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RIGHT OF WAY ACQUISITION, DAMAGE PROBLEM CREATED BY THE LIMITED ACCESS HIGHWAY

I. Right of Way Acquisition

In 1956 Congress initiated the National System of Interstate and Defense Highways[1] designed to provide safe, limited access highways linking all parts of the United States. As in any new program of this magnitude, certain problems have become apparent, and foremost is that of right of way acquisition. Indiana's experience in this area is typical.[2]

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108. Apgar Travel Agency v. International Air Transp. Ass'n, 107 F. Supp. 706, 711 (S.D.N.Y. 1952).

109. The quotation in the text accompanying note 99, *supra* indicates that a criminal prosecution might be a special consideration. Putnam v. Air Transp. Ass'n of America, 112 F. Supp. 885, 888 (S.D.N.Y. 1953) suggests another possible limitation: "There may well be however, a determinitive distinction between exempting parties from the operation of such statutory expressions of public policy on the one hand and from the operation of the rules of the common law on the other hand."

The unions also argued that the agreement could not be approved because if a subsidized carrier became a party to the Pact the government mail pay would be used to break a "lawful strike," but the Board properly reserved judgment on this issue until it is properly before them, since none of the present members of the Pact were on subsidy at the time of the decision. The Board is charged with fixing the rate which a carrier receives for transporting mail, 72 Stat. 763 (1958), 49 U.S.C. § 1376 (a) (1958), and subsection (b) of the same section requires that the "need of each such air carrier for compensation . . . together with all other revenue . . . to enable . . . [it] under honest, economical, and efficient management, to maintain and continue the development of air transportation . . ." be considered in determining this rate. It has been held that the fact that a strike will be subsidized is not to be considered by the Board in determining the rate for mail transported, so the union argument seems invalid. American Overseas Airlines v. CAB, 254 F. 2d 744 (D.C. Cir. 1958). It has been said, however, that strike losses resulting from other than "honest, economical, and efficient management" cannot be taken into account, but those occurring through no fault of the management may be, with the Board making the determination as to the cause of the losses. American Overseas Airlines v. CAB, *supra*. Since all revenue, including nonflight revenue, Western Air Lines, Inc. v. CAB, 347 U.S. 67 (1954), must be considered in determining a carrier's need for subsidy, it may be that income from the Pact *must* be considered, but expenditures will be taken into account only if the Board finds these to be a product of "honest, economical, and efficient management."

1. The Interstate System was established by the Federal Aid Highway Act of 1944, ch. 626, §7, 58 Stat. 838, but it was not until the Federal Aid Highway Act of 1956, ch. 462, §108(b), 70 Stat. 378, that the necessary funds were provided.

2. Letter from Ia. State Highway Commission to the *Indiana Law Journal,* encl. 2, Oct. 14, 1949.

Before the advent of the Interstate System, Indiana averaged ten to fifteen highway condemnation suits a year. On December 31, 1959, 732 highway right of way condemnation suits were pending in the State, and the State had placed $9,432,490.06 in escrow, pending determination of these suits.[3] This increase in condemnation suits occurred despite the fact that Indiana is required by statute to make an effort to purchase the needed property before condemnation proceedings are commenced.[4]

Right of way acquisition in Indiana involves two basic functions, appraisal and negotiation, and each function is delegated to separate sections within the State Highway Department. The Department appraises all parcels before attempting to negotiate with the land owner and employs staff and independent fee appraisers for this purpose. If the value of the parcel to be acquired is $25,000.00 or more, two appraisals are made. All appraisals are submitted to a reviewing appraiser who examines each appraisal for accuracy and correctness and determines the fair cash market value of the parcel to be acquired. This determination of the offering price terminates the function of the appraisal section.[5]

The offering price is submitted to the negotiation section which thenceforth assumes the responsibility for procuring the parcel by sending a representative to contact the owner. The negotiating representative has a limited function, for in negotiating with the land owner he may not depart from the offering price determined by the reviewing appraiser.[6] Consequently, the representative's function is, in actuality, not one of negotiating but consists of 1) convincing the land owner that the offer represents the fair cash market value of his property and 2) persuading the land owner to accept the offer. If the land owner can present evidence that the appraisal on which the State's offer is based is erroneous, reappraisals are obtained by repeating the entire appraisal process. If, however, the land owner cannot prove to the satisfaction of the representative that the State's appraisal is erroneous, and if he refuses to accept the price offered by the representative of the negotiation section, the parcel must be condemned.[7]

Forty-three states[8] require at least one appraisal prior to negotiating

3. IND. ATT'Y GEN. OFFICE, REPORT OF CONDEMNATION ACTIVITY 1958 AND 1959. This report also shows that during the period covered, 966 condemnation suits were filed for highway right of way.

4. IND. ANN. STAT. §3-1701 (Burns 1946).

5. Interview with Chief Appraiser, Right of Way Dep't, State Highway Dep't of Ind., in Indianapolis, Jan. 22, 1960.

6. *Ibid.*

7. *Ibid.*

8. To ascertain how other states have met the problem created by increased right of way acquisition, a questionnaire was sent to the highway department of each state, and answers were received from forty-three. No questionnaire was sent to the State

a voluntary sale, and every appraisal must be reviewed by a reviewing appraiser. In eight states, however, it is a matter of policy to offer the land owner the amount of the highest appraisal which is acceptable to the reviewing appraiser.[9] Thirty-five states use both staff and fee appraisers; five states use fee appraisers only, and three states use only staff appraisers. Twenty-five of the states prefer that the appraiser be a resident of the vicinity where the appraisal is to be made.[10]

The amount of variation from the original appraisal price which is permitted in negotiation is of primary importance in right of way acquisition. Two different methods are utilized by various states: 1) the "one price-one offer" method and 2) the "limited bargaining" method. Thirty-five states (thirty-six including Indiana) follow the "one price-one offer" method by determining a price to be offered the land owner and forbidding the negotiator to depart from it. These states contend that such a plan is fairest to all land owners, for a land owner who receives compensation because the state wishes to avoid litigation receives compensation in addition to the fair market value of his land, while a land owner who accepts the state's offer is penalized because he receives compensation only for the market value of his land. Thus, the "one price-one offer" states believe that "horse-trading" rewards the uncooperative land owner while penalizing the cooperative land owner.[11] Eight states permit the negotiator to adjust the offering price during negotiations with the land owner to a limited extent: ten percent of the selected appraisal in Mississippi,[12] "very, very limited amount" in Idaho,[13] "slight" in Delaware,[14] "not substantially outside the range of the appraisals secured" in Ohio.[15] Connecticut allows a compromise method not utilized by any other state by which the land owner or his attorney is permitted to submit appraisals from independent appraisers recognized by the State Highway Department. By following this procedure, the negotiator may effectuate a compromise which exceeds the state's highest appraisal.[16]

Highway Dep't of Indiana, as the necessary information was received in the interview with Chief Appraiser, Right of Way Dep't, *supra* note 5. A tabulation of the results of this survey is on file in the office of the *Indiana Law Journal.*

9. Indiana does not follow this policy.

10. Tabulation of results of survey, *supra* note 8.

11. State of Cal., Dep't of Pub. Works, Div. of Highways, Circular Letter 59-80, March 20, 1959, pg. 1. Iowa State Highway Comm'n, Right of Way Dep't, Memorandum 57-1, Jan., 1957, pg. 1.

12. Letter from Miss. State Highway Comm'n to the *Indiana Law Journal,* Oct. 20, 1959.

13. Letter from Idaho Dep't of Highways to the *Indiana Law Journal,* Oct. 21, 1959.

14. Letter from Del. State Highway Dep't to the *Indiana Law Journal,* Oct. 18, 1959.

15. Letter from Ohio Dep't of Highways to the *Indiana Law Journal,* Oct. 23, 1959.

16. Letter from Conn. Highway Dep't to the *Indiana Law Journal,* Oct. 14, 1959.

The states adhering to "limited bargaining" contend that value is a quantity which cannot be determined exactly[17] and that limited adjustments are justified to avoid the cost of condemnation litigation.[18] In addition the negotiator does not appear to be uncompromising, and the give and take which is common to open market sales is preserved, thus facilitating voluntary settlement. The "limited bargaining" method represents an attempt to find some middle ground between "horse-trading"[19] and the "one price-one offer" method.

Regardless of the method used, a state must meet certain requirements of the Bureau of Public Roads to be eligible to receive federal funds for the Interstate System. At least one appraisal must be secured prior to negotiation, and if the first appraisal is in excess of $25,000.00, a second appraisal is required. Before negotiation, all appraisals must be reviewed by a supervisor in the right of way division who is competent to approve right of way appraisals, and negotiation for purchase may not be carried on by the person who appraised the parcel.[20] Documentation and support of every voluntary settlement are required by the Bureau, and every settlement must be based on the determination by a reviewing appraiser of fair cash market value. If the reviewing appraiser determines that the appraisals secured by the state represent fair cash market value, he need only initial them. A subsequent settlement which is "not substantially outside the range of such appraisals"[21] needs no further documentation or support. If the reviewing appraiser determines that the fair cash market value is substantially outside the range of the appraisals secured by the state, he must prepare a signed statement of his reasons for such determination, and a subsequent settlement may not "differ substantially from the value set forth in such statement."[22] In arriving at fair cash market value, the requirements of the Bureau permit the reviewing appraiser in each state to consider the "appraisals secured by the State Highway Department and the property owner, recent awards by condemnation juries for similar property in the same area, and

17. Letter from Idaho Dep't of Highways, *supra* note 13; Letter from Del. State Highway Dep't, *supra* note 14.

18. Letter from Ohio Dep't of Highways, *supra* note 15.

19. The "one price-one offer" method is relatively new. Prior to its use right of way was acquired in many instances by a negotiator who was told to acquire the property and not to pay too much. No appraisals were made to guide the negotiator, and the purchase price was the result of pure "horsetrading." See Letter from Idaho Dep't of Highways, *supra* note 13.

20. Dep't of Commerce, Bureau of Pub. Roads, Policy and Procedure Memorandum 21-4.1, Jan. 31, 1958.

21. Dep't of Commerce, Bureau of Pub. Roads, Circular Memorandum, July 11, 1958.

22. *Ibid.*

any other pertinent value information. . . ."[23] The reviewing appraiser is limited, however, in his determination to value considerations, and, since amounts paid to avoid litigation are not based on value of the property, this factor cannot be considered in arriving at an offering price.

In summary, the requirements of the Bureau strive to accomplish first, fair and equal treatment to all land owners and second, acquisition of right of way without excessive cost. These requirements do not necessitate the use of the "one price-one offer" method which students of the Interstate System believe is responsible for the increase in number of right of way condemnation cases in Indiana. In support of this contention, the opponents of the "one price-one offer" method point out that during 1958 and 1959 a total of forty-seven right of way condemnation cases were tried by jury in Indiana. The total sum offered by the state under the "one price-one offer" method was $370,653.64; however, the jury verdicts totaled $747,371.41.[24] The significance of these figures can hardly be overemphasized. The land owner, knowing this fact and being confronted with what seems to him to be an adamant and unreasonable attitude on the part of the negotiator, will hesitate to settle voluntarily. Consequently, the number of condemnation suits will continue to be excessive. While some contend that the "one price-one offer" method is the fairest to all land owners, if it is conceded that market value is difficult to determine exactly, adjustments within narrow, strict limits are not unfair to other land owners who accept the state's first offer. Furthermore, it would seem to be in the best interest of the state and the Interstate System to avoid the expenses of condemnation when an amicable settlement within these limits can be made. The "limited bargaining" method would not alter the attitude of a land owner who has decided that he will not part with his land short of condemnation; however, its advantage is that an undecided land owner might be induced by a slight concession in his favor to settle voluntarily.

II. Damage Problem Created by the Limited Access Highway

A related problem to the appraisal and negotiation involved in right of way acquisition is that of determination of damages. It is an accepted principle that the actual taking of a property right must be compensated for by the state. The Interstate System however, presents an area for consideration which is of particular significance in limited access

23. *Ibid.*
24. Ind. Att'y Gen. Office, *op. cit. supra* note 3.

highway[25] construction, namely, whether an abutting land owner's right of access to a public highway is a property right.

It was recognized early in Indiana that the owner of land abutting on a street or highway possesses a right in the street which cannot be taken from him without compensation.[26] Shortly after this right was recognized the court specified that the basis of this right was the ownership by the abutting land owner of the fee simple to the center of the street.[27] In this case, the defendant railroad laid tracks down the center of the street which abutted the plaintiff's land. Since the abutting land owner was the owner of the fee over which the railroad's tracks passed, he was entitled to compensation for the additional burden placed on his fee simple. This basis for the right of access would necessarily preclude recovery where the obstruction was not upon the fee of the abutting land owner. Thirteen years later, however, the Indiana court decided that an abutting owner's right of access, when taken by a private individual or corporation, exists independently of his ownership of the fee in the street.[28] The court held that

> the owners of lots abutting on a street may have a peculiar and distinct interest in the easement in the street in front of their lots. This interest includes the right to have the street kept open and free from any obstruction which prevents or materially interferes with the ordinary means of ingress to and egress from the lots.[29]

The court has since consistently held that ownership of the fee is not necessary for recovery of damages,[30] and all that need be shown is a denial of, or material interference with the abutting land owner's means of ingress and egress.

Despite the abolition of ownership of the fee as a prerequisite to recovery against a private individual or corporation, the court refused to change this requirement where the access was taken on behalf of a governmental unit. In *Randall v. Board of Comm'rs of Tippecanoe County*,[31]

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25. IND. ANN. STAT. §36-3102 (Burns 1949) defines limited access highway as a "highway or street especially designed for through traffic, and over, from, or to which owners or occupants of abutting land or other persons have no right or easement or only a limited right or easement of direct access, light, air, or view by reason of the fact that their property abuts upon such limited access facility. . . ."

26. Tate v. Ohio & M. R.R., 7 Ind. 479 (1856).

27. Cox v. Louisville, N.A., & C. R.R., 48 Ind. 178 (1874).

28. Indiana, B. & W. Ry. v. Eberle, 110 Ind. 542, 11 N.E. 467 (1887).

29. *Id.* at 546, 11 N.E. at 469.

30. Martin v. Marks, 154 Ind. 549, 57 N.E. 249 (1900); Pittsburgh, C., & St.L. Ry. v. Noftsger, 148 Ind. 101, 47 N.E. 332 (1897); Dantzer v. Indianapolis Union Ry., 141 Ind. 604, 39 N.E. 223 (1894).

31. 77 Ind. App. 320, 131 N.E. 776, *error dismissed*, 261 U.S. 252 (1921).

the abutting land owner had access to the approach to a bridge over the Wabash River and had constructed permanent buildings at the grade of this approach. A new bridge was constructed nine feet above the grade of the old approach, and the abutting land was separated from the new bridge by an airspace and a concrete railing. A more complete denial of access can hardly be imagined. The court, however, held that since the fee simple of the street was in the county, the abutting land owner could not acquire any right in the street. In distinguishing the present case from earlier cases where the right of access had been recognized, the court stated that as against private persons or private corporations, all land owners have the right of access; but when a governmental unit obstructs an abutting property owner's access, there is no such right, even though similar or greater damage results. The distinction made by the court between access impairment by private individuals and governmental units may be emphasized by comparing the *Randall* case with an earlier case[32] where a railroad raised the grade of its tracks, thus necessitating the raising of the grade of a street running parallel to the tracks. The court held that this constituted a material interference with the abutting land owner's right of access and subjected the railroad to damages therefor.

Although an abutting land owner may not recover from a governmental unit for loss of access where he does not own the fee upon which the obstruction has been constructed, this is not the case where he possesses the fee simple in the street and the obstruction is situated thereon. That he may recover for his loss of access in such a situation is aptly illutrated by *City of Cannelton v. Lewis*.[33] In this case the city constructed a flood wall in the street abutting the land owner's property. It does not specifically appear from the facts of the case that the floodwall was located upon the abutting land owner's fee simple in the street; however, the court stated that the flood wall was a change from the use to which the street was originally dedicated. Such a statement indicates that the fee was in the abutting land owner, and this is the only ground on which the case can be distinguished from *Randall* where the court held that an abutting land owner can acquire no rights in the street when the fee simple is in the governmental unit.

With the advent of the Interstate System and the numerous access problems it presents, the Indiana Supreme Court appears to be moving away from applying a double standard—one in suits against private individuals and another in suits against governmental units. A recent

32. Egbert v. Lake S. & M.S. Ry., 6 Ind. App. 350, 33 N.E. 659 (1893).
33. 123 Ind. App. 473, 111 N.E.2d 899 (1953).

case[34] involved an existing street which was declared limited access. The grade of the street was lowered, obstructing the abutting land owner's access thereto. It may be inferred from the court's opinion that the land owner was denied access and that this denial was a taking of a property right for which compensation must be paid. In speaking of the right of access the court did not mention the ownership of the fee simple, and in supporting the premise that a right of access is a property right, it cited cases which were between private persons. Although this case is not a clear holding that the right of access as against the State is no longer based on ownership of the fee in the street, it is important because it indicates the attitude of the court toward the new limited access highways. The case indicates that the court now believes that an abutting land owner has a right of access in the existing highway or street which may not be taken or materially interfered with without compensation.

The problems created by limited access highways are not solved when the courts determine that an abutter must be compensated whenever an existing right of access is impaired or destroyed, for much of the Interstate System will be constructed on new right of way[35] to which no right of access was previously available to abutting land owners. This dedication of an entirely new limited access highway is a relatively recent innovation. For many years highways conceptually served a dual purpose: first, they were designed to serve through traffic, and second, they also served the land which abutted them. The latter of these concepts explains the court's recognition that an abutting land owner has a property right in the land service road, but the sole function of the limited access facility is to serve through traffic. The right of access from land abutting a land service highway is acquired by implication from the purpose of the highway, and it arises upon completion of such highway. When a limited access highway or traffic service highway is constructed on new right of way the purpose to serve the abutting land cannot be implied, and the right of access never arises.[36]

Because the traffic service concept is applied to limited access highways, a distinction must be made between damage to the remaining land because of the character of the highway and the failure to provide the abutting land owner with access to the new limited access highway. The former is a compensable item of damage while the latter is not. This

34. State v. Marion Cir. Ct., 238 Ind. 637, 153 N.E.2d 327 (1958).

35. In congested areas where an existing highway has attracted businesses, filling stations, motels and residences, the cost of extinguishing their rights of access may be prohibitive.

36. Schneider v. State, 38 Cal. 2d 439, 241 P.2d 1 (1952); State Highway Comm'n v. Burk, 200 Or. 211, 265 P.2d 783 (1954).

problem often arises where the limited access highway completely severs a farm so that it can no longer be operated as a unit. Under such circumstances, damage results, not because access to the new highway is denied, but because access is denied between the two parts of the farm. Access could be granted to the highway from one part of the farm and yet not provide access between the two severed parts. The difficulty of discerning between these two factors has apparently led to questionable decisions in some cases. In *Riddle v. State Highway Comm'n*,[37] the land was not severed, but a strip of land was taken from the rear of the owner's tract. The court, however, held that the limited access character of the highway could be considered by the jury in determining damages to the remaining land, and in support of the decision cited a case where the highway divided a farm. The limited access feature of the highway in determining damages to the land remaining, however, has relevance only when the land is severed, a distinction which escaped the court in the *Riddle* case.

If a right of access is destroyed or materially interfered with, the state must pay for the taking or impairment of this right. It must be determined, first, what action by the state results in a taking or impairment of this right. Generally, the state is not required to respond in damages when it regulates the flow of traffic upon the street, as by construction of lane divider strips[38] and left turn restrictions[39] or traffic diversion.[40]

The criterion of whether or not a right of access has been taken or impaired is whether the access permitted is reasonable, considering the uses to which the property is adapted.[41] That the abutting land owner

37. 184 Kan. 603, 339 P.2d 301 (1959).

38. State v. Ensley, 164 N.E.2d 342 (Ind. 1960); Iowa State Highway Comm'n v. Smith, 248 Ia. 869, 82 N.W.2d 755 (1957).

39. Jones Beach Blvd. Estate, Inc. v. Moses, 268 N.Y. 362, 197 N.E. 313 (1935).

40. State v. Ensley, 164 N.E.2d 342 (Ind. 1960); Heller v. Atchison T. & S.F. Ry., 28 Kan. 446 (1882). The damages problem becomes complicated when the new limited access highway is to be constructed on part of a tract which abuts on a highway from which traffic will be diverted to the limited access highway. The usual measure of damages is the difference between the value of the land remaining before the taking and the value immediately after. This permits a jury to award damages because of a cessation or diminution of traffic passing the abutting land owner's land because a part of his land was taken for construction of the new highway, and the instruction to the jury should therefore be qualified to exclude such damages. In this situation, the Supreme Court of Wisconsin took the extraordinary step of reversing itself on rehearing. In its original opinion, the court held that it was not error to refuse an instruction which would have withdrawn from the jury's consideration any evidence as to destruction of commercial value of the land remaining caused by diversion of traffic from the old highway to the new. The usual instruction as to measure of damages to the remainder was given and approved. On rehearing, however, the court held that the denied instruction should have been given and reversed the lower court. Carazalla v. State, 269 Wis. 593, 70 N.W.2d 208, *rev'd on rehearing* 269 Wis. 608a, 71 N.W.2d 276 (1955).

41. People v. La Macchia, 41 Cal. 2d 738, 264 P.2d 15 (1953).

has no right of access at every point where his land abuts the street is aptly illustrated by *Huff v. Indiana State Highway Comm'n.*[42] This case involved the denial by the Commission of plaintiff's application for access to a recently designated limited access highway which denied plaintiff access from the particular tract in question. The court stated, "we hardly think it can be held that anyone wherever his land may be situated has a constitutional right to a way of ingress and egress for a public filling station along a state highway which has been declared a limited access facility."[43] Thus, the court upheld the power of the Commission to freeze access to existing highways to those points existing at the time the highway was designated as limited access. This power is not construed, however, to permit the state to deny reasonable access without responding in damages for the right taken.[44] Access is unreasonable if inadequate for the uses to which the abutting land is adapted. When access rights are frozen by the designation of a highway as limited access and existing access points are not adequate, the abutting land owner must either be permitted to utilize his right to the fullest extent, or the state must pay for the right taken.[45] In addition, that an abutting land owner has not exercised his right of access by providing physical means of access prior to the designation of a highway as limited access does not deprive him of the right, for it cannot be said that no access is reasonable access.[46]

Closely related to the problem of determining reasonableness of access is the problem of determining whether the right of access attaches to the entire tract of land or only to that part which is immediately adjacent to the existing highway. The problem arises where a limited access highway divides land so that access to the old highway is no longer possible from part of the land.[47] The new limited access highway denies access to an existing highway. The reasonable rule is that the right attaches to the entire tract. The owner of a farm is entitled to access to the highway from both the near and distant portions of his property, and the courts should not determine arbitrarily how far the right extends.

In congested areas, the state has often attempted to solve the access problem by providing abutting land owners with a frontage road which runs parallel with the through lanes. Although access to the through

42. 238 Ind. 280, 149 N.E.2d 299 (1958).
43. *Id.* at 287, 149 N.E.2d at 303.
44. People v. La Macchia, 41 Cal. 2d 738, 264 P.2d 15 (1953).
45. *Ibid.*
46. Iowa State Highway Comm'n v. Smith, 248 Ia. 869, 82 N.W.2d 755 (1957); Petition of Burnquist, 220 Minn. 48, 19 N.W.2d 394 (1945).
47. Carazalla v. State, 269 Wis. 593, 70 N.W.2d 208, *rev'd on rehearing* 269 Wis. 608a, 71 N.W.2d 276 (1955).

lanes is withdrawn, access is provided to the parallel frontage road which ultimately has access to both lanes of the limited access highway. That the abutting land owner's right has been taken in this situation is beyond question, and the state must pay damages for this confiscated property right. It has been held, however, that the nature of the right of access is an easement, the value of which is determined by the amount of damage resulting to the dominant tenement from its taking. The benefits bestowed on the dominant tenement by construction of the frontage road are deducted from the damages caused by taking the easement.[48] Thus, where access is provided in either direction upon the frontage road and ultimately access to the through lanes, it should be capable of proof that the benefits of the frontage road offset completely the damage caused by the taking of the right of access. This rule is an equitable one, for the state has gone to considerable expense to provide the substitute access road, and by adhering to this method, the state preserves the right of the abutting property owners without detriment to the through raffic upon the limited access highway.

The problem of access to the limited access highway itself is only slightly removed from the problem presented by the dead end street or cul de sac. In the construction of a limited access highway, the crossing streets or roads will either be dead ended at the limited access highway or will pass over or under it. The property owners abutting the dead ended streets are left in a cul de sac. It is well settled in Indiana that as between private parties the ". . . owner of a lot on a street in a city or town has a private right of access in both directions which extends as far at least as the next connecting highway."[49] The question, however, whether this right is recognized as against the state remains undecided. Of the states which have considered the cul de sac problem in the context of the limited access highway, California[50] and Oklahoma[51] permit recovery while Kentucky[52] and Iowa[53] do not. The California court held that the state materially interfered with the abutting land owner's right of access by placing his lot in a cul de sac.[54] Since this "material interference test" is applied in Indiana to determine whether there is a taking of the right of

48. Gilmore v. State, 208 Misc. 427, 143 N.Y.S.2d 873 (Ct. Cl. 1955). One dollar awarded for taking of right of access.

49. Oler v. Pittsburgh, C., C. & St.L. Ry., 184 Ind. 431, 440, 111 N.E. 619, 622 (1916).

50. Schneider v. State, 38 Cal. 2d 439, 241 P.2d 1 (1952); Bacich v. Board of Control of Cal., 23 Cal. 2d 343, 144 P.2d 818 (1943).

51. Oklahoma Turnpike Authority v. Chandler, 316 P.2d 828 (Okla. 1957).

52. Smick v. Commonwealth, 268 S.W.2d 424 (Ky. 1954).

53. Warren v. Iowa State Highway Comm'n, 93 N.W.2d 60 (Ia. 1958).

54. Bacich v. Board of Control of Cal., 23 Cal. 2d 343, 144 P.2d 818 (1943).

access in the eminent domain sense, and in view of the Indiana court's apparent change of attitude towards the right of access as against the state, it would seem a justified prognostication that an abutting land owner who is placed in a cul de sac by the state suffers compensable damage.