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William H. Gibbes
Assistant Attorney General of SC

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CONTROL OF HIGHWAY ACCESS — ITS PROSPECTS AND PROBLEMS

WILLIAM H. GIBBES*

I. THE NEW SYSTEM OF CONTROLLED ACCESS HIGHWAYS UNDER THE INTERSTATE PROGRAM

For several years it has been apparent to local and national highway officials, safety committees, and other interested groups that a tremendous need existed for expansion and improvement of the national system of highways. In addition to the ever increasing traffic congestion on the highways, the inadequacies of present highway facilities have been forcefully demonstrated by the mounting annual toll of over 40,000 highway fatalities and about 1,400,000 injuries, not even to mention the staggering annual economic loss of about $5,000,000,000.¹

The need for a safe and efficient road network in the interest of national defense and the expanding economy was recognized by the Congress with the enactment of the Federal Aid Highway Act of 1956 which was signed into law by the President on June 29, 1956.² Under this legislation, construction of 41,000 miles of controlled access highways was authorized for the nation at an estimated total cost, at that time, of 37.6 billion dollars. The State of South Carolina, under the interstate program, was authorized 680 miles of newly designed, four-lane, controlled access highways at an estimated cost, at that time, of $340,000,000.

The plans for the new highways show that they are being designed to meet the traffic needs of the future as well as to relieve the present day congested conditions existing upon our highways. The new routes in the interstate system, four of which will stretch across South Carolina, will carry about 20% of the nation’s traffic on slightly more than 1% of the total road and street mileage in the country. Nationally, these interstate routes will extend into or pass through 48 states, connecting 42 state capitals, and joining 90% of all cities in the United States with a population of over 50,000.

*Assistant Attorney General of South Carolina; B.S., 1952, University of South Carolina; LL.B., 1953, University of South Carolina; member Richland County and South Carolina Bar Associations.

The numbers of the four interstate routes which will extend through South Carolina are 26, 85, 20, and 95. Interstate Route 26, the Charleston-Spartanburg-Knoxville route, which is all upon new location, should be open for travel in 1960. Route 85, in Spartanburg and Cherokee Counties, two lanes of which was existing U. S. Route 29, is the most advanced of all the state’s interstate projects. One section of this route, however, in Anderson and Oconee Counties, which will connect Interstate 85 with the same route in the State of Georgia, is yet to be constructed, as the location has not been determined. The two remaining routes, Interstates 95 and 20, are not as yet under contract, but work should commence on Interstate 20 in 1960. Interstate 95, which will be on new location except for a short section in Jasper County, will extend through the eastern section of the State, passing through Dillon and Florence Counties and by the cities of Summerton and Savannah. Interstate 20, all of which will be on new location, will pass by Augusta, Columbia, Camden, and connect with Interstate 95 near the city of Florence.

These new highways will be of the four-lane divided, fully controlled access type, with each highway having at least two twelve-foot wide traffic lanes in each direction, and ten-foot paved shoulders. Opposing traffic lanes will be divided by a thirty-six-foot median strip. There will be no intersections at grade level and no stop signs or traffic lights on the main highway. Traffic entering or leaving the main highways will do so at safe, conveniently located interchange areas. However, under construction plans for these new controlled access highways, abutting property owners will not be cut off entirely from the highway either on new locations or where existing conventional highways are converted into controlled access facilities, as they will be served by land service or frontage roads as need arises.3

From analysis of the records, safety experts conservatively estimate that the interstate system, alone, when completed, will save at least 3,500 lives every year — 35,000 lives in its first ten years of existence.4

3. Information on new Interstate Routes with respect to design, plans, progress of construction, effect, etc., furnished by Office of Chief Highway Commissioner, State of South Carolina.

4. The President’s Committee for Traffic Safety, supra note 1.
II. THE RIGHT OF ACCESS

A. Origin

The right of access of an owner of property abutting on an existing street or highway has been generally recognized by the courts. This right has been described by the decisions as an “easement appurtenant” to the abutting property, and it encompasses not only the ability of the abutting landowner to enter and leave his property by way of the public highway, but also establishes the accessibility of his premises for his friends, clients, and customers. But the matter of defining the extent of the right of access and the abutting property owner’s interests with respect thereto has been a source of great difficulty to the courts for many years. Salient recognition of the problem appears in the following words of the United States Supreme Court:

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

A review of the history of the right of access does not reveal with any degree of certainty where it originated. The old English cases recognized the principle that abutting property owners had a personal right of access to a public highway which could not be interfered with by another private individual. But these cases are not very helpful in considering sovereign interference on behalf of the public because the principle of eminent domain is not recognized in England by the “Constitution”, and compensation can only be made

5. Bacich v. Board of Control, 23 Cal. 2d 343, 144 P. 2d 818 (1943); People v. Ricciardi, 23 Cal. 2d 390, 144 P. 2d 799 (1943); 10 McQuillin, MUNICIPAL CORPORATIONS 647 (3d ed. 1950).
when specifically authorized by statute.\textsuperscript{10} The American
decisions lend very little assistance in determination of the
source of the right of access, although it is generally believed
that this right was an outgrowth of the basic purpose of the
public highway. This view is reflected by the following state-
ment of the California Supreme Court:\textsuperscript{11}

The precise origin of that property right is somewhat
obscure, but it may be said generally to have arisen by
Court decision declaring that such right existed and rec-
ognizing it.

Notwithstanding this, Mr. Justice Holmes, in \textit{Muhlker v. New
York and Harlem RR. Co.}\textsuperscript{12} asserted that if at the outset the
courts had decided that, apart from statute or express grant,
the abutters on a street had only the rights of the public
and no private easement of any kind, it would not have been
surprising.

In this country, the idea of access rights in all probability
originated with the celebrated New York elevated railway
cases.\textsuperscript{13} Under the New York statutes, the establishment of
streets was viewed as a trust created for the benefit of the
public at large as well as the abutting property owners. The
exclusion of the public, and the diversion of the streets to
private use, violated the rights of abutting owners, author-
izing them to recover all property-value losses they could
trace to the breach of trust. But only a few years thereafter
the United States Supreme Court ruled that abutters' rights
are subordinate to any reasonable use of the street made by
public authorities to facilitate general travel, and the de-
cisions of the states have since followed this principle.\textsuperscript{14}

A general review of the decisions seems to reflect that
the right of access evolved from a recognition of the basic
use of the highway and the legal obligation of the public to
preserve the highway for that use. From the earliest times

\begin{itemize}
  \item \textsuperscript{10} 16 Halsbury, Laws of England 253 (2d ed. 1935).
  \item \textsuperscript{11} Bacich v. Board of Control, \textbf{supra} note 5.
  \item \textsuperscript{12} 197 U. S. 544 (1905); \textit{see also} Stanwood v. City of Malden, 157
    Mass. 17 (1892).
  \item \textsuperscript{13} Lahr v. Metropolitan Elevated Ry., 104 N. Y. 268, 10 N. E. 528
    (1887); Story v. New York Elevated R. R., 90 N. Y. 122 (1882).
  \item \textsuperscript{14} Saur v. City of New York, \textbf{supra} note 8; Adams v. Commissioners
    of Town of Trapp, 204 Md. 165, 102 A. 2d 830 (1954); McGowan v.
    City of Burns, 172 Ore. 63, 187 P. 2d 994 (1948); King v. Stark County,
    66 N. D. 467, 266 N. W. 554 (1936); State v. Nelson, 189 Minn. 87, 248
    N. W. 751 (1933). \textit{See} State Highway Department v. Butterfield, 216
    S. C. 463, 56 S. E. 2d 797 (1950); Leppard v. Central Carolina Tele-
    phone Co., 205 S. C. 1, 90 S. E. 2d 768 (1949).
\end{itemize}
in our history, through the days of the horse and buggy and model "T" Ford, highways were built and utilized primarily for the purpose of giving access to farms, plantations, homes and business establishments. This is the original concept of the "land service road". Originally, the landowner usually dedicated a portion of his land for the road-way and helped build it, either with his own labor or through the payment of assessments. Under these circumstances, each of the abutting landowners was considered to have the right of access to this road which was, after all, built to give him access. Under these circumstances to deny access would defeat the very purpose and object of the road. The courts have recognized in a variety of ways the legal obligation to protect "land service". In some cases this recognition has been under the "natural rights" theory that access is just one of the inherent property rights of the ownership and enjoyment of land; in other cases the courts' explanations have been based on the transaction by which the street or highway was established.

B. Extent

Irrespective of the source of the right, the principle has apparently evolved that the easement of access which the judiciary has declared to exist is subject to the fullest exercise of the primary right of public travel, out of which the right sprang, and that any change in the street or highway for the benefit of the public travel is a matter of public right. In general, the extent of the right of access may be summarized by saying that an abutter on an existing highway has only the right to get into the street or highway in front of his property and thence, in a reasonable manner, to the general system of streets or highways. This view is supported in the recent decision of the Iowa Supreme Court in Iowa State Highway Commission v. Smith:

It seems fairly well settled that, while access may not be entirely cut off, an owner is not entitled, as against the public, to access to his land at all points between it and

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15. In re Forrestrom, 44 Ariz. 472, 38 P. 2d 878 (1934); City of Denver v. Bayer, 7 Colo. 113, 2 Pac. 6 (1883); Rigney v. City of Chicago, 102 Ill. 64 (1882).
the highway. If he has free and convenient access to his property and the improvements on it and his means of ingress and egress are not substantially interfered with by the public he has no cause for complaint. . . .

With recognition of the principle that the rights of abutting property owners are subordinate to the right of the public to the proper use of the highway, it becomes apparent that the exercise of the rights of abutting owners is subject to reasonable regulation and restriction for the purpose of furnishing safe highways for the public use. Regulations, however, cannot be sustained which unduly limit or unreasonably interfere with the rights of abutting property owners. Mere interference with or slight disturbance of the rights of abutting owners by imposition of new uses on the highway consistent with highway purposes and usages must be tolerated in the overriding interest of the public welfare and safety. Historically, it may be noted that traffic laws and laws pertaining to the construction and use of streets and highways have been consistently upheld although such laws may indirectly affect access. Thus, the police power has been used to establish one-way streets, divided highways, ordinances prohibiting U-turns or left turns, vehicle size and weight laws, and parking meters where their erection interfered with access. In addition thereto, the "circuity of travel" and "diversion of traffic" cases would appear to cover, in principle, the establishment of land service or frontage roads and the restriction of access from property which previously abutted upon and had access to a main highway under the police power. But some cases have held that this involves compensable damage under eminent domain. The police power has been held adequate to support reasonable denial of a request for a new means of access to a street where

24. See cases cited in notes 22 and 23, infra.
alternate or other reasonable access exists to that street or some other street. In one of the best documented cases clarifying this proposition, the Court said:

The absolute prohibition of drive-ways to an abutting owner's land which fronts on a single thoroughfare, and which cannot be reached by any other means, is unlawful and will not be sustained. But the public authorities have the undisputed right to regulate the manner of the use of drive-ways by adopting such rules and regulations, in the interest of public safety, as will accord some measure of access and yet permit public safety, as will accord some measure of access and yet permit public travel with with a minimum of danger. The rules and regulations must be reasonable, striking a balance between the public and private interest. The abutter cannot make a business of his right of access in derogation of the rights of the traveling public. He is entitled only to make such use of his right of access as is consonant with traffic conditions and police requirements that are reasonable and uniform.

The Supreme Court of North Dakota has recognized reasonable regulation, as is reflected by its statement:

It is well settled that the state may prevent access to the road at certain places where public safety requires it and thus may interfere with and even prevent access at a specific point and shut it off entirely. But this is not the damage to private property prohibited by the Constitution. Access at another point must be allowed even though it may be less convenient.

But, even with the numerous decisions on the subject of access, forty-five of the state legislatures have thought that the common law principles relating to the control of highway access were insufficient to meet all the problems which arise in connection with such highways and that new legal tools in the form of statutes were needed. The District of Columbia, Minnesota, Missouri, North Carolina, Alaska, and


Hawaii have no legislation on the subject. Thirty-three of these states which have legislation, including South Carolina, have specific provisions authorizing the construction and designation of both existing and new highways as controlled access facilities. The remaining states do not have specific provisions dealing with this matter, but in some of these states the authority seems to be assumed in other sections of their statutes. 20

In South Carolina the Supreme Court has not yet had occasion to construe the right of access and the respective rights of abutting property owners as recognized and defined under the new controlled access law, 30 but over the years there has been apparent recognition of the existence of the right of access by the decisions of our Court. One of the best statements recognizing the principle comes from Mr. Justice Fishburne in the case of Brown v. Hendricks: 31

The right of the abutting property owner to access over the street adjacent to his property as an appurtenance to his property, and to have such access protected from material obstruction, has been recognized by many of the Courts, including our own. [Citing cases]

In the same decision the Court had already noted the obvious inconsistency and lack of uniformity in cases involving the right of access:

The decisions of the Courts upon the right of the abutting property owners to recover where his access is obstructed on one street, but where he has a means of access from another street, are not uniform.

In recognizing the right the Court has also in an older case a2 apparently recognized the general rule that an abutting property owner’s private right of access in the street or highway is subordinate to the public easement. The Court held in this case that the abutting owner is only entitled to reasonable access to the street and will not be compensated where the route to the street is merely made more circuitous and inconvenient. The Court stated:

The only question being, as we have said, whether the

29. HIGHWAY RESEARCH BOARD PUBLICATION No. 482, EXPRESSWAY LAW (1957).
complaint states facts sufficient to constitute a cause of action, our first inquiry here, what is the gravamen of the Plaintiff's complaint? Manifestly it is that the City Council has, without lawful authority, closed, as it is expressed in the Complaint, one of the public streets of the City of Rock Hill, a public highway, whereby the Plaintiff has sustained damage, not by reason of being denied the access to his place of residence or to his place of business, for there is no such allegation in the Complaint, but solely because the Plaintiff has thereby been forced 'to take a more circuitous and difficult route, in going to and from his place of residence to his place of business. . . .' 

So far as appears from the allegations of the Complaint, the only right which the Plaintiff had in the street in question was the right, to which in common with all other citizens, he was entitled, of using this street as a public highway. That right is not, in our judgment, private property protected by the constitutional provision which is invoked.

In a more recent case,\(^2\) in apparent recognition of this view, the South Carolina Supreme Court, in an action by an abutting landowner for damages and an injunction to restrain obstruction of an alleged neighborhood road, held that the defendant was entitled to a non-suit because the plaintiff had failed to prove any special damages as the result of the closing of the neighborhood road, but that he had sustained only such damages as had been suffered by the public generally as a direct result of the obstruction of the road.

While there is no doubt that the old decisions will influence the Court's thinking on the matter of the right of access when it has a specific case up for consideration under the new law, the Court will be confronted in the future with a somewhat different situation because of the apparent recognition under the new controlled access law of the right of the State to regulate or control the right of access under the police power. This obvious recognition comes directly from the headlines or "whereas clauses" of the Act,\(^3\) which are set forth as follows:

Whereas, the General Assembly finds that traffic acci-


\(3\) See headlines or "whereas clauses", Act No. 621 of 1956, Acts and Joint Resolutions of S. C. 1594, 1595 (1956).
Students are occurring on the public highways of the State in an ever increasing number, resulting in an irreparable loss of life, limb and property; and,

Whereas, many of such accidents are caused by vehicles entering the main through highways from drive-ways and side roads; and,

Whereas, such accidents can be greatly reduced in number and severity by controlling access to and egress from the main traveled way to suitable safe points, as determined by engineering principles; and,

Whereas, a program providing for controlled access facilities is necessary to preserve highway capacities, promote economic motor vehicle operation, stabilize and enhance the value of abutting and community property, safeguard the existing investment in major highways, protect abutting enterprises, preserve aesthetic qualities of the landscape, and otherwise assist in the orderly development of communities; and,

Whereas, the General Assembly defines, determines and declares that this Act is necessary for the preservation of the public peace, health and safety, and for the promotion of general welfare.

Section 3 of the Act, 35 not considering all of the other specific regulatory provisions, discussed hereinafter, provides generally for the control or regulation of the right of access on the new highways:

The Department may so design any controlled access facility and so regulate or prohibit access as to best serve the traffic for which such facility is intended. No person shall have any right of access or egress to, from or across the controlled access facilities to or from abutting property or lands, except at such designated places at which access may be permitted, upon such terms and conditions as may be specified from time to time by the Department.

As has already been noted, extensive controlled access highway construction is presently underway in this State and no doubt numerous varied questions involving the right of access will be presented to the courts as a result of construction of the interstate program. It will be interesting to observe the

35. See note 30 supra.
future course of the decisions with respect to the right of access under the new controlled access highway laws.

III. CONTROL OF ACCESS ON NEW LOCATIONS.

Where there is recognition of the principle that the right of access does not exist legally until a highway is open to the public for travel, the new location and construction of a controlled access highway would appear to cause no particular difficulty. The factual situation created and the legal implications resulting therefrom should not differ greatly from that presented when the State acquires property for the construction of a conventional “land service” road. When a new right of way for a controlled access highway is acquired through a person’s property, compensation should be awarded for the land taken and “severance damages” for the separation of the property which may arise from the taking, but there should be no compensation to the landowner for the loss of a right of access which he never had. The control of access merely detracts from the possible beneficial value which the construction of the new highway might create and in most instances would limit the possibilities of an abutting owner to gain any benefit from the new construction unless his property is located near an interchange or other access point. While it would appear academic that a landowner should not be compensated for the loss of access on new location, at least one court apparently considers it as an element of damage under certain circumstances. The majority of jurisdictions, however, follow the reasoning that there can be no damage to a right which never existed and no compensation for a loss not sustained. In one of the leading cases on the subject, the California Supreme Court said:

The sole issue before us is whether the landowners acquired a right of direct access as the result of the construction of the free-way. Where a property owner has

36. In the Illinois case of Dept. of Public Welfare v. Wolf, 414 Ill. 386, 111 N. E. 2d 232 (1953), the Court held that if a highway right of way is acquired and dedicated without a prohibition of access to the abutters, an interest in access arises immediately even though the road has not been opened or even paved.


38. Schnider v. State, supra note 37.
no right of direct access to a highway before it is converted into a free-way abutting upon his property, nothing is taken from him by the failure to give him such a right when the conversion takes place. The construction of the free-way, pursuant to the resolution, did not create new rights of access in favor of land which did not abut upon the highway as it formerly existed. Where an ordinary or conventional road is built, there may be an intent to serve abutting owners, but when a free-way is established the intent is just the opposite, and a resolution creating a free-way gives adequate notice that no new rights of access will arise unless they are specifically granted.

A situation which somewhat parallels the new location of a controlled access highway is created when an existing conventional highway is relocated and access to it is controlled. However, this factual situation presents no particular difficulty because the decisions treat it the same as if the relocation were merely the new location of a controlled access facility.39 The Oregon Supreme Court in a recent case40 sustained the validity of an instruction of a lower Court to the effect that the defendant landowners had no right or easement of access between their land and relocated portion of the highway, and that the jury, in determining the fair cash market value of all such land, should not consider that the owners had a pertinent right or easement of access, and that in determining the value of remaining land not taken, they should not consider that it had any such right or easement taken from it; and, hence, should not allow any damage for a taking of access.

A related problem which sometimes arises with the construction of a new controlled access facility is the confusion of severance damages with special damages that are permitted by most jurisdictions when the right of access to an existing highway is completely destroyed. Where a single tract of land is divided into two separate tracts by the new location of a controlled access highway, the owner of such property is entitled to special damages in the form of severance damages. A severance damage does not arise from the loss of any rights associated with the highway, but it would

have occurred just the same as if the tract of land had been
evered for the construction of a conventional land service
road or any other purpose. However, when a tract of land
is divided by the construction of a new highway, severance
damages may be greater than those occasioned by the cross-
ing of a conventional highway because of the increased diffi-
culty in using the separate parcels of the tract as an eco-

nomic unit. An increase in severance damages may not occur
if the separate parcels of a divided tract are connected by a
land service road which passes either over or under the new
controlled access facility. If an increase in damages does occur
on a new location, it does not result from the taking of any
right of access in the highway, but comes about merely from
the separation for the construction of a controlled access
facility and is considered in determining the after value of
the remaining lands after the severance takes place.

In South Carolina no particular problem should arise with
respect to the right of access on new locations of controlled
access facilities. The new Controlled Access Statute specifically covers this situation:

Along new highway locations abutting property owners
shall not be entitled as a matter of right, to access to
such new locations, and any denial of such rights of ac-

cess shall not be deemed as grounds for special damages.

No serious question apparently can be raised with respect
to the validity or constitutionality of the Act because of its
regulation of access on new locations, as it is noted that the
validity of similar acts in other states regulating access has
been sustained as necessary regulation under the police power
of the state.

IV. CONTROL OF ACCESS ON EXISTING HIGHWAYS

A. Total Obstruction of Access

It can be stated confidently that the greatest legal prob-

lems that can be associated with the construction of con-

41. Cf. 1 ORGEL ON VALUATION UNDER EMINENT DOMAIN § 47, 54
(2d ed. 1953); Annot., 6 A. L. R. 2d 1199 (1944).
42. Section 4, Act. No. 621 of 1956.
43. State v. Superior Court, 287 P. 2d 494 (Wash. 1955); Wiseman v.
Merrill, 99 N. H. 256, 109 A. 2d 42 (1954); Dept. of Public Works
and Buildings v. Lanter, 413 Ill. 581, 110 N. E. 2d 179 (1953); Holt v.
Board of Commissioners of Okla. County, 205 Okla. 178, 236 P. 2d 476
(1951); Zeigler v. Witherspoon, 331 Mich. 337, 49 N. W. 2d 318 (1951);
Neuweiler v. Kauer, 107 N. E. 2d 779 (Ohio 1951); Holloway v. Purcell,
trolled access highways arise when the State converts an existing conventional land service road into a controlled access facility. Such a conversion occurs when highway officials erect a fence or other obstruction such as a grass or concrete median strip along an existing highway and thereafter only permit entry by an abutting landowner into the main highway at specified points from a parallel or frontage road or by other means. As a result of this conversion, an abutting landowner may have his access to the main highway completely cut off or curtailed considerably from that which he originally had when his property directly abutted upon the main traffic artery. If, as a result of controlling access on an existing conventional highway, an abutting landowner’s access to such highway is completely obstructed, it would obviously appear that he is entitled to compensation for the taking of this right of access under eminent domain. It is noted, however, that some few cases have held to the contrary.44 The measure of damages or the amount of compensation to which the landowner would be entitled in this factual situation is determined by consideration of the fair market value of the property before the right of access is taken and after it is taken. The difference in the two figures is the damage for the total loss or obstruction of access. Where there is a total obstruction or abridgement of the right of access as a result of controlling access on an existing highway, the preponderance of authority recognizes that a landowner is entitled to compensation.45

B. Restriction of Access

While the question of total obstruction of access resolves itself rather simply, the greater problem arises when an abutting landowner’s access to an existing highway is severely restricted or curtailed by control of access thereon. This diminution of access usually occurs when a landowner abuts upon a conventional highway and after designation of that highway as a controlled access facility, he abuts on a frontage or land service road which only enters the main highway at designated access points. By such control of access


on the existing highway upon which the landowner originally abutted, he is then forced to travel on a frontage road and pursue a more circuitous or roundabout route to enter the same highway to which he originally had direct access. As a practical matter it is seldom that an abutting property owner’s access is totally obstructed or severely curtailed, since it has been the accepted practice by highway officials to permit reasonable access to the existing highways upon which landowners abut. It has also apparently been the practice under the interstate program that when existing highways are converted into controlled access facilities, land service or frontage roads are built for the convenience of the landowners whose access has been restricted and adequate drive-ways have been provided to the frontage roads.

Notwithstanding provisions for access by an abutting property owner through the construction of a frontage road or other less convenient means of access, it is in this area that the courts have become perplexed with the problem of determining whether or not a landowner is entitled to compensation. The Supreme Court of the United States has said that nothing in the federal constitution obliges the states to recognize any particular interest of an abutting landowner in access to the highway.\(^{46}\) It has, therefore, been left to the courts of each state to define the landowner’s interest and the courts of different states have often reached different conclusions.\(^{47}\) To a great extent, the difference in conclusions is due to the different types of provisions in the state constitutions with respect to compensation. In some states, compensation is only allowed under the constitution for “taking” of property.\(^{48}\) In these states, where no property is physically taken in the construction of the highway and access is merely curtailed or diminished, there is ordinarily no compensation to the abutting landowners, since the right of access is not superior to proper highway purposes and usages. This may be reasonably explained on the basis that the interest acquired by the State in condemnation for highway purposes is sufficient under the police power to allow for

all changes in the character or amount of traffic and for all improvements which such changes may require, irrespective of whether or not such developments or changes were, in fact, considered in fixing the price for the original right of way on the existing highway. In other states, constitutional or statutory provisions permit compensation under certain circumstances for a "damage" to property without a "taking." The damage, however, to be compensable, must be different in kind, not merely in degree, from that sustained by the community generally. There also must be actual damage before an award will be allowed.

1. "Circuity of Travel"

Even in states where compensation for "damage" without a taking is allowed, there exist restrictive or limiting doctrines. The first doctrine, referred to as "circuity of travel", has evolved from the use of modern traffic and engineering devices in the construction of controlled access highways. In recent years, public officials have found it necessary to devise and enforce traffic regulations and prescribe certain construction standards to make vehicular travel safer and to insure that the highway and street system will accommodate the increasingly heavy burden of automotive traffic. As has been observed with the interstate program, these improvements have been in the form of one-way streets and highways, grade-crossing eliminations, prohibitions against U-turns, divided highways and control of entrances and exits to such highways. The use of these modern traffic and engineering devices has resulted in some "circuity of travel" as the courts have seen fit to identify this principle. It is based on the premise that a landowner who retains free access to the general system of public highways and streets makes no case for compensation merely by proving that improvements or traffic regulations compelled him to travel a greater distance or by a more circuitous route to reach or leave his property. Judicial authority has concluded that such "circuity of travel" is non-compensable in the absence of

49. See Corwin, supra note 48, listing states of Arizona, Arkansas, California, Colorado, Georgia, Illinois, Kentucky, Louisiana, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, North Dakota, Oklahoma, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming.


arbitrary action on the basis that the landowner suffers an inconvenience shared in common with the general public, and there is no special or peculiar damage to him. This doctrine has been applied to deny payment to a landowner who is forced to travel further by a prohibition against left turns, by the establishment of a one-way street, and by the erection of median strips separating opposing traffic lanes of traffic.

A review of a few of the leading cases clearly illustrate the thinking behind the “circuity of travel” doctrine. In the California case of Holman v. State, the State constructed a dividing strip eight inches high and six feet wide down the center of the highway. Its effect upon the landowner’s premises is described in the Court’s opinion:

That the building located on the premises of Plaintiff is especially designed for carrying on the business of servicing and repairing heavy highway trucks and equipment; but prior to the erection of said dividing strip, Plaintiff’s property was easily accessible by heavy truck traffic proceeding northerly on the said highway, but as a proximate result of the construction of such dividing strip, all reasonable access to Plaintiff’s property by all such north-bound traffic has been prevented and likewise, vehicles leaving Plaintiff’s property may not cross the south-bound lane and immediately make a left hand turn and proceed in a northerly direction, resulting in the depreciation of the reasonable market value of the Plaintiff’s property.

The California Court then reviewed some of its earlier decisions involving street constructions preventing access from abutting property because of obstructions placed in the street or because of the placing of the abutting property owner on a dead-end street, but factually distinguished these cases from the Holman case and concluded:

The facts pleaded herein show that the highway upon

52. Wilson v. Iowa State Highway Commission, 90 N. W. 2d 161 (Iowa 1958); Lindley v. Oklahoma Turnpike Authority, 262 P. 2d 169 (Okla. 1955); Cavannah v. Gerk, 313 Mo. 375, 280 S. W. 51 (1926); Fort Smith v. Van Zandt, 197 Ark. 122 S. W. 2d 187 (1938); Annot., 100 A. L. R. 491 (1936).
54. Cavannah v. Gerk, supra note 52.
which Plaintiff's property abuts is not closed and that
Plaintiffs, once upon the highway to which they have free
access, are in the same position and subject to the same
police power regulations as every other member of the
traveling public. Because of a police power regulation
for the safety of traffic, they are, like all other travelers,
subject to traffic regulations. They are liable to some cir-
cuity of travel in going from their property in a northerly
direction. They are not inconvenienced whatever when
traveling in a southerly direction from their property.
The re-routing or diversion of traffic is a police power
regulation and the incidental result of a lawful act and
not the taking or damaging of a property right. People
v. Ricciardi, supra, 23 Cal. (2d) at page 399, 144 P. (2d)
799.

This decision is quoted in the later California case of People
v. Sayig, 57 in which the subject highway was a divided high-
way and the property owners in question upon entering the
highway were required to travel on a one-way street distan-
ces ranging from 500 to 1000 feet to a cross-over where they
could make a "U-turn" and proceed in the opposite direction.
The Court stated:

We also know that mere relocation of a highway thus di-
verting traffic from the property does not legally dam-
age the property.... We also know that the consideration
of a divided highway in front of the property does not
legally damage it.

In the recent West Virginia case of Brady v. Smith, 58 the
plaintiff, in asking for an injunction, alleged that the con-
struction of the proposed median strip would require all east-
bound traffic on U. S. 60 to proceed about 300 feet beyond
his property in order to turn and approach his garage busi-
ess, thereby resulting in substantial damage to the business.
In dissolving a temporary injunction granted by the lower
court and dismissing the complaint, the Supreme Court of
Appeals said:

Nor does the Bill of Complaint expressly or inferentially
allege that the Plaintiff has suffered, or will suffer, in-
jury from the proposed construction of the center con-

57. See note 55 supra.
58. See note 55 supra.
crete island or median strip different in kind from that suffered by other property owners similarly situated.

The cases generally do not attempt to specify how great a distance or re-routing will be permitted under the police power without the payment of damages, but one New York decision has held that five miles is not an unreasonable distance. In the case of Jones Beach Blvd. Estate v. Moses, the landowner complained because a median strip was erected on a heavily traveled highway for the purpose of eliminating grade crossings and traffic lights and because U-turns and left turns were prohibited under certain conditions. To proceed toward the left from his property on the parkway, the abutting landowner was first required to travel five miles in the opposite direction to reach a properly designated turning point. The Court of Appeals of New York, in dismissing the complaint, held that the right of access to the highway means a right to enter upon it but not to use it differently or in violation of the driving regulations imposed upon other users of the highway, adopted for the purpose of speeding up traffic and eliminating danger. In the words of the Court: "The Plaintiff once upon the highway is treated no differently than is any other member of the traveling public."

There is not complete agreement with this doctrine, however, as in one rather recent decision, the Supreme Judicial Court of Massachusetts found it necessary to award damages for injury to access even though it was shown that a circuitous means of travel was available to the landowner in reaching the new highway. The specific Massachusetts statute was apparently worded and interpreted to require payment for the damages for loss of access, even when, evidently, an indirect means of access was present. It is also interesting to note at this point that Massachusetts is listed among those states which have either a constitutional or statutory provision permitting compensation for "damage" without a "taking".

As recently as November, 1958, the Supreme Court of Iowa in a very comprehensive and well-written decision had occasion to pass upon the question of damages in "circuity of travel" cases. The facts reveal that the plaintiff, one Lelia Warren, owned two tracts of land abutting on an east-west

61. See note 49 supra.
county road. The Iowa Highway Commission constructed a north-south fully controlled access interstate highway, closing off at the boundary line of the interstate highway the county road between the two parcels owned by Lelia Warren. Neither parcel was closer than 300 feet from the right-of-way lines of the interstate highway. The Warrens, operating the two farms as a unit, were required to travel a circuitous route of approximately 3 1/2 miles between the two parcels. The lower court concluded that the plaintiff suffered a special damage which was compensable, but the Supreme Court, in reversing the lower court decision, set forth its reasoning in unmistakable language:

Many Iowa cases have dealt with some facet of the question here presented. To the casual reader they may appear to be in confusion, and some in conflict with others. But we think the seeming contradictions are more apparent than real, and that upon careful analysis of the cases the true rule appears with reasonable certainty. It is that one whose right of access from his property to an abutting highway is cut off or substantially interfered with by the vacation or closing of the road has a special property which entitles him to damages. But if his access is not so terminated or obstructed, if he has the same access to the highway as he did before the closing, his damage is not special, but is of the same kind, although it may be greater in degree, as that of the general public, and he has lost no property right for which he is entitled to compensation.

2. Diversion of Traffic

The second restrictive doctrine, identified by the courts as the "diversion of traffic" doctrine, holds that a landowner abutting upon a highway has no vested interest in the con-
tinuation of the flow of traffic passing his property and that
the diversion of traffic to another route does not result in
compensable damage.65 Such diversion of traffic may come
about from the construction of highways or streets or the
relocation of them either vertically or horizontally.64 In the
Ohio case of State v. Linzell,65 the Court in a well-written
opinion said:

It is now established doctrine in most jurisdictions that
such an owner has no right to the continuation or main-
tenance of the flow of traffic past his property. The
diminution in the value of land occasioned by a public
improvement that diverts the main flow of traffic from
in front of one's premises is non-compensable. [Citing
authorities] The change in the traffic flow in such a
case is the result of the exercise of the police power or
the incidental result of a lawful act, and is not the tak-
ing or damaging of a property right.

The Alabama Supreme Court in a recent decision66 aptly
stated the sound reasoning behind the rule. The Court, in
holding that no grounds existed for an injunction which would
prevent the relocation of a highway, said that private induce-
ments or considerations could not rightly enter into the ques-
tion as to whether or not a highway should be constructed at
a particular location. It stated that the controlling factor must
always be the good of the general public, and not the conven-
ience or financial gain of the people who lived along any par-
ticular way.

South Carolina has recognized the "diversion of traffic"
doctrine with respect to land service roads in one of the lead-
ing cases in this state. In the case of Wilson v. Greenville
County,67 the Court stated:

The owner of land on a public highway has no property
or other vested right in the continuance of it as a high-
way at the public expense. If damage results merely from
its abandonment as a public highway, without its being

63. Wilson v. Iowa State Highway Commission, supra note 52; Pruett
v. Las Vegas, Inc., 216 Ala. 557, 74 So. 2d 807 (1954); Holloway v.
Porcell, 22 Cal. 2d 220, 217 P. 2d 665 (1950); McMinn v. Anderson,
139 Va. 239, 62 S. E. 2d 67 (1949); Greer v. City of Texarkana,
147 S. W. 2d 1004 (Ark. 1941); El Paso v. Sandflinger, 118 S. W.
2d 950 (Tex. 1938); 118 A. L. R. 921 (1939).
64. City of Stockton v. Marengo, 137 Cal. 760, 31 P. 2d 467 (1934).
65. 163 Ohio St. 97, 126 N. E. 2d 53 (1955).
67. 110 S. C. 321, 96 S. E. 301 (1918).

3. "Cul-de-sac" Doctrine

While there does not apparently seem to be the degree of harmony among the decisions of the states on the third limiting doctrine, there nevertheless exists what is commonly known as the "cul-de-sac" doctrine. This doctrine is restrictive in that a great many jurisdictions hold that an abutting landowner is not entitled to compensation when his access from one direction on a highway is cut off and adequate means of access are left in the other direction.68 The damages, if any, by the creation of the cul-de-sac are said to be damnum absque injuria. However, a number of other jurisdictions hold that the right of access extends in both directions, and the blocking of access to the next intersecting street in one direction is compensable, although access still exists in the opposite direction to another intersecting street.69

While there may be apparent lack of harmony in other states with respect to the "cul-de-sac" doctrine, the Iowa Supreme Court seems to have settled the question in Iowa by the following statement:70

It is apparent that the plaintiff here will suffer considerable inconvenience in being shut off from a previous direct access to her lands lying west of the point of closing the secondary road at its intersection with Highway 35. Her home property on the east of the intersection will lie in a cul-de-sac, and her travel can be only to the east instead of both east and west. Nevertheless, her means of access to the general highway system is not impaired; that is to say, she has the same means of ingress and egress to and from her lands as before. Her damage is greater in degree than that suffered by the general public; but it is not different in kind, which is the ulti-

68. New York, C & St L. R. R. v. Bucri, 128 Ohio St. 124, 190 N. E. 562 (1934); Krebs v. Uhl, 160 Md. 584, 154 Atl. 131 (1931); City of Lynchburg v. Peters, 145 Va. 1, 133 S. E. 674 (1926); Freeman v. City of Centralia, 67 Wash. 142, 120 Pac. 886 (1912); Meyer v. City of Richmond, 172 U. S. 82 (1898).
69. See Bacich v. Board of Control, 23 Cal. 2d 343, 144 P. 2d 818 (1943), and cases cited therein; Annot., 93 A. L. R. 639 (1934); Annot., 49 A. L. R. 330 (1927).
70. Warren v. Iowa State Highway Commission, supra note 62.
mate test. The greatest good of the greatest number is the criterion which the authorities having charge of the building, alteration, and maintenance of the highway systems in the State must follow. In the absence of any showing of fraud or bad faith their judgment is final. It cannot be reviewed by the courts.

C. Measure of Compensation

What conclusion can be reached with respect to the law as to the proper measure of compensation or damages, if any, when an existing highway is converted into a controlled access facility? A careful analysis of the decisions of the many states leads one to adopt certain basic views on the subject.

The majority of jurisdictions do not allow an abutting landowner to ask for more than reasonable access to the general system of highways and streets in the vicinity of his property. In order to recover he must show special damages, differing in kind, and not merely in degree, from those sustained by the public generally. For instance, where an existing highway is converted into a controlled access facility with a complete blocking of all access from the landowner’s abutting property to the highway, there is a “taking” or “damage”, as the case may be, for which compensation must be made under the principle of eminent domain. However, if the improvement results in some inconvenience to the abutting landowner’s access, or compels him to pursue a more circuitous route to reach or leave the highway, or a diversion of travel in front of his premises, then no compensation need be paid since these elements are a reasonable exercise of the police power of the State and any damages resulting therefrom would be considered damnum absque injuria. In every such situation, reasonable ingress and egress from the landowner’s premises to the controlled access highway must be provided by means of a land service or frontage road. These would appear to be fair and equitable rules, since they recognize the allowance of compensation where justified but do not permit compensation where the public safety and welfare is the paramount consideration and where the damage suffered has not been special to the property owner. Compensation should be paid when a substantial right has been affected and a special injury has been suffered, but no individual property owner should be permitted to profit at the expense of the general public when highway construction is greatly needed.
at economical cost in the interest of the general safety and welfare of all the citizens.

D. South Carolina View

1. Statutes

In South Carolina, the present status of the law with respect to control of access on existing conventional highways is not entirely clear. There have been no decisions in this State on this particular aspect of the problem since the enactment of the new controlled access law.\textsuperscript{71} The literal wording of some sections of the statute leads one to infer that the legislature intended that the State would not be permitted to totally block access to an existing highway without the allowance of compensation under eminent domain. In conjunction therewith, the legislature also apparently recognized the authority of the State to restrict a pre-existing easement of access by an abutting property owner to an existing highway under the police power without the payment of compensation where other reasonable means of access are furnished the abutting landowner. Section 5 of the Act\textsuperscript{72} provides for the designation of existing highways as controlled access facilities:

The Department may designate and establish controlled access highways as new and additional facilities, or an existing highway may be designated as a controlled access facility, or included in a new controlled access facility, and may provide for the elimination of intersections at grades with existing state or county roads and city or town streets, or other public ways, if the public interest shall be served thereby, or may provide for the elimination of intersections at grades by closing off intersecting roads or streets at the right-of-way boundary line of such controlled access facilities.

Section 7 (b) and (c) of the Act\textsuperscript{73} state in substance that upon the designation of an existing highway as a controlled access highway, the Department may issue permits for driveways and side road entrances or exits as referred to in this Section, and include in such permits such requirements and restrictions for design and location of the driveways and side road entrances or exits as may be deemed necessary for the Department to avoid creating a hazard to the traveling public.

\textsuperscript{71} Act No. 621 of 1956.
\textsuperscript{72} See note 71 supra.
\textsuperscript{73} The specific wording of § 7 (b) and (c) of Act No. 621 of 1956 is as follows:

(b) The Department may issue permits for driveways and side road entrances or exits as referred to in this Section, and include in such permits such requirements and restrictions for design and location of the driveways and side road entrances or exits as may be deemed necessary for the Department to avoid creating a hazard to the traveling public.
access facility, the Highway Department may close or change any existing entrance or exit to such existing highway if it considers such action necessary in the interest of the public safety, but this may only be done when other reasonable access to the existing highway is provided by means of a frontage road or otherwise.

In addition, the statute specifically gives the landowner, as an alternative remedy, an added protection against any arbitrary action in this area by the State Highway Department in that provision is made for a hearing by the circuit court upon the reasonableness of any decision by the Department with respect to substitute entrances or exits or other substitute means of access.74

The above mentioned sections and the headlines75 of the Controlled Access Statute strongly indicate that the South Carolina Legislature recognized the problems that have confronted the tribunals of other states with respect to curtailment of pre-existing rights of access and have adequately covered the situation by legislation. The general import of this new controlled access legislation leads one to conclude that the State cannot totally block access to an existing highway without payment of compensation to an abutting landowner under the power of eminent domain; but, on the other hand, the State can curtail or diminish a pre-existing right of access without the payment of compensation under the police power, if other reasonable means of access are furnished. This interpretation of the provisions of the controlled access law would certainly appear to be fair and equitable; it not only recognizes the right of an abutting property owner to have reasonable access from his property to the general sys-

74. Section 7 (e), Act No. 621 of 1956.
75. See Act No. 621 of 1956.
tem of highways, but it also recognizes the public interest in modern and efficient highway construction in the advancement of the general public safety and welfare. This view, of course, is in accordance with the preponderance of authority on the subject and the current trend of the decisions in other states under new controlled access legislation.

2. Decisions

Since past decisions of the Supreme Court of South Carolina do not contemplate the above provisions of the new controlled access law, they shed very little light on the Court's thinking on the legal questions presented upon conversion of an existing highway into a controlled access road. However, it is noted with interest that the old case of Cherry v. Rock Hill,76 in passing upon the matter of the closing of a public street or "land service" road, apparently failed to recognize circuity of travel and inconvenience in access as a basis for compensation. In dismissing the complaint in this action for an injunction and damages, the Supreme Court made the following statement, while quoting and referring to an Illinois decision:

There, as here, the point was made that this was a taking or damaging private property for public use without just compensation, and was, therefore, forbidden by the provisions of the Constitution of Illinois, that 'private property shall not be taken or damaged for public use without just compensation.' The Court, however, held otherwise, saying: 'It is not true, in fact or in law, that Defendant has either taken or damaged Plaintiff's property for public use. It has taken no property for public use or any other use. That of which complaint is made is vacating certain streets. In no sense can that act be construed as either taking or damaging private property for public use, as those terms are used in the Constitution.' If that be the rule under the Constitution of Illinois, which goes further than our Constitution in forbidding not only the taking but the damaging of private property, how much more should it be the rule here.

In the case of Leitzsey v. Fellers,77 the Court sustained a non-suit for the defendant in an action by an abutting landowner for damages and an injunction to restrain obstruc-

76. 48 S. C. 553, 26 S. E. 798 (1897).
tion of an alleged neighborhood road on the grounds that the plaintiff had failed to prove any special damage. As has already been pointed out, in the case of Wilson v. Greenville County, the Supreme Court clearly recognized that "diversion of traffic" by relocation of a highway does not cause an abutting property owner any special damages and is, therefore, noncompensable. Two later cases which are similar factually, with the exception that one involves the obstruction of a city street by a municipality and the other involves the obstruction of an alleyway by a private individual, appear to recognize that at least a city or a private individual cannot totally obstruct the access of an abutting property owner without payment of compensation, but neither of these cases seems to be very clear on the matter of curtailment or restriction of access. Both of these decisions recognize the existence of the right of access and the later of the two cases, which cites the first case with approval, states with reference to destruction of the right of access:

These authorities are in line with the generally recognized principle that a property owner has an easement in a street upon which his property abuts, which is special to him and should be protected. While the owner of a lot on a public street has the same right to the use of the street that rest in the public, he at the same time has other rights which are special and peculiar to him; and the right of ingress and egress is one of them. This right of access is appurtenant to his lot, and is private property. To destroy that right is to damage that property.

V. CONTROL OF ACCESS UNDER POLICE POWER OR EMINENT DOMAIN?

It has no doubt become quite obvious that the authorities generally recognize that the single issue in control of access cases involves the reconciliation of conflicting interests — private versus public rights. Two distinct powers have been

78. See note 67 supra.
utilized to restrict and control rights of access — the police power and the power of eminent domain. The police power is the inherent authority which the State has to restrict property rights in the promotion of the public health, safety, morals and general welfare, without incurring liability for any resulting injury to private individuals. Eminent domain is the power of the sovereign to take or damage private property for a public purpose upon payment of just compensation. The issue most difficult to resolve in any given case is the determination of where the police power ends and the power of eminent domain begins. Salient recognition of this problem is given in a recent decision of the Supreme Court of Wisconsin:82

The general rule is that damage resulting to property through the exercise of the police power is not compensable. We consider the following statement appearing in 11 McQuillan, Municipal Corporations (3rd. ed.) p. 319, Section 32.27, to be particularly pertinent to the facts of the instant case: 'The question of what constitutes a taking is often interwoven with the question of whether a particular act is an exercise of the police power or the power of eminent domain. If the act is a proper exercise of the police power, the Constitutional provision that private property shall not be taken for public use, unless compensation is made, is not applicable.'

At least one court has suggested that the police power ends when the injury to the property owner in not being paid for his property is greater than the injury to the public in having to pay for the property.83

The ultimate decision in any case as to whether a right of access ought to be taken without paying for it can only be made fairly and equitably by weighing and balancing the need for the property, the injury to the property owner, and the burden of compensation upon the public. This fair and just approach to the issue has been very recently recognized by the following apt quotation from a decision of the Iowa Supreme Court:84

No hard and fast rule can be stated as to whether an

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83. See Justice Edmonds' concurring opinion in Bacich v. Board of Control, 23 Cal. 2d 343, 144 P. 2d 818 (1943).
84. Iowa State Highway Commission v. Smith, supra note 81.
abutting property owner has been denied access that is reasonable or, as we have said, 'free and convenient'. In most instances the question is one of fact, not of law, and its determination depends largely upon the evidence in the particular case.

VI. CONCLUSION

In the final analysis, a review of the leading cases throughout many states reflects a current trend by the courts to sustain the right of the individual states to control access upon the highways according to their own judgment, and without equivalent liability on the state to allow compensation to abutting property owners in every instance. This has, no doubt, resulted from the salient recognition by the courts of the commanding public obligation of the states to provide a modern, safe and efficient highway system adequately designed to meet the requirements of increasing traffic congestion and the ever-mounting toll of highway accidents and fatalities. These obvious motivations for control of highway access have been recognized by the legislatures of the various states, including South Carolina, as will more fully appear by reference to the headlines or policy declarations in the various acts.\footnote{55 See Justice Thompson's discussion of "Declaration of Policy" in controlled access statute of State of Iowa in Warren v. Iowa State Highway Commission, supra note 62. See note 75 supra.} The controlled access highway is in its incubation or developmental stage and the corresponding law on this subject is likewise being established and interpreted in the light of the public necessity. There is currently a paucity of decisions by appellate courts reviewing this type of legislation in many of our states and South Carolina has none to date. But, even in this State, it has been interesting to note the rulings by the circuit courts within the last three years with respect to legal questions involving control of access on roads which are being constructed under the interstate program. Since early in 1957 the writer has had the opportunity to participate in a number of trials in the circuit courts of the State involving control of highway access under the new statute. In interpreting the act, it has been the observation of the writer that our circuit courts have been in complete harmony in their rulings on practically all legal questions arising from control of access on new locations; but, like many appellate jurisdictions of other states,
they have been divided in their rulings on legal questions arising from control of access on existing highways.

The next decade — the challenging 60's, a new era of highway and economic development — should envisage the crystallization and unification of judicial and legislative approach to this very vital subject. The issue between the police power and the power of eminent domain has been joined, and the courts must adjudicate the factual and legal differences between the two and attempt to arrive at results which will be fair to both the property owner and the public. Fairness and justice will require clear and analytical reasoning, as the future course of highway development will be profoundly influenced by judicial determination of the basic issues. It is, therefore, hoped that future judicial action will not pursue a course which will in any manner serve to discourage much needed highway improvement.