influenced that decision. We have to assume that the dicta in Burk, which follows, would affirm an interpretation which does not recognize access rights as against highway improvements because:

. . . no right of access can be implied contrary to the express provisions of the statute. .

This takes us back to the language of the Throughway and Access laws. Did the legislature imply some access rights when it authorized their purchase or created damage provisions in ORS Ch. 105? Can we read those more narrowly, by always going through the first step in each case of looking for actual access rights - granted by statute, contract, or vested? Vested meaning actually used, not a mere theoretical right¹⁰⁶. Thus, the Court leaves room to apply 374.405, but it continues,

It follows that the damages awarded to a land owner may include an element of loss by reason of a depreciation in the market value of the remaining land by reason of the peculiar nature of the appropriation.¹⁰⁷

¹⁰⁴ 200 Or. 211, at 231.

¹⁰⁵ But, see generally, "Where an established "land service" road in which normal right of access has already come into being, is converted into a limited highway access in such a manner that the existing rights of access are destroyed, the owners of such rights are entitled to compensation" 43 A.L.R. 2d 1072.

¹⁰⁶ See generally, 2 Land Use, (Oregon CLE) 1988 Rev, Sec 30.5.

¹⁰⁷ 200 Or. 211, 238.

By which it means, that if the land is taken for a throughway and such a taking diminishes value of the remaining land by restricting access, then the owner can recover that loss of value. The damages are not directly for loss of access as a property right, but for damages to the remaining parcel.¹⁰⁸

Next time the Oregon Supreme Court dealt with the Throughway Law, it did not focus directly on the rights of access, but on severance damages to the parcel not taken, both because it now had no access, and because it might be separated from the land of which it was once a part. In State Highway Comm'n. v. Bailey, 212 Or. 261, 319 P.2d 906 (1957) the Court allowed evidence to show the manner, nature and extent of taking, separation of defendant's land into different tracts and added inconvenience in going about and managing the property, and similar circumstances so far as they caused depreciation in fair market value of land not taken. . . . [Similarly it allowed evidence] to show beneficial effects of rights of access and crossing which tend to minimize the damage[s].¹⁰⁹ The case states the rule in condemnation how to assess damages to the land not taken, and how to show special benefits to offset damages to the parcel not taken.

State Highway Comm'n. v. Ralston, 226 Or. 143, 359 P.2d 529 (1961) is a police power case. In an action to condemn right of way for highway widening (Bertha-Beaverton Road) owner argued that even though he had no access to Barbur Boulevard before the improvement, the value of his property was diminished by the change in traffic flow on Slavin road which admittedly resulted from the elimination of a

¹⁰⁸ 200 Or. 211, 239. The court made the point relying on a California case:

"This general rule was invoked in People v. Al G. Smith Co., Limited, supra, 86 Cal. App. 2d 308, 194 P.2d 750, where the state condemned the access rights of defendants in a conventional highway, thereby converting it into a freeway.... The court held that the facts brought the case within the rule that "Where private property is taken for a public use and damage results to the remaining property of the landowner, compensation for such damage must be awarded which is measured by the diminution in value of that property which remains." ... [T]he case is authority for the proposition that the extinguishment of such right [of access] is relevant on the issue of damage, if any to the remaining property. The same rule is followed when condemnation is brought to acquire a conventional highway. Pape et al v. Lincoln County 135 Or. 430, 296 P. 65. We hold that the peculiar character of the appropriation is relevant to the issue of damages to the portion of the land not taken."

¹⁰⁹ 212 Or. at 261.

"Obviously, the completeness of the severance might affect the amount of the damage or depreciation in the land value. It is equally obvious that if the severance is not complete-if the owner is given access to the highway at specified points, or the right to go from his land on one side of the highway to the rest of his tract lying on the other side of the highway, then the depreciation, if any, resulting from the nonaccess aspect of the taking would be reduced. It is of little importance whether we say that the rights of access granted to the owner constitute special benefits or merely circumstances tending to minimize the depreciation in value which might otherwise result from taking in the manner proposed." 212 Or. at 284.

"Only such benefits as are or will be the proximate result of the improvement may be considered and only such benefits as are reasonably probable. The issue of benefits is limited to the particular tract of land of which a portion is taken." 212 Or. at 307

"From the very nature of the nonaccess road which is proposed, the jury may consider what if any special benefits accrue to the defendants' land with its rights of access, in view of the rarity of such rights as may appear from the evidence." 212 Or. at 308.

nearby grade crossing.

It is too well settled for argument that a property owner may not recover damages where the sovereign, in exercise of the police power, reroutes, increases, or decreases the flow of traffic on a public highway. Public regulation is not a taking.¹¹⁰

In State Highway Comm'n. v. Blaue, 231 Or. 216, 371 P.2d 972 (1962) defendants owned a tract abutting Cascade Highway. A new throughway divided the tract. The Court upheld the jury instruction that **"no damages should be allowed, as such, because defendants will not have a future unrestricted right to go to and from their remaining property and the new highway when that highway is constructed and open to public travel."**¹¹¹ (Emphasis provided.) The court cited Burk as authority for this rule.

It's not clear what access, if any, remained to the defendants. What is clear is that the Commission dealt with an existing highway and made it into a throughway by making it a four lane highway, and that the Court found no damages for denying future access to a widened, reconstructed road, even where access existed before conversion. This case should remove any residue of doubt remaining as a result of informal Opinion #181 and it refutes legal assertion in the Guidebook, as to whether the highway needs to purchase access rights in order to restrict direct access to a state highway designated for through travel. The next case tells us why.

In 1965 Oregon Supreme Court visited these issues twice. In State Highway Comm'n. v. Central Paving Co., 240 Or. 71, 399 P.2d 1019 (1965), the Court found that landowner could not recover for circuitry of travel resulting from construction of limited access highway when access to a frontage road was provided connecting to a widened and improved highway. Defendant owned 3.73 acres upon which they conducted a sand and gravel business a few miles west of Salem. Commission condemned a .17 acre strip for the construction and maintenance of a frontage road in connection with the widening, improvement and maintenance of the existing Willamina-Salem the highway as a throughway. Instead of connecting directly to the highway, the Defendant now had to take a frontage road to the new throughway.

The Court first stated the rule in Oregon that allied itself with those courts which deny recovery for circuitry of travel.

Defendants' access to their property from the frontage road is the same as it was prior to the construction of the throughway. The construction of the throughway admittedly creates an impediment in travelling between defendants' land and the new highway. That impediment consists only of the inconvenience in being forced to travel a longer distance in going to and from the throughway. The inconvenience resulting from travelling a more circuitous route is the same kind of inconvenience the general public suffers when there is modification of certain traffic regulations on existing streets and highways. Thus, the

¹¹⁰ 226 Or. at 144.

¹¹¹ 231 Or. at 218.

public is forced to travel a more circuitous route upon the adoption of no-left-turn regulations or one-way-street restrictions. Defendants are not entitled to recover compensation for a loss unless they can show that the type of loss is peculiar to those owning land as distinct from the loss suffered by the general public.¹¹²

This is a key ruling, in that it states the rule that denying access to what had been an existing road, by converting it to a throughway, is not a taking of property that is compensable, because other access is provided, and circuitry of travel is an inconvenience that public as a whole may experience as result of any traffic regulation. Relying on the argument in *Corey's, Frontage Roads: To Compensate or Not to Compensate*, 56 N.W.U.L. Rev. 587 (1961) quoting from page 599:

[W]hat he is losing, in fact, is the benefit - entirely unearned by him - to his land of the commercially exploitable proximity of heavy traffic. Since he has no right to this benefit and has done nothing to create it, he should have little cause to complain at losing it.

The court used both barrels of its legal shotgun to eliminate the defendant's argument. It stated not only that the defendant can not recover under any police power analysis but also under the Throughway law, or eminent domain, they do not have an interest in land:

Since we do not regard the limitation on defendant's access to their land from the throughway as the deprivation of an interest in land we need not decide whether, if it were, the state could appropriate the interest without compensation under the police power.¹¹³ (Emphasis provided.)

This case is cited in commentaries and ALR as an example of those jurisdictions where the rule is that there is no property right in direct access to a highway, only to reasonable access.¹¹⁴ The common law of access rights in Oregon has not changed since the turn of the century.

In *Oregon Investment Co. v. Schrunk*, 242 Or. 63, 408 P.2d 89 (1965), Oregon Supreme Court dealt with a situation in which a parking lot's access to a street in the retail heart of Portland was cut off because of placing of a bus stop, but access to other streets remained. The Court using police power analysis found that there was no taking.

While an abutting proprietor's right to the use of the street in front of his premises as a means of ingress and egress is a property right. . . "[T]he rights of abutting proprietors to access to their premises are subservient to the primary rights of the public to free use of the streets for the purposes of travel and incidental purposes. . . ." The rule is otherwise where the interference is caused by the use of the streets for other than legitimate

¹¹² 240 Or. at 74-5.

¹¹³ 240 Or. at 75.

¹¹⁴ 42 A.L.R. 3d 1, at 65 (1972).

street purposes. . . . ¹¹⁵

The Court restated with approval the decision and the reasoning in Brand v. Multnomah County, 38 Or. 79, 60 P. 390, 62 P. 209 (1900). It then noted that some cases in other states have denied access completely and without compensation in cases of "real traffic hazard."¹¹⁶ Since the court did not have to make that ruling, it didn't. It stated the extent of police power analysis as follows:

We agree, however, with those courts which hold that where the property fronts on more than one street, access may be denied, under particular circumstances, at one of the streets if adequate means of access remain to the owner at the other street or streets. To us this seems a reasonable exercise of the power of the city to provide for the public safety, convenience and welfare under the conditions created by modern motorized traffic in a large city. ¹¹⁷

The final Oregon Supreme Court decision in these series is Douglas County v. Briggs, 286 Or. 151, 593 P.2d 1115 (1979). Douglas County brought a proceeding to determine whether it was required to compensate defendants for loss of access from defendant's property to an established abutting county road which had been converted by the county into a throughway where access through another road remained. The court said that the County needed to compensate.

The court interpreted ORS 374.420¹¹⁸ which is that portion of Access Control legislation which authorizes counties to designate throughways on county roads. The court concluded in examining that statute that: "A perusal of the legislative history shows clearly that the legislature intended that property owners be compensated for the termination of their rights of access upon the conversion of an ordinary county road into a throughway." (Emphasis provided.)¹¹⁹

Court's reading of this legislative history also indicated that provision of alternate access was

¹¹⁵ 242 Or. at 69.

¹¹⁶ 242 Or. at 72.

¹¹⁷ 242 Or. at 72-3.

¹¹⁸ ORS 374.420 County throughways: Rights of abutting property owners. (1) The county court or board of county commissioners may acquire by purchase, agreement, donation or exercise of the power of eminent domain, fee title or any interest in real property, including easements of air, view, light and access, which is necessary for the construction of a throughway or establishment of a section of an existing county road as a throughway.

(2) When right of way is acquired for a throughway after August 13, 1965, no rights in or to the throughway, including what is known as right of access, accrue to real property merely because the property abuts upon that part of the right of way so acquired....

(3) "Throughway," as used in this section, means a proposed or existing county road especially designed for through traffic, which has been designated by resolution of the county court or board of county commissioners as a throughway, over, from or to which owners or occupants of abutting land or other persons have no easement of access or only a limited easement of access, light, air or view, merely because of the fact that their property abuts upon the throughway or for any other reason.

¹¹⁹ 286 Or. at 154, 593 P.2d at 1116.

meant to minimize damages. It then implied, that while constitutionally there may not be a taking in this case, and in reading Central Paving one could hardly make a case that there would be, the statute made them decide otherwise: "Despite defendants' common law right of access, we believe the matter [of compensation] to be one of considerable doubt in situations in which the access is terminated for purposes which have to do with the use of the county road as a public road."¹²⁰

It's not clear why the Court was not more explicit in its taking conclusion in view of Ralston and Central Paving, above. This makes it appear that the Court reopens the door on the "taking" issue, albeit with "considerable doubt". Similarly, the common law of access refers to dicta in Burk, based on a case which found no common law right of access as against highway improvements.

This case is better viewed as an example of legislative generosity and its desire to compensate owners in cases where they don't need to under the constitution. The county contended that the Court of Appeals erred "in holding the determination of whether adequate or reasonable access to a public highway remains for an abutting landlord when access has been restricted is a question of fact as determined by the highest and best use." But for the legislative history of this section that would be true.

Analytically, there is nothing in this case to distinguish it from the one that authorizes the State convert an existing highway to a throughway. The result should have been the same as in Central Paving Co., but for the debate on the legislative floor which implied that this is the result legislature wanted to reach in respect to counties. Under the Access Law (Approach/permit) there would be no compensable taking, but under county throughway law there is.

What remains to be analyzed are the pronouncements of the Oregon Court of Appeals on these issues. The Court of Appeals does not hesitate to draw full inference from its police power analysis.

In State Highway Comm'n. v. Hazapis, 3 Or. App. 282, 472 P.2d 831 (1970), defendants owned 2.2 acres, of which the State took .6 of an acre for the Wauna interchange on the Columbia River Highway. Located at the intersection of the Highway and Wauna Road on the portion not taken was a building that contained an apartment and a tavern-restaurant. As part of the project Wauna Road was closed at the point where it formerly connected to the highway at grade. Since defendant's property was located immediately adjacent to Wauna Road intersection, the closure of the road left the property on a cul-de-sac. Traffic on the highway now must travel farther to reach the property and farther to return. Court found that defendants were not entitled to compensation for damage to remaining property.

Apparently the State could have provided direct access to the relocated road, for which part of the land was taken, but did not, and argued that as to remainder, mere circuitry of travel was not compensable based on Central Paving. Court relied on Ralston for the proposition that: "It is too well settled for argument that a property owner may not recover damages where the sovereign, in exercise of the police power, reroutes, increases, or decreases the flow of traffic on a public highway. Public regulation is not a

¹²⁰ 286 Or. at 156-57, 593 P.2d at 117.

taking."¹²¹ The court then distinguished the fact that this is a rural cul-de-sac from one created in the cities, where in Sandstorm v. Oregon-Washington, Ry. & Nav., Co., 75 Or. 159, 146 P. 803 (1915) owner relied on street dedication appearing in the plat. Even Sandstorm, the court concluded, has been overturned by the decision in Central Paving.

The court used ORS 373.060 for the proposition that under certain circumstances one could recover for creation of a cul-de-sac in the city, see below. Arguing that the legislature was aware of the circuitry / cul-de-sac problem in terms of economic loss to those affected by their creation, it then pointed out that it failed to provide a remedy for damages occurring in rural setting. Going back to police power analysis in Central Paving the Court concluded that changes in routing and flow are not compensable and finally relying on NICHOLS 6. 443(3) concluded that cul-de-sacs are not compensable in most jurisdictions.

State Highway Comm'n. v. Stockoff, 16 Or. App. 647, 519 P.2d 1281 (1974) resulted in a change in the ODOT policy of requiring reservations of access clauses to be made in those instances where access or other right-of-way was acquired. The State pursued that policy initially in order to reduce the cost of acquisition, and to create authority to control access in the future when access needed to be changed as part of a future project.

In this case there was an agreement in a 1950 deed from landowners' predecessors that the State, which acquired a tract of land abutting the old highway, had a right to build an outer highway within right-of-way and that grantor's right of access which was reserved under the deed, would cease upon such construction. The court found the language which limited the agreement to frontage roads built within the right-of-way conveyed by 1950 deed controlling and therefore found that it had no application to proposed frontage roads which were not to be built within boundaries of such right-of-way. Landowners could allege and prove that conversion of highway would result in diminution of their right of access.

The headings and the reportage do not explicitly address the statutes construed. The road divided a farm, which was temporarily used to quarry rock for road construction which had ended. The rights of farms in relation to a limited access highway are covered specifically in ORS 374.090 and one could argue that the result is dictated by special access rights created by that statute, which are not available to other property owners. The court bypassed the analysis of whether right of access exists, or such taking compensable, or whether the reasonableness of the substitute frontage road access negated damages to the new owners, and chose an argument based on contract theory, wherein specific location of the frontage road might have effected the original purchase price.

The reservation of access condition was based on frontage road being within 1950 right of way. A dozen years later frontage road was built outside of that of right of way. The specific harm to the owners of that change is not described in the case, so that cases which would have found this uncompensable can not be compared. The court did say that abutters could put on evidence and show that such new access

¹²¹ 3, Or. App. at 287, 472 P.2d at 833 quoting State Highway Comm'n. v. Burk, 200 Or. 211, 230.

resulted in diminution of their right of access, where the diminution of access in this case represented an element of contractual damages.¹²²

One can clearly see that in view of the ruling, and the reality that ODOT could not undertake with any assurance of precision to predict the exact location of a frontage road 10 or 20 years into the future, why reservation of access clauses were abandoned. A less precise, or more generic, frontage clause might be substituted, or a temporary (until frontage road is constructed) approach road permit issued.

In State Highway Comm'n. v. Center, 23 Or. App. 693, 543 P.2d 1084 (1975), the State brought a condemnation proceeding in connection with widening of Highway 66 near Ashland. Defendants owned real property abutting the highway from which they operated an auto body shop and towing service.

Defendants contended that ORS 374.305 and 374.310 (Access Law) do not restrict an already existing access but only regulated the construction of new access. They argued that it was an error to charge the jury that the defendants' right of access was restricted before condemnation by virtue of ORS 374.305 and 374.310, which allow access to state highways by permit only. Court disagreed, and for the purpose of ORS 374.305 and 374.310 approved the following as the correct statement of the law, giving approving emphasis to section [5] as the correct rule: **[5] If you find that the Defendant has been denied reasonable access to his remaining property, then you may include such loss in your determination of just compensation.**¹²³

¹²² 16 Or. App. at 653-54, 519 P.2d at 1284: "We agree that the 1950 deed speaks for itself, and that defendants agreed to trade their existing right of access for access to an outer highway only if the outer highway were constructed within the right of way conveyed by the 1950 deed. The frontage roads were not constructed in the place contemplated, and therefore defendants were not barred from alleging and proving damages to their right of access. Since plaintiff moved to strike all testimony of damage to right of access, offered to prove that the effect of the 1950 deed was to eliminate totally such damage, and requested that the jury be instructed that they could give no award for such damage, the trial court was correct in its ruling. The potential restriction of access under the 1950 deed was not an exact equivalent of the new restriction of access and therefore cannot be used to cancel it out."

"The basic proposition, again, is that fair compensation is the difference between the market value of the property before and after the taking. The fact that defendants' predecessors in interest had given the state an option to build a frontage road in the right of way and had agreed to accept access to that road as a substitute for access to the highway per se would be a relevant factor in determining the "before" market value of the property, since a prospective buyer would likely be influenced by the existence of the option in determining the purchase price."

¹²³ 23 Or. at 694-95. The remaining portions of the jury instructions might be of interest:

[1] A person who owns property abutting a highway has an absolute legal right to the use of the whole highway in front of his premises subject only to reasonable regulations by the Highway Commission. For this purpose I instruct you that a statute of the State of Oregon restricting access reads as follows:

[2] No person may place, build or construct on the right-of-way of any state highway any approach road without first obtaining written permission from the Department of Transportation. The Department of Transportation with respect to state highways may issue permits not inconsistent with law for the use of the rights-of-way of such highways and roads. Such permits shall include provisions, terms and conditions as in the judgement of the granting authority may be in the best interests of the public for the protection of the highway or road and the travelling public.

[3] 'The powers granted by this section shall not be exercised so as to deny any property adjoining the road or highway reasonable access.'

[4] Therefore the Defendants' right to access, even before the taking herein, was restricted by virtue of the statute just read to you. You may, however, compare the access after the taking with that available before the taking to determine whether the Defendant has been denied reasonable access to his property.

This case does not state the rule in the manner most beneficial to the State. For example the rule in Central Paving might have suggested an instruction to the effect that when alternative means of ingress and egress remain, the defendant is not deprived of a property right. The case does suggest that the right of access is never absolute even to an existing road and only reasonable access may be part of any entitlement, leaving ODOT great latitude in conditioning its permits.

In State Highway Comm'n. v. Boothman, 22 Or. App. 576, 540 P.2d 1020 (1975), commission condemned 37.5 acres in connection with Highway 30 freeway project. The freeway followed a previously existing highway and cut across defendant's cattle ranch. Prior to the freeway defendants had a farm grade crossing over the old highway. State provided a tube crossing and then offered defendants a different tube a mile away from the nearest point of defendant's property. The future availability of the second tube was in dispute and there was some evidence that the cattle did not view the first tube with a degree of enthusiasm sufficient to venture into it. The question, as the court saw it, was whether the State can provide something which avoids payment of compensation as an equal alternative to direct crossing.¹²⁴ The court interpreting ORS 374.085¹²⁵ which created special access rights for agricultural lands under common ownership separated by a throughway, said:

We hold that this statute does not reasonably contemplate that the Commission may escape paying compensation for loss of previously existing direct access from a farm on one side of a new throughway to the rest of the farm on the other side of the new throughway by offering a roundabout way over an interchange (or, for that matter, a tube designed for cattle passage) which is located an unreasonably long distance away.¹²⁶

The court concluded that ORS 374.085 contemplated a more direct crossing, and that therefore defendants were entitled to severance, not loss of access, damages. Access Law has a 1981 provision tailor made to the facts of this case, protecting rights of animal and cattle crossings, but subjecting such rights to the public interest standard of the Access Law.¹²⁷ These specific grants of rights by the legislature take this

[6] However, if you find that the access reserved to the Defendant is reasonable, then the Defendant is not entitled to recover any compensation for the restriction of access which is caused by the lawful exercise of the Highway Commission's right to regulate the number, location and the type of approaches to public highways.

¹²⁴ 22 Or. App. at 582, 540 P.2d at 1023.

¹²⁵ ORS 374.085 Severance by throughway of agricultural land. Whenever by the location, relocation, establishment and construction or reconstruction of a throughway...real property, title to which is held under one ownership, is severed and the land is being used for farm or other agricultural purposes, provisions shall be made by the [Oregon] Department of Transportation for crossing the highway from one such tract to the other or compensation for the severance of the tract shall be paid. Should such tracts at any time cease to be held under one ownership, the department may terminate and discontinue the road crossings. No such connecting-road crossing shall be used for or in connection with the conduct of any roadside business or enterprise, but shall be available and used solely for passage from one of the severed tracts to the other.

¹²⁶ 22 Or. App. at 583, 540 P.2d at 1023.

¹²⁷ ORS 374.340 Cattle crossing under public roads. Any person owning, using or occupying lands on both sides of any public road is entitled to the privilege of making a crossing under the road for the purpose of letting the person's cattle and other domestic animals cross the road. A crossing may be installed as provided under ORS 374.305 to 374.330.

case out of the scope of police power analysis.

The next case is an important one for the administration and management of access, Spaght v. Dept of Transportation, 29 Or. App. 681, 564 P.2d 1092 (1977). The question was relatively simple. Prior to August 20, 1957, plaintiffs, through their predecessors in title, constructed an approach road on state highway right of way leading to a farm. The date is significant because that is the effective date for ORS 374.305 which requires a permit from the State for any approach road. That law was amended in 1967 to require a permit as well in order to ". . . substantially alter any such facility, thing or appurtenance or change the manner of using any such approach road. . . ." 29 Or. App. at 687 (quoting ORS 374.305 as amended in 1967 by "Oregon Laws, Ch. 497, § 1, p. 1187. . . ." In 1972 plaintiffs changed the use and began developing a race track complex. Did they need a written permission from Dept. of Transportation in light of ORS 374.330(2)(a) which appears to grandfather approach roads existing before the effective dates of these statutes?¹²⁸

The court found that the "savings clause" only preserved the existing conditions, those lawfully placed or constructed. It did not preserve any potential alterations that may have been accomplished prior to the amendment.¹²⁹ The purpose of the clause is to prevent hardship to individuals who have existing uses, particularly in view of the purpose of the laws relating to control of highway access.¹³⁰ Note in our earlier discussion that the Commission has abandoned use restrictions in its grants policy, but that these are enforceable. The analysis in this case would also cut off any rights of access not actually used before the effective date.

In Boese v. City of Salem, 40 Or. App. 381, 595 P.2d 822 (1979), plaintiffs owned some rental property. In the rear of the units there were five garages served by a private driveway. The city installed a light near the intersection with the driveway and closed the driveway because of a traffic hazard.

The court relying primarily on the Schrunk case police power analysis found no taking, "if adequate means of access remain to the owner at the other street or streets."¹³¹ Dismissing the fact that Plaintiff lost access to his garages, and therefore the use of his garages, the court said:

¹²⁸ ORS 374.330 Prior status preserved. (1) Nothing in ORS 374.305, 374.310 and 374.325, as such sections were amended by chapter 323, Oregon Laws 1957, shall be deemed to affect any approach road, structure...lawfully placed or constructed upon the right of way of any highway prior to August 20, 1957.

(2)(a) Nothing in ORS 374.305 or 374.310 as such sections are amended by chapter 497, Oregon Laws 1967, shall be deemed to affect any approach road...lawfully placed or constructed upon the right of way of any state highway or county road prior to September 13, 1967.

¹²⁹ 29 Or. App. at 683-84, 564 P.2d at 1094.

¹³⁰ 29 Or. App. at 685-86, 564 P.2d at 1095.
It is of interest to note that the court derived the purpose from 374.005, which is justification of the Throughway law, because of its clear police power authorization. That justification statute needs to be retained for any new Access Control Law.

¹³¹ 40 Or. App. 384, 595 P.2d at 823, quoting Schrunk, 242 Or. 63, 73 (1965).

[R]ecord shows plaintiffs retained adequate access to their property from another street for the principal purpose for which the property was utilized, i.e., maintaining a triplex and a duplex, although that access may have been less satisfactory or even nonexistent for an auxiliary purpose, e.g. utilizing garages at the rear of those structures. Such inconvenience is *damnum absque injuria*¹³² and not compensable.¹³³

The court commented on the Briggs decision enough to say it that even in the case of converting the nature of the road from one thing to another, in Briggs to throughway, there is considerable doubt a taking exists.

The rationale in this case underscores the need for clear police power authorization for the law. The court also cited Fifth Avenue Corp. v. Washington County, 282 Or. 591, 581 P.2d 50 (1978) the leading police power case in Oregon, which will be discussed later. Had the court used the clear rationale of Fifth Avenue, its analysis might have been more consistent than in its reliance on access cases alone. That analysis would have still found against the plaintiff, but on the explicit basis that the police power regulation did not deprive him of all the economic value of his property, rather than on the more strained argument that in closing the plaintiff's only access to his garages, he still retained the right to park on the street, and therefore retained other access to his property. The case standing alone is probably the furthest extension of the sovereign's right to take access, finding that being deprived of automobile access to enter one's land is not compensable, presumably so long as the land can be reached on foot from a parked automobile.

Argo Investment v. Dept. of Transportation, 66 Or. App. 430, 674 P.2d 620 (1984) again underscores the benefit of police power reliance. Plaintiffs sued Salem in inverse condemnation alleging that their business diminished in value by closing Center Street at Front in Salem. Plaintiffs property abuts Center Street. As a result of changes made to Center by the Front Street Bypass project, Center became a cul-de-sac, preventing traffic access directly from Front. In order to get from Front to Center plaintiffs and their customers had to take a more circuitous route. Relying again on Schrunk and Briggs court found that: **"It is reasonable exercise of. . . police power to change a public road to provide for public safety or convenience.** Oregon Investment Co. v. Schrunk, 242 Or. 63, 73, 408 P.2d 89 (1965). . . . Douglas County v. Briggs, 286 Or. 151, 157, 593 P.2d 1115 (1979),¹³⁴ and citing Highway Commission v. Central Paving Co., 240 Or. 71, 74, 399 P.2d 1019 (1965):¹³⁵

A landowner is not entitled to compensation under eminent domain for the circuitry of a route resulting from the construction of a limited access highway (emphasis provided).

¹³² Black's law dictionary defines as a loss or harm without injury in the legal sense, that is, without such breach of duty as to give cause for an action for damages.

¹³³ 40 Or. App. at 385, 595 P.2d at 523-24.

¹³⁴ 66 Or. App. at 432, 674 P.2d at 622.

¹³⁵ 66 Or. App. at 432-33, 674 P.2d at 622.

This case is also interesting for its clear implication how ODOT should manage its access program in the cities and keep damages low. The plaintiffs claimed that Center was closed by the State pursuant to an agreement between City and the State. Such an agreement would entitle them to compensation for the diminished value of their respective properties under ORS 373.050 and 373.060. ORS 373.060(1) provides for compensation by the State when streets closures are effected pursuant to ORS 373.050. As applied to this case ORS 373.050 allows ODOT to close any street at the point it intersects with a state highway designated under ORS 373.010¹³⁶ by entering into a formal agreement with the municipal authorities of a city set out in a resolution or ordinance of the city. "The statute further requires that, before the street can be closed, the city must comply with all the city ordinances and charter provisions pertaining to the closing of streets in the city, and . . . [ODOT] must find and declare by resolution that the proposed street closing is necessary for the safety of the general public or the more expeditious and orderly movement of traffic or both. When all the requirements of ORS 373.050 and 373.060 have been met, the owner of real property abutting a city street which becomes a cul-de-sac may recover damages from the State."¹³⁷

But, the Court found that Center was not closed pursuant to ORS 373.050. There was no evidence or merit, the court said that 99E Redesignation Agreement constitutes a *de facto* resolution contemplated by chapter 373 and no evidence that state investigated or declared the closing necessary or entered into a formal agreement with the City.

The statutory language is clear, and liability can be imposed only when the legislatively required conditions precedent have been met. Because Center was not closed, as provided in ORS 373.050, the court properly found that plaintiffs had no cause of action against the State under ORS 373.060(1). What was done was done by the City under its police power; there was no compensable taking. (Emphasis provided.)¹³⁸

The implication for city-state relations on access management is informality. Whether that is good long term policy is another question. The Court's message is that it will save money.

In City of Salem v. Merritt Truax, 70 Or. App. 138, 688 P.2d 120 (1984), a service station lost one access point due to a street widening, but retained others. Compensation was denied based on Schrunk and Argo.

¹³⁶ ORS 373.010 Routing and marking state highways through cities. Whenever the route of any state highway passes through the corporate limits of any city of this state, the [Oregon] Department of Transportation:
(1) Shall select and designate the streets of the city over which the state highway shall be routed.
(2) Shall erect and maintain such road and other signs on and along such streets at such places and of such material and design as it may select.
(3) May alter or change such routing when in its opinion the interests of the motoring public will be better served.

¹³⁷ 66 Or. App. at 434, 674 P.2d at 623, citing ORS 373.050(2) and (3).

¹³⁸ 66 Or. App. at 435, 674 P.2d at 623.

[R]ights of abutting proprietors are subservient to the public's right to free use of the streets. That right is protected by the state's exercise of its police power. . . . An interference with access rights that is an exercise of the city's police power is not a compensable taking.¹³⁹

Inverse Condemnation

"Eminent domain" and "inverse condemnation" are two terms often used to describe governmental actions resulting in taking of private property for public use. The terms describe two different methods of acquisition. In a typical condemnation or eminent domain proceeding, government initiates a formal judicial proceeding against a property owner to acquire or all or part of the owner's interest in the property. A court decides the amount the property owner is entitled to be compensated for the value of the property taken and issues an order in condemnation. (See ORS ch. 35)

In contrast, inverse condemnation describes the legal action a property owner brings against government to obtain compensation for taking the owner's property. The taking may be the result of regulatory or physically invasive action by the government. The condemnation is "inverse" because it is the property owner who initiates legal action against the government to obtain compensation.

Typically, government construction activities have been held to constitute takings by physical invasion. Tomasek v. Oregon State Highway Comm'n., 196 Or. 120, 248 P.2d 703 (1952), was a successful inverse condemnation claim where construction of a bridge caused private property downstream to erode. In Cereghino v. State Highway Comm'n., 230 Or. 439, 370 P. 694 (1962), construction of a state highway resulted in water and mud inundating plaintiff's property, but for example in Moeller v. Multnomah County, 218 Or. 413, 345 P.2d 813 (1959) or Citizens Ass'n. of Portland v. Int'l. Raceways, 833 F.2d 760 (9th Cir. 1987) found that blasting (noise and vibration) and similar interference from racing did not constitute such interference as to amount to a taking¹⁴⁰. It is useful to remember that, physical invasion of private property, as will be discussed, is always compensable, but in access control ODOT regulates access to state property. Also, that in Oregon there is no property right of access to highways, where the highways are being improved as highways, unless granted by statute.¹⁴¹

While the Argo Investment v. Dept. of Transportation, *supra*, is an inverse condemnation case the court exempted "reasonable exercise of police power" from a "taking" result. The Argo Court relied on the rule that circuitry of travel is not compensable in Oregon. Lincoln Loan Co. v. State Highway Comm'n., 274 Or. 49, 545 P.2d 105 (1976) is the leading inverse condemnation case in Oregon where the Court

¹³⁹ 70 Or. App. at 140, 688 P.2d 120 at 122.

¹⁴⁰ But see Thornburg v. Port of Portland, 233 Or. 178, 192, 376 P.2d 100 (1963), where inverse condemnation was expanded from trespass or invasion basis to nuisance. "In summary, a taking occurs whenever government acts in such a way as substantially to deprive an owner of the useful possession of that which he owns, either by repeated trespasses or by repeated nontrespassory invasions called 'nuisance.'"

¹⁴¹ State Highway Comm'n. v. Burk, 200 Or. 211, 238, 265 P.2d 783 (1954): "[N]o right of access can be implied contrary to the express provisions of the statute."

found a taking without a physical or a noise invasion. Here plaintiff brought an action to recover damages for taking of plaintiff's property in the process of the construction of East Portland Freeway by allegedly placing a "cloud of condemnation" over the property, which resulted in a "condemnation blight" and a *de facto* taking of substantial use and benefit of the property. The court agreed that when highway commission caused notices to be published that plaintiff's land would be taken for highway purposes, took property surrounding plaintiff's property, demolished surrounding buildings and caused notices to be published that it would pay moving expenses and other compensation to tenants if they vacated plaintiff's property and that such actions over ten-year period resulted in a "condemnation blight" inverse condemnation took place.

In Willard v. City of Eugene, 25 Or. App. 491, 550 P.2d 457 (1976), a destruction of a dangerous building resulted in inverse condemnation claim. The Court found that the destruction of the property as a nuisance failed to state a cause of action in inverse condemnation.

To allege inverse condemnation property must be taken for public use. Under its eminent domain power the state may acquire property for the use and benefit of the public; under its police power the state may regulate or restrict activities or use of property which are harmful to the public.¹⁴²

"The proper test to determine whether there has been a compensable invasion of individual's property rights in a case of this kind is whether the interference with use and enjoyment is sufficiently direct, sufficiently peculiar, and of sufficient magnitude to support a conclusion that the interference has reduced the fair market value of the plaintiff's land by a sum certain in money. If so, justice as between the state and the citizen requires the burden imposed to be borne by the public and not by individual alone."¹⁴³ In Lincoln Loan Co. the interference was incident to condemnation, and directed at a specific property. It was not a regulation of a state resource based on classification or standards, nor was it meant to protect the public from harm. The State ultimately sought to acquire a property for public use.

The question needs to be formulated as follows: Is the State's regulation of access to its right of way, which it is managing in the public interest for the benefit of the citizens of the State a "sufficiently direct" or "sufficiently peculiar" or of "sufficient magnitude" to amount to a taking of property. There is no direct effect on private property, unless there is some property right. In access cases, property rights are either contractual, statutory or vested, and as for the latter other "reasonable" access can be substituted. We would conclude that inverse condemnation in access cases will produce same results as our analysis has suggested, namely that compensation will be awarded because the property is effectively landlocked or owner has been deprived of all economic use of his property. Any doubt as to the result should be dispelled by the Fifth Avenue case, below.

Summary of Case Law.

Can we surmise what the rule in Oregon is? We can say so

¹⁴² 25 Or. App. at 495.

¹⁴³ Lincoln Loan Co. v. State Highway Comm'n., 274 Or. 49, 57, 545 P.2d 105, 109 (1976) citing Thornburg v. Port of Portland, 244 Or. 69, 73, 415 P.2d 750 (1960).

long as some other access remains or is provided, where access was diminished or taken in order to improve the highway, there is no taking. In police power terms we reach the same result, but will be able to say in another way. If some value remains to the owner as a result of controlling access to a state highway facility, there is no taking.

Does the remaining access have to be reasonable? Under general police power analysis, if there had been access to existing highway, and it has been effectively destroyed and with it all or almost all economic value of the land, there is probably a taking. But as preceding cases indicate, the Courts can reach quite far in cutting of right to compensation. The exceptions in cases reported in Oregon are not mandated by police power limitations, but by specific legislation. The key is the willingness to use police power to the extent available to control and manage access for the benefit of the motoring public, for prolongation of the useful life of highway facilities and better faster communication between cities.

POLICE POWER

Preface. The next step in our analysis is to understand the real extent of police power so that the recommendations that emerge can take in the full scope of the concept. What is the status and extent of police power in Oregon, and is it different from police power analysis engaged in by the Supreme Court to determine comparable rights under the United States Constitution? Once we understand the extent of the concept, we will be able to come back into the access framework, with a better understanding of the possibilities that police power may offer.

Leading article in Oregon is by a now Associate Justice of the Oregon Supreme Court.¹⁴⁴ The basic premise starts with the search for a due process clause in the Oregon Constitution. That search is important because of the doctrine of "substantive due process" which allowed the courts to review legislation for reasonableness or rational relationship to its purpose. We referred to this doctrine in our interpretation of ORS 373.310(3) which said that access may not be "unreasonably" denied. This analysis will go to measure how far can future access control legislation (and implementing regulations) go in regulating property rights in order to preserve public investment in highways and for the benefit of the travelling public, without having to pay compensation.

Former willingness of courts to examine legislation in the light of "substantive due process" was important because it required greater justification for any kind of legislation which interfered with property rights. The courts have largely abandoned the doctrine, but the terminology and some of the concepts still remain in use, sometimes confusing the analysis of constitutional limitations. In any event while the analysis will start and end in Oregon, we will need to look at the federal doctrine because the Fourteenth Amendment makes the Due Process clause of the Fifth Amendment applicable to the states.

Linde begins his search with Article I, section 18. He first distinguishes that section from the due process clause of the Fifth Amendment. The Fifth Amendment has a taking clause similar to Oregon's, but

¹⁴⁴ Linde, Without "Due Process" 49 Or. L. Rev. 125 (1970).

Oregon lacks the "due process" phraseology.¹⁴⁵ Section 18 reads:

Private property shall not be taken for public use, nor particular services of any man be demanded, without just compensation; nor except in the case of the state, without such compensation first assessed and tendered. . .¹⁴⁶

Linde's first point is that this constitutional provision does not provide a basis for invalidating a regulation, but merely for requiring payment under proper circumstances. "Police power" terminology is deeply imbedded in the Oregon cases, and it is a source of genuine confusion that goes beyond mere style. "It ought to be completely abandoned, shunned in opinions, proscribed from briefs, and blue-penciled whenever it threatens to creep into sight."¹⁴⁷

Judge Linde continues: "No constitution, state or federal, grants Oregon or any other state a 'police power.' There simply is no such thing. What Oregon has, as a state, is plenary power to make and administer law, by means of constitutional institutions and subject to constitutional limitations. . . . Article IV of the Oregon constitution states that 'the legislative power of the state, except for the initiative and referendum powers reserved to the people, is vested in a legislative Assembly . . .' But where in any constitution is the state granted a 'police power?' Or power to define property rights?"¹⁴⁸

The state has that legislative power, not because of any grant, but because it is a state. . . . To call a law a "police" regulation if its objective concerns public health or safety or morals or welfare does not mean that it may be enacted because it has such an objective, but only that laws passed for such objectives are so described.¹⁴⁹

He concludes that "'Police power' is not a constitutional term. There can be no such thing as a state law 'exceeding the police power'. 'Plenary power in the legislature, for all purposes of civil

¹⁴⁵ Linde begins his search with the proposition that once it is recognized that "due process" is not common law but a particular kind of provision that some state constitutions might adopt while others might not, and that Oregon in 1859 did not, then the customary promise to pay a man for property taken for public use, for instance, is an unlikely candidate for expansion into a "substantive due process" clause. By which he means that the clause itself is a taking clause and nothing in it requires the Oregon legislature to provide for a rationale relationship between legislative goals to be achieved, and the legislation itself. 49 Or. L. Rev. at 139.

¹⁴⁶ Id. at 139:

This constitutional obligation to repay for property taken has its own long history of legal difficulty: what is property; what is a taking; what is just compensation ; is "public use" a judicially enforceable limitation on governmental purposes in acquiring land ? This is not the place to retrace the battle lines at the borders between "taking" and regulation or trespass or temporary use....[Section 18] appears independently along with such clauses in the federal fifth amendment as well as in the state constitutions. And its clear import is that under the circumstances within its reach, a private owner may have a claim that the government must pay him for the impact of its action, not that the action is "void." Id. at 139-140.

¹⁴⁷ Id. at 147.

¹⁴⁸ Id. at 147.

¹⁴⁹ Id. at 149.

government, is the rule, and a prohibition to exercise a particular power is an exception. It, therefore, is competent for the legislature to enact any law not forbidden by the constitution or delegated to the federal government or prohibited by the constitution of the United States."¹⁵⁰

This view of police power has implications for the kind of justification that may be needed to regulate access to state highways. This article notwithstanding, police power is still alive as a concept to at least describe legislation enacted for public welfare. Police power concept does not by itself constrict or expand the limitation of Article I, section 18, which is private property taken for public use requires compensation. Legislature may, for the public good, restrict certain activities, that interfere with some uses of property, without a taking that requires compensation.

Linde takes note that Oregon Investment Co. v. Schrunck, used "police power" phrasing to explain why a city may deny an abutting landowner his "property right" of access to the street without paying him compensation, a claim which the court apparently hinges on the "reasonableness" of the city's action for purposes of Article I, section 18 of the Oregon constitution though not necessarily the federal Fourteenth Amendment. The test of reasonableness of city's action implies a *de facto* limit on police power taking in Oregon very much akin to the substantive due process analysis.¹⁵¹ Linde's and Kelso's argument is that there is no "reasonable" limit in what we would be describing as "police power" regulation (public welfare), because there is no "due process" clause in the Oregon Constitution. There is a "just compensation" clause under Article I, section 18 for taking of property. But under Central Paving there may not be a property right to take.

Fifth Amendment There is a "due process" clause in the Fifth amendment to the United States Constitution. Modern federal takings analysis starts with Penn Central Transportation v. City of New York, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed 2d. 631 (1978) and for now ends with the three Supreme Court case decided at the end of 1987 term. We will come back to Oregon after establishing the limits imposed by the "taking clause" of the Fifth Amendment.¹⁵² Penn Central¹⁵³ created a three-factor

¹⁵⁰ Id. at 149.

¹⁵¹ Kelso, Substantive Due Process as a Limit on Police Power Regulatory Takings, 20 Willamette L. Rev. 1 (1984). Whether or not there is a *de facto* reasonableness test on police power regulation is the subject of this article. His thesis is that in two leading cases, Fred F. French Investing Co. v. City of New York, 39 N.Y. 2d 587, 350 N.E. 2d 381 (1976) appeal to the Supreme Court dismissed and Agins v. City of Tiburon, 447 U.S. 255 (1980) courts have found that the takings clause of the fifth amendment, similar to the takings clause in Article I, section 18 of the Oregon constitution, does not limit the government's power to regulate property when the government is not acting pursuant to its powers of eminent domain. In that view excessive regulation can not violate the takings clause. He then argues that the Oregon Supreme Court has adopted that approach.

¹⁵² The Fifth Amendment states: "No person...shall be deprived of...property without due process of law. Nor shall private property be taken for public use without just compensation." And The Fifth Amendment does not prohibit the taking of private property, but instead places a condition on the exercise of that power." First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S. Ct. 2378, 2383, 96 L.Ed. 2d 250 (1987).

¹⁵³ 438 U.S. at 130-31.

analysis, requiring its ad hoc application to each case:

1. The character of government action,
2. The economic impact of the regulation, and
3. The extent to which the regulation has interfered with distinct investment backed expectations.

Keystone¹⁵⁴ provided an alternative articulation in a two-part test

1. Whether the regulation in question substantially advances legitimate state interests, and
2. Whether the regulation denies an owner economically viable use of land.

Character of the Government Action

1. Permanent occupation of physical space is a taking, "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." So that in Loretto v. Teleprompter Manhattan CATV Corp.¹⁵⁵ where at issue was a requirement to allow TV cable connection to an apartment building, the Court said:

We affirm the traditional rule that a permanent physical occupation of property is a taking. In such a case, the property owner entertains a historically rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation. We do not, however, question the equally substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's use of his property.¹⁵⁶

2. Physical invasion on a regular basis that constitutes a "direct and immediate interference with the enjoyment and use of land" is a taking.¹⁵⁷ Of local interest, in Citizens Ass'n. of Portland v. International Raceways, Inc., 833 F.2d 760, 762 (9th Cir. 1987), a suit in inverse condemnation stemming from racing schedule (racing was not constant and occurred only six months a year) at Portland raceway, the court concluded that:

Whether an unconstitutional taking of property without compensation has occurred depends upon whether the owner has been deprived of economically viable use of the property. . . . Mere reductions of property value is insufficient to establish a taking. .

¹⁵⁴ Supra note Keystone Bituminous Coal Ass'n. v. DeBenedictis, 107 S. Ct. 1232, 1246, 480 U.S. 470, 94 L.Ed. 2d 472 (1987).

¹⁵⁵ 458 U.S. 419, 434-435, 102 S. Ct 3164, 73 L.Ed. 2d 868 (1982).

¹⁵⁶ 458 U.S. at 441.

¹⁵⁷ United States v. Causby, 328 U.S. 256, 66 S.C t. 1062, 90 L.Ed. 1206 (1946) (overflight easement) and Kaiser Aetna v. United States, 444 U.S. 164, 100 S. Ct 383, 62 L.Ed. 2d 332 (1979) (navigational servitude on privately owned marina).

. . . The recent Supreme Court decisions in [First English and Nollan] are not to the contrary. Both of those cases involved land use regulations so extensive they constituted a taking.¹⁵⁸

Most claims in inverse condemnation allege some form of repeated "invasion" - be it flooding, noise etc.

3. Governmental action that denies the owner all reasonable economic use of the property is a taking, First English.¹⁵⁹ The court found regulation which temporary denied use of property because of flooding danger as a compensable taking. The Court did not say that, if floodplain controls do take property, the owner is entitled to money damages, apparently even if that prevents all private use of land: "We . . . have no occasion to decide . . . whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as part of the State's authority to enact safety regulations."¹⁶⁰ Therefore, even the most grievous effects on private property values may be justifiable if the public need for regulation is sufficiently dire.¹⁶¹

4. Regulation of a particular use while authorizing other uses normally is not a taking. This is the typical zoning and development regulation setting. "[A]djusting the benefits and burdens of economic life to promote the common good"¹⁶² so long as regulations substantially advance a legitimate state interest.¹⁶³

5. Restriction on use to abate a nuisance is not a taking.¹⁶⁴

In access control and management, what the State is protecting is property it holds for the common good against unrestrained invasion by others. Only property land locked by that protection can give rise to a reasonable claim that the State is so using its property so as to deprive adjacent owner of reasonable economic use of his property. Allowing access for less intensive land use and denying it for more intense would be adjusting the burdens of economic life. A quick revisit to the purpose clause of Throughway Law and court's characterization of the purpose in Burk establish access control as a form of nuisance abatement, not only for safety purposes, but for the destruction of highway capacity which represents the

¹⁵⁸ Where claimant shares benefits that accrue to the members of the public, there is less likely to be a taking. Benefits must be considered along with any diminution in market value that the claimant might suffer. Penn Central, 98 S. Ct. at 2662.

¹⁵⁹ First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S. Ct. 2378, 96 L.Ed. 2d 250 (1987).

¹⁶⁰ Id. at 2384-85.

¹⁶¹ Callies, Property Rights: Are There Any Left, 20 Urban Lawyer 597, 625 (1988).

¹⁶² Penn Central, 98 S. Ct. at 2659.

¹⁶³ Nollan v. California Coastal Comm'n., 107 S. Ct. 3141, 97 L.Ed. 2d 677 (1987) and Agins v. City of Tiburon, 477 U.S. 255, 260, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980).

¹⁶⁴ Keystone Bituminous Coal Ass'n. v. DeBenedictis, 107 S. Ct. 1232, 480 U.S. 470, 94 L.Ed. 2d 475 (1987) and Mugler v. Kansas, 8 S. Ct. 273, 123 U.S. 623, 32 L.Ed. 205 (1887) (no property right to commit a nuisance).

collective investment of the citizens of the State for a period of time. Nothing in this analysis mitigates against an aggressive access control program.

Nature and Extent of Interference with Property Rights

Takings analysis in access control and management also depends to some extent on theory of property rights: whether the courts or the legislature view all of the rights together (Aggregate Theory) or focus on specific strands of the bundle (Segment Theory).

"Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. . . . [T]his Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole. . . .¹⁶⁵

and

[D]iminution in property value would not establish a taking. . .¹⁶⁶

[W]here an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety.¹⁶⁷

and

[L]oss of future profits-unaccompanied by any physical property restriction-provides a slender reed upon which to rest a takings claim.¹⁶⁸

Eliminating most of a landowner's expected profit from the use of property is not a taking, Hodel v. Indiana, 452 U.S. 335 (1986).

Finally in Keystone,¹⁶⁹ the right under Pennsylvania law to leave in place or to remove coal and earth under the surface were not seen as separate segments of property for takings purposes, but merely "part of entire bundle of property rights" of the owner of the surface or of the coal.

Distinguished from these cases are those which do find compensatory taking for taking of segments of rights. Those cases which viewed access to an existing highway as a property right probably adhered to

¹⁶⁵ Penn Central, 438 U.S. at 130-31, 98 S. Ct. at 2662, holding that air rights above Grand Central Station do not constitute a compensable segment of property for Takings Clause purposes.

¹⁶⁶ Penn Central, 438 at 131, 98 S. Ct. 2663.

¹⁶⁷ Andrus v. Allard, 444 U.S. 51, 65-66, 100 S. Ct. 318, 62 L.Ed. 2d 210 (1979) (upholding a regulation prohibiting the sale of parts of protected birds, but allowing the possession, transportation, donation or devise of the birds).

¹⁶⁸ Id. at 66.

¹⁶⁹ Keystone Bituminous Coal Ass'n. v. DeBenedictis, 107 S. Ct. 1232, 480 U.S. 470, 94 L.Ed. 2d 472 (1987).

this view, seeing access to a state highway or a city street as a stick in the bundle of property rights whose taking was compensable. Oregon cases have either not found a property right in specific access or found that compensation was due because of a specific statutory grant. Police power analysis in other Oregon cases relied on some articulation of alternative access to deny compensation.

Economic Impact of Regulation

Generally, the landowner must be deprived of all reasonable economic uses of his property before a taking occurs. The proper focus in a taking inquiry is on the uses still permitted, not the uses prohibited.¹⁷⁰ For example, a regulation is valid if it deprives the landowner of even the best economic use as long as other reasonable uses are available, as when a landowner who successfully challenged a rezone of portion of land from industrial to agricultural was not entitled to compensation for loss of property during the time the rezone was being challenged because reasonable economic uses of property still existed while the property was zoned agricultural.¹⁷¹ Citizen's Ass'n. of Portland,¹⁷² upholding a variance to a noise ordinance was based on the theory that economic uses still remained.

The Supreme Court has validated land use regulations, and access control regulates the use of the land, that resulted in severe, but not total, economic loss to landowners. In the classic case of Village of Euclid Ohio v. Ambler Realty Co.,¹⁷³ a 75% reduction in value was upheld; in Hadacheck v. Sebastian,¹⁷⁴ a reduction in value from \$800,000 to \$60,000. The rule in Furey v. City of Sacramento,¹⁷⁵ required compensation only if regulation results in total loss of all economic uses.

Investment - Backed Expectations

Interference with distinct "investment-backed expectations" may cause a taking to occur, but only if the expectations are "more than a unilateral expectation or an abstract need."¹⁷⁶ This doctrine is similar to the doctrine of vested rights in zoning.¹⁷⁷ In zoning, a change in zoning designation by a planning jurisdiction can not affect a development decision that has advanced far enough. A substantial investment

¹⁷⁰ Penn Central Transportation v. City of New York, 438 U.S. 104, 98 S. Ct. 2646, 57 L.Ed. 631 (1978).

¹⁷¹ Pace Resources, Inc. v. Shrewsbury Township, 808 F.2d 1023 (3d Cir. 1987).

¹⁷² Citizen's Ass'n. of Portland v. International Raceways, 833 F.2d 760 (9th Cir. 1987).

¹⁷³ 272 U.S. 365, 47 S. Ct. 114, 71 L.Ed. 303 (1926).

¹⁷⁴ 239 U.S. 394, 36 S. Ct. 143, 60 L.Ed. 348 (1915).

¹⁷⁵ 780 F.2d 1448 (9th Cir. 1986).

¹⁷⁶ Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005, 104 S. Ct. 2862 (1984) quoting Webb's Fabulous Pharmacies, Inc., 449 U.S. 455, 161 (1980). The requisite interference was not found in Monsanto because the company was on notice that application for a patent permit triggered the disputed regulation's requirement that sensitive health and safety data be disclosed by the government.

¹⁷⁷ See generally, Mandelker, Investment-Backed Expectations: Is There a Taking? 31 Jour. of Urb. & Contmp. L. 3 (1987).

in reliance on zoning is deemed sufficient to vest. There is a nuisance exception to this doctrine. Since a property owner has no right to commit a nuisance, regulations that deprive a land owner of a use that amounts to a nuisance do not constitute a taking.¹⁷⁸ Oregon case for this proposition is McGowan v. City of Burns, 172 Or. 63, 137 P.2d 994, 139 P.2d 785 (1943), access can not make a road dangerous to travel. Oregon does not recognize investment backed expectations doctrine,¹⁷⁹ but it may still play a role in claim under the Fourteenth Amendment.

Generally, if the regulation is said to prevent a harm, the use of the police power will be upheld despite impact on land use and value.¹⁸⁰ The dispositive case in the nuisance exception is the 1987 Keystone decision.¹⁸¹ It is of added interest because its ruling is different from the famous Pennsylvania Coal¹⁸² case, which struck down similar regulations based on the famous statement of Judge Holmes that a regulation amounts to a taking when it goes too far.

What is "too far" and when is compensation an appropriate remedy, once the "too far" has been reached? Until 1987 the US Supreme Court avoided the issue. Since 1966, Pennsylvania's Subsidence Act had prohibited any mining causing subsidence damage to public buildings, dwellings used for human habitation, and cemeteries. The state Department of Environmental Resources required 50 percent of the

¹⁷⁸ See Hadacheck and Mugler, *supra*.

¹⁷⁹ In Suess Builders Co. v. Beaverton, 294 Or. 254, 656 P.2d 306 (1982) Judge Linde pointed to the absence of investment backed rule in Oregon as one of the ways that Article I, sec 18 differs from the Fifth Amendment taking doctrine. Because Oregon is less restrictive in allowing "police" power regulations than United States Supreme Court, a federal court might find taking under this doctrine, where the state court would not.

"Although the basic thrust of the fifth amendment and article I, sec 18, is generally the same, see Cereghino v. State Highway Commission, 230 Or. 439, 444-445, 370 P.2d 694 (1962), the criteria of compensable "taking for public use" under art.I sec. 18, are not necessarily identical to those pronounced from time to time by the United States Supreme Court under the fifth amendment. For instance, plaintiffs refer to the phrase "investment-backed expectations" in Penn Central... but this court has not mentioned such an element in cases under art I, sec 18. Nor have we regarded "fairness and justice" as a usable tool to draw a legal line between regulation and taking, as Penn Central suggests....

Investment-backed expectations, of course, exist in planned uses of other tangible or intangible private assets than land; the question is whether such expectations should take account of governmental power to change the laws. As we understand it, "investment-backed expectations" are a necessary but not a sufficient element before a regulation precluding any economic use of property can be attacked as a compensable taking or as a deprivation of property under the 14th amendment; but private property actually taken for public use must be paid for whether it represents an investment or not. Of course there are hypothetical and not so hypothetical situations in which it may be argued that government is misusing regulatory power to impose on private property the burdens of actual governmental or public uses as a means of circumventing its obligation to pay, as for instance by making a carrier provide free transportation for government employees or goods or by imposing a right of passage for the public across private land.... Suess Builders Co., 294 Or. at 259 n.5.

¹⁸⁰ Chayenne Airport Bd. v. Rogers, 707 P.2d 717, 731 (Wyo. 1985).

¹⁸¹ Keystone Bituminous Coal Ass'n. v. DeBenedictis, 107 S. Ct 1232 (1987), see origins *supra*.

¹⁸² Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922) is the source of the assumption that, for constitutional purposes, the "value" of land is its value for economic development; after Mahon, [sic] if a state removed too much of the land's value, the state had to pay for it no matter how worthy the purpose." Large, The Supreme Court and the Takings Clause: The Search For A Better Rule, 18 Envtl. L. J. 3, 16 (1988).

coal beneath such protected structures to be kept in place in order to provide that support.

The Court said the Subsidence Act was directed at what the State perceived to be a significant threat to common welfare and that there was nothing in the record of the case to indicate that the Association could not profitably engage in business or that there would be undue interference with investment-backed expectations. In acting to protect public interest in health, the environment, and the fiscal integrity of the area, the state was exercising its police power to abate activity akin to a nuisance.

It was established that a taking occurred when the government took or used the landowner's land to secure a benefit for the public; there was no taking if the government only prevented the landowner from causing a detriment to the public.¹⁸³

A third major distinction. . . was. . . the state's purpose in passing laws such as the Kohler Act and later laws such as open-space zoning, flood plain restriction, and wetlands preservation. In each instance, the state could be seen as preventing the individual landowner from doing something that would harm other people or property. . . . If a law is viewed in this fashion, it is easy to apply the Mugler concept that there is no property right in a nuisance; consequently, it follows that there is no taking of property if the state merely makes the landowner desist from some harmful activity. **The loss of market value based on the assumption that a landowner could engage in harmful activity is irrelevant for constitutional purposes.**¹⁸⁴

Analogously, loss of market value based on the assumption that the owner had a right to contribute to the destruction of public investment or create hazards for the travelling public can have no relevance to a taking claim. So long as the State clearly establishes its purposes, no individual land owner can have right to access such that it will create a hazard, harm public investment or interfere with other people's use of a public facility. The draft Highway Plan securely rests its desire to regulate access on the basis of "investment protection" and the benefits of throughway travel have already been accepted both by the Oregon legislature and its Supreme Court.

Impact of 1987 US Supreme Court Decisions

The Keystone Court characterized plaintiff's showing of deprivation of property rights as not sufficiently significant to satisfy the "heavy burden placed upon one alleging a regulatory taking."¹⁸⁵ The Court rejected the claim that in forcing them to leave 27 million tons of coal in place it took that coal. "First, the coal in place did not represent a separate segment of property for takings law purposes. . . ." ob-

¹⁸³ Large, The Supreme Court and the Takings Clause: The Search For A Better Rule, 18 *Envtl. L.* 3, 16 (1988), "After Mugler, assertions of takings based on decline in value of land without physical invasion or impairment were consistently rejected." Citing Mugler v. Kansas, 123 U.S. 635, 668-69 (1878).

¹⁸⁴ Id. at 15.

¹⁸⁵ Keystone, 107 S. Ct at 1246.

servicing that it had consistently held that when an owner has a full bundle of rights, the destruction of one strand would not be taking. The bundle must be viewed in its entirety. Access rights are no more than a strand in the bundle of property rights, and for highway improvement purposes in Oregon they are no even a strand from Brand (1900) to Central Paving (1965).

Dissent wanted the court to define property consistently with state law. Given what we understand the state law to be based on Central Paving, even the dissent would uphold restricting or cutting off direct access to a state highway in Oregon. The "new" standard appears to be this: in order to successfully challenge a land-use regulation as a regulatory taking, a plaintiff must show: **(1) it is not merely difficult, but impossible to make a profit on the land as restricted;** and **(2) the regulation does not serve a legitimate, general, and substantial public interest in the health, environment, and fiscal integrity of the area.**¹⁸⁶

As Large comments¹⁸⁷ the court distinguished Keystone Bituminous from Pennsylvania Coal through the public purpose to be served by the act. The law was basically the same as in the 1920's to prevent subsidence of houses caused by mining. The winning clause of the Pennsylvania act establishing the purpose and basis of the law bears imitation for its presumably correct statement of police power authority.¹⁸⁸ Keystone becomes indispensable to access management issues.

In First English,¹⁸⁹ Supreme Court held that compensation may be appropriate remedy for the regulatory taking of all of a landowner's property. In the first Oregon decision relying on 'First English, Dunn v. City of Redmond, 86 Or. App. at 267 n.1, the court noted that "First English Evangelical states no new standards about when governmental regulations give rise to takings subject to federal constitutional redress."¹⁹⁰ It found the decision consistent with the Oregon Supreme Court decision in Dunn v. City of Redmond, 303 Or. 201, 735 P.2d 609 (1987).

¹⁸⁶ See Callies, Property Rights: Are There Any Left? 20 Urban Lawyer 597, 620-24 (1988).

¹⁸⁷ Large, The Supreme Court and the Takings Clause: The Search For A Better Rule, 18 Env'tl. L. 3, 35 (1988).

¹⁸⁸ Id. at 35-36.

"This act shall be deemed to be an exercise of the police powers of the Commonwealth for the protection of the health, safety and general welfare of the people of the Commonwealth, by providing for the conservation of surface land areas which may be affected in the mining of bituminous coal by methods other than "open pit" or "strip" mining, to aid in the protection of the safety of the public, to enhance the value of such lands for taxation, to aid in the preservation of surface water drainage and public water supplies and generally to improve the use and enjoyment of such lands... (Citing Keystone Bituminous Coal Ass'n. v. DeBenedictis, 480 U.S. ____, 107 S. Ct. 1232, 1242 (1987); 18 Env'tl. L. at 36.)

<Comment: Unlike the Pennsylvania Coal decision that Keystone set aside, this proved that the law was not enacted for the benefit of just surface owners. Oregon Highway Plan - should also have an opening clause, perhaps beginning with 'This plan shall be deemed to discharge the duties of the Transportation Commission to exercise its power to protect, maintain etc...">

¹⁸⁹ First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S. Ct. 2378, 96 L.Ed. 2d 250 (1987).

¹⁹⁰ Dunn v. City of Redmond, 86 Or. App. 267, 270 n.1, 739 P.2d 55 (1987).

Nollan¹⁹¹ decision involved different issues than either Keystone or First English. For the purposes of this analysis, while it does not add to taking analysis on access control cases, it does impact the broader parameters or possibilities of access management program. The Nollans' exercising a lease option to purchase property, applied to the California Coastal Commission for a coastal development permit, to replace their existing house with a slightly larger one. The Commission attached a condition to the permit which required the Nollans to convey an easement to the State granting access to the public across the entire beach area of their property, approximately one-third of the lot. The Court found that this condition amounted to a taking.

"Noting that the taking of such an access over private property by itself would require compensation, the Court then examined whether the same requirement, imposed under the police or regulatory power of the Commission rather than under its powers of eminent domain, would modify the 'just compensation' requirement."¹⁹² The Court first noted that:

We have long recognized that land use regulation does not effect a taking if it "substantially advance[s] legitimate state interests" and does not "den[y] an owner economically viable use of his land,"¹⁹³

and then

We assume, without deciding, that. . . the Commission. . . would be able to deny the Nollans their permit outright. . . unless the denial would interfere so drastically with the Nollans' use of their property as to constitute a taking.¹⁹⁴

As a first step, if the agency has a right to deny a permit, that permit may be issued with conditions. That is so because the applicant need not obtain a permit to retain his previous use and therefore arguably some economically viable use of his property.¹⁹⁵

Once it has been determined that a condition or an exaction can be imposed, because denial of a permit would still leave the landowner with some economic use of his property, the agency needs a valid reason, such as advancing a legitimate governmental interest, to deny a permit.¹⁹⁶ The condition selected by the agency must "serve the same legitimate police-power purpose as a refusal to issue the permit."¹⁹⁷ Even

¹⁹¹ Nollan v. California Coastal Comm'n., 107 S. Ct. 3141, 97 L.Ed. 2d 677 (1987).

¹⁹² Callies, Property Rights: Are There Any Left? 20 Urban Lawyer 597, 638 (1988).

¹⁹³ Nollan, 107 S. Ct. at 3146.

¹⁹⁴ Id. at 3147.

¹⁹⁵ Bittle, Nollan v. California Coastal Commission: You Can't Always Get What You Want, But Sometimes You Get What You Need, 15 Pepperdine L. Rev. 345, 363 (1988).

¹⁹⁶ Nollan, 107 S. Ct. at 3146-47.

¹⁹⁷ Id. at 3147.

a condition that requires the dedication of land will be found to be constitutional if it alleviates public impacts of the project that could instead have been alleviated by outright denial of permission to carry out the project.¹⁹⁸ The court required a nexus between condition and the original purpose of the permit.

In access control, conditions requiring donation of a strip for future highway widening, would be a legitimate exaction for granting an access permit, where the grant of access contributes to diminution of road's vehicle carrying capacity. The draft Oregon Highway Plan establishes a basis for these conditions through its variable right-of-way standards. ODOT regulations are phrased in a way to meet the Nollan standard. By the same token, it is always legitimate to deny access to preserve road capacity. Power to require conditions, or exactions, derives from power to deny outright. If there is no power to deny, there can be no conditions interfering with the use of property or exactions under Nollan.

The decision in Frost¹⁹⁹ gives some indication of the type of conditions the State might be able legitimately to impose upon highway use. The clue comes from justice Sutherland's reference to the "protection and conservation of the highways,

Thus the state can impose taxes and rules that are designed to promote the smooth flow of traffic, to prevent accidents, to resolve tort actions, and to ensure that individuals have to answer for their wrongs. These rules are necessary to prevent the exploitation of a common pool resource by its users. To be sure, these rules condition access to the roads upon the consent of the users, but the consent is for conditions that are justified by the need to curtail opportunistic behavior by the road users.²⁰⁰

How limited is the extent of regulatory taking was clarified by Judge Scalia (author of Nollan) in the next case Pennell v. City of San Jose, 108 S. Ct. 849, 862, 99 L. Ed. 2d 1 (1988) upholding San Jose's rent control law, where he distinguishes "traditional" land-use regulations which don't totally destroy the economic value of property:

¹⁹⁸ Bittle, Nollan v. California Coastal Commission: You Can't Always Get What You Want, But Sometimes You Get What You Need, 15 Pepperdine L. Rev. 345, 363 (1988).

¹⁹⁹ Frost v. Railroad Comm'n. of State of California, 271 U.S. 583, 46 S. Ct. 605, 70 L.Ed. 1101 (1926).

²⁰⁰ Epstein, Unconstitutional Conditions, State Power and Limits of Consent, 102 Harv. L. Rev. 5, 51 (1988).
Also:

It should come as no surprise, therefore, that the doctrine of unconstitutional conditions also emerged in cases where the state demanded the release of constitutional rights as the price of access to public highways.... The first inquiry is to determine the extent of government's monopoly power in its control of public highways. The second inquiry is to determine the extent to which the conditions imposed upon entry or use are designed to upset the competitive balance between rival users. The third inquiry, which is the flip side of the second, is to determine whether the restrictions in question are designed to control against opportunistic behavior by individual citizens in their use of the common pool asset, the public roads. 102 Harv. L. Rev. at 47.

The police power addresses the set of justifications that the state must put forward in order to override any of the substantive protections of the Constitution. . . . In essence, the state is allowed to regulate in ways that are thought generally to advance the public good, and a very low level of scrutiny is applied both to the ends sought and to the connection between means and ends. In land use cases, the police power was extended far beyond the nuisance control rationale at least as early as Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). 102 Harv. L. Rev. at 59.

Traditional land-use regulation (short of that which totally destroys the economic value of property) does not violate this principle because there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy. Since the owner's use of the property is (or, but for the regulation, would be) the source of the social problem, it cannot be said that he has been singled out unfairly. Thus, the common zoning regulations requiring subdividers to observe lot-size and set-back restrictions, and to dedicate certain areas to public streets, are in accord with our constitutional traditions because the proposed property use would otherwise be the cause of excessive congestion. " (Concurring opinion.) (Emphasis provided by Forester.)

Finally at least one decision found Nollan inapplicable to a loss of right of access. Atlanta Bd. of Zoning Adjustment v. Midtown North Ltd., 360 S.E. 2d 569, 257 Ga. 496 (1987).

As Callies concludes:

The question never was, what has the owner lost. Nor has it been, until recently, has the government left any use of the property. Rather, the first and preeminent question is and always was: does the regulation represent a proper exercise of the police power? ²⁰¹

Oregon Doctrine The key "police power" decision in Oregon defining inverse condemnation context how far can use of land be regulated without compensation is Fifth Avenue Corp v. Washington County, 282 Or. 591, 581 P. 2d 50 (1978). In that case, plaintiff bought land which at the time was zoned to allow construction of a shopping center. Subsequently, the County Commissioners changed the zone and the comprehensive plan so that intensive uses such as the shopping center were no longer allowed. In fact the plan designated a portion of plaintiff's property as a greenway and a public transit station, but it was never acquired. Plaintiff claimed inverse condemnation.

Relying on New York case of Fred French, the court stated the rule to be:

Where government acts in its enterprise capacity, as where it takes land to widen a road, there is a compensable taking. Where government acts in its arbitral capacity, as where it legislates zoning or provides the machinery to enjoin noxious use, there is simply noncompensable regulation. ²⁰²

and

In summary, even if planning or zoning designates land for a public use and thereby effects some diminution in value of his land, the owner is not entitled to compensation in inverse condemnation unless: (1) he is precluded from all economically feasible private uses pending eventual taking for public use; or (2) the designation results in such governmental intrusion as to inflict virtually irreversible damage. ²⁰³

²⁰¹ Callies, Property Rights: Are There Any Left? 20 Urban Lawyer 597, 643 (1988).

²⁰² 282 Or. at 613, 581 P.2d at 63.

²⁰³ 282 Or. at 614, 581 P.2d at 63.

In Suess Builders Co. v. Beaverton, 294 Or. 254, 656 P.2d 306 (1982), aff'd on rehearing, 714 P.2d 229 (1986) the Court was asked to revisit Fifth Avenue. In this case Plaintiff alleged that the city temporarily deprived him of his property and caused permanent damage to the fair market value of his property when the city adopted a comprehensive plan designating his property as a future public park, but later changed its mind and never acquired the land. Court was encouraged to revisit Fifth Avenue below, but the court refused.

The issue in this case does not arise from regulation of the private use of property. That happens to many forms of business enterprise and private investment, not peculiarly to investment in real property, where it perhaps stirs special atavistic memories of the feudal and pioneering past. And land use control is not the only kind of regulation directed to specific identifiable property. The generality of a rule often safeguards against biased and unequal political decisions, but that alone does not turn a more narrowly focused ruling into a taking. A newly adopted health or environmental regulation may forbid the use of a fuel or the production of certain wastes and thereby cause the closure of a large plant. A tightened safety standard may devastate an investment in expensive machinery or product inventory. New building codes or other rules concerning fire safety of access for handicapped persons may make it uneconomic to maintain a hotel or a residential building, with consequent financial loss. Business invests with knowledge of such governmental power to make laws for its conduct, and the balancing of regulatory goals against their economic consequences is the daily stuff of politics rather than of litigation for "just compensation." . . . **Regulation in pursuit of public policy is not equivalent to taking for a public use, even if the regulated property is land.** (Emphasis provided.) ²⁰⁴

Oregon Court in this case staked out a strong claim on behalf of the government's ability to regulate land without compensation. In its logical extension this doctrine reaches quite far into access control. Increased highway congestion can make formerly direct access unacceptable, just as increased air pollution can make emissions no longer acceptable. State action in each will reduce or eliminate the value of investment, but each can be regulated without compensation. Oregon Court said in effect that the two cases are not different just because land is involved.

Standards and classifications are important because cases, such as Central Paving, require that regulations apply equally to everyone. Standards legitimize public policy and reduce the need for individual studies to prove the legitimacy of the policy. The public has a right to designate highways for through travel for any number of valid public reasons ranging from safety, to efficiency, to economic growth, or to control access in order to insure "Investment Protection" for the useful life of a new facility. Regulations to advance those objectives can not amount to a taking, unless what remains to the owner has no useful economic value. In cases of safety or nuisance, Linde's analysis implies, even the loss of economic value is not compensable, as when a plant which pollutes becomes uncompetitive in light of clean air standards.

²⁰⁴ 294 Or. at 258-59, 656 P.2d at 309.

Summary of Police Power. *We can conclude that "police power" is more extensive under the Oregon constitution than under the federal. Oregon Supreme Court went to some effort to point out that it will deny inverse condemnation claims based on regulation advancing legitimate state interest even more liberally than the United States Supreme Court. Under both constitutions, in regulations affecting safety, preservation of public investment or resources, the emphasis is not on what is taken, but on what remains. If what remains as a result of regulatory activity is a viable economic use, there should be no taking, under either constitution.*

In case of access control a "taking" result may be avoided in virtually all instances, with the exception of land locked property. Even in the latter case, there could be circumstances under which some remaining market value in the land could be shown or the use so unsafe that courts following Suess might not find a taking. Focusing on a police power approach, especially in more urbanized areas, access control legislation and regulations could avoid "taking" in most cases where now an acquisition policy is used.

CONCLUSION - LEGAL ISSUES

We believe there is greater latitude in the "police power" approach by the State than the Department now uses. The issue of assertive pro-active access control program utilizing regulatory powers for the State is one of policy choice for the Department. Oregon land use system also offers opportunities for systematic long term work with local governments to preserve and encourage access control sought by the State. Limitations to this twin approach, regulation and land use, are not in the law, at least not to the extent thought.

Our recommended approach would combine Access Control and Throughway Laws into a comprehensive regulatory framework, based solidly and unequivocally on police power. Such legislation and regulations should utilize highway classifications based on functions and broad access objectives rationally related to those functions: levels of importance, service, variable modernization and access standards. The program should be integrated with the state's land use system as a way of systematically building partnerships with local governments for long term access control and management.

This paper recommends a broader regulatory approach to access control which would reduce the need for acquisition of access rights, while allowing the Department to act more assertively in protecting the public's investment in our highway infrastructure. The objectives of the proposed draft Highway Plan can be advanced considerably through regulations that control and regulate access without the need to purchase access rights except in very specific instances.

We end with Duhaine:

While it is undeniable that a person should receive adequate compensation when his property or property rights are taken by the state, it is submitted that the public interest in promoting a highway program of access limitation demands a judicious effort to prevent the dissipation of public funds in the acquisition of access rights

which would result from any unwarranted extension of the abutting landowner's right
of access. ²⁰⁵