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# *Control of Highway Access*

By

ROSS D. NETHERTON

Madison: The University of Wisconsin Press. 1963

Pp. xxvi, 518, \$10.00

The transformation in the way men live in an industrialized society, the shift from the feudal manor and a rural society to the city and suburb of the metropolitan area, outmode old ways and, with them, accepted legal doctrines and administrative techniques. In particular, the rules of land law have been subjected to massive pressures. Since the end of World War II the statute books and judicial opinions have reflected the attempts to provide a new synthesis for the law governing property.<sup>1</sup>

*Control of Highway Access* is a study in depth of one aspect of this transformation in the way men live in an industrialized, urbanized society. As such, it is an excellent contribution to the exploding body of materials on land-use planning. It is a far more important book than its technical-sounding title discloses because, while its specific subject matter is the limited-access highway, it illuminates shadowy areas across the full spectrum of modern land utilization. It is a book which should be read and, indeed, *studied* by all those who are interested in the critical problems which stand at the juncture of property law and constitutional law.

Mr. Netherton, who has had extensive practical experience as legislative counsel for the American Automobile Association, spent full time in research and writing at the University of Wisconsin Law School during 1960 and 1961, and the finished product shows the influence of two of the leading scholars of that faculty. The volume is an Anglo-American legal history of the public highway in the best tradition of Professor J. W. Hurst and a prime example of the great need for similar studies in specific areas of our rich legal heritage. It is also a comprehensive analysis of that hazy no man's land between *regulation* under the police power without compensation and *taking* under eminent domain with just<sup>2</sup> compensation. Here, where private property begins to disappear or be clarified

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1. Haar, *Land-Use Planning*, at vii (1959).

2. As to how "just" the compensation may be see Haar, *id.* at 470-556. Professor Haar has justifiably labeled these materials "The Riddle of Just Compensation."

(depending on your point of view) under the impact of zoning, subdivision controls, official maps, comprehensive plans, development rights, etc., Professor J. H. Beuscher has long labored as a pioneer. It is gratifying to see these diverse, yet unified, concepts of land-use planning pulled together in a functional study of the limited-access highway. This review is a tribute not only to the author, Mr. Netherton, but also to the broad program of land-use studies at the University of Wisconsin Law School.

The book is well-organized and easy to read. It consists of three basic parts—the legal relationship of the roadside and the roadway, access-control powers and their uses, and valuation of access rights—divided into thirteen chapters. The whole culminates in a three-page final appraisal which demonstrates the author's faith in law as a positive force in adjusting the pressures of a dynamic society. There are three appendices, including a useful glossary of terms and diagrams of leading cases on control of highway access. Throughout the book, there are many graphic illustrations of the problems being discussed, and they add immeasurably to the clarity of the exposition. Seldom does the discussion become too abstract, and this is partly due to the excellence of the diagrams. There are almost one hundred pages of notes placed at the end of the volume, just before the index. This handling of the documentation adds to the eye appeal of the book and is probably best for the casual reader. It is annoying, however, to the specialist and leads to wasted time and constant page flipping. Contrary to the great Gibbon in *The Decline and Fall of the Roman Empire*, Mr. Netherton is not at his best in the footnotes, but he does have some thread of argument and several interesting points that may be lost by this back of the book burial.

Thus, on page 318, there is a discussion of the valuation problems where land is devoted to highly specialized uses. Nothing in the body of the text is half so fascinating as the note (on page 504) which says, in part, "Consider, for example, the extreme case where highway improvement plans called for taking part of a golf course so as to reduce the course from 18 to 17 holes."<sup>3</sup> Even non-golfers are reduced to anguish by this preference for cars over golf carts and yet the whole point may be lost by the scholar's easy surrender to the book making stylist.

The organization of the book leads to one other mild, general criticism. Because history, power to create limited-access highways,

3. It might have been worse. Suppose they had taken the nineteenth hole!

regulation of land uses, and valuation techniques are discussed in separate parts, there is a certain amount of overlapping and, when read straight through, one has the feeling of replowing old ground. It would have been possible, by careful editing, to eliminate some of this duplication and a tighter, shorter book would have resulted. However, this volume is a valuable reference tool and the repetition may be necessary in order to make each part of the book understandable. In any case, it is not so excessive as to bother the general reader.

Turning from form to substance, the great contribution of this book lies in its analysis of the property concept as expressed in the rubric "access rights." We live in an era when population expansion, scientific developments, and other factors are forcing a re-examination of our basic land law. Private rights *à la Blackstone*<sup>4</sup> are yielding to public necessity expressed through the police power and eminent domain. If property is taken or damaged (depending on jurisdictional variances) by the State, then just compensation must be paid. But what is property? Laymen, and some lawyers, tend to think of property in a static, clearly defined sense, as if it were frozen at some specific moment in history, probably the passage of the federal constitution. Not so, says Mr. Netherton: "Thus, while 'property rights' under American law enjoy a reputation for permanence, they are in fact more highly relative and more sensitive to changing economic factors and social opinion than most other legal concepts."<sup>5</sup> He then proceeds to demonstrate the truth of this thesis by exploring the relatively recent and limiting origins of the right of access. In the end, whether access rights are a part of the traditional "bundle of rights" that make up property will depend on whether the law will grant compensation to the abutting owner when they are "taken." Courts cannot start the process of decision by looking at a closed category labeled "property" and then award fair market value if the right fits the category. They must face squarely the fact that if they grant compensation they are creating property. "The law must be prepared to carry out its role as arbitrator between these competing demands,"<sup>6</sup> *i.e.*, the demands of the

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There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.

Blackstone, 2 Commentaries on the Laws of England, ch. 1, at 2 (15th ed. 1809).

5. Netherton, Control of Highway Access 80 (1963).

6. *Id.* at 381.

travelling public and the roadside landowners. The chief value of this book is the light it casts on the nature of that choice.

This is a legally sophisticated book, and Mr. Netherton is quite familiar with all of the tools of land-use control. He makes clear that even if abutters' rights are property in the particular situation those rights may be regulated rather than taken, providing the landowner is left with some freedom of use. Nowhere is the process of legal balancing better illustrated than in the determination of permissible use of governmental power. "A realistic description of the distinction between eminent domain and police power methods must recognize that in some cases this difference is sometimes a matter of degree."<sup>7</sup> The discussion of the "matter of degree" does not provide answers to all of the questions the author raises (indeed, one would be suspicious if it did), but it does something more important—it identifies and clarifies the area of choice.

If the less drastic methods, viewed from the highway builder's perspective, of regulation under the police power, control of access through the law of nuisance, or acquisition of rights by negotiated purchase, fail to provide a solution, resort must be had to the power of eminent domain. Full treatment is given to the constitutional and statutory scope of this power, including a succinct summary of "inverse condemnation,"<sup>8</sup> but happily the author does not stop there. He correctly focuses on the process of valuation as the final key to the riddle of access rights, and the concluding portions of the book analyze, in some detail, the concept of fair market value. Once again, Mr. Netherton eschews pat answers as he compares the economist's concept of value with the highly pragmatic lawyer's test. Searching for the market value of abutter's rights (such intangibles as access, accessibility, easement to view and to be viewed, right to light and air, etc.) in a non-existent market is reminiscent of the student's definition of jurisprudence<sup>9</sup> but the author is equal to the task. He uses the technique of looking, in turn, at numerous varieties of land use—farm land, suburban residential land, urban multi-unit residence areas, industrial sites, institutional sites, commercial areas, and roadside business—in order to draw meaningful conclusions about loss to the land owner. His most telling point

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7. *Id.* at 131.

8. "The legal process by which a property owner may claim and receive compensation for the taking of, or payment for damages to, his property as a result of a highway improvement." *Id.* at 400.

9. The study of jurisprudence is analogous to the blind man who goes into a dark room, looking for a black hat that isn't there, and emerges claiming he has found it.

comes as he discusses the difference between access and accessibility, a distinction frequently obscured by the judicial opinions :

Proper appraisal practice, therefore, adapts its search for evidence to the peculiar function of access in the land use that is involved and recognizes a distinction between *access*, referring to a particular means of ingress and egress between the highway and abutting land, and *accessibility*, referring to the relative proximity in travel time of land being evaluated and the various centers of government, commerce, employment, recreation, and the like, upon which land uses depend.<sup>10</sup>

The stakes involved in appraisal methods are high. "An increase of only 10 percent in the cost of right of way for the National System of Interstate and Defense Highways—the nation's most extensive and important network of controlled-access highways—would result in adding approximately \$2,000,000,000 to the cost of these public works."<sup>11</sup> As taxpayers all of us are interested in keeping right of way costs at a reasonable level, but as citizens we want to be sure that the cost is not borne more heavily by some, simply because their land lies in the path of an advancing civilization. After all, our turn may come next! The pressures which have given rise to the controlled-access highway are already at work on water resources, on the central core of cities, on sprawling suburbia, and on every aspect of our dwindling natural resources. If parallel problems suggest parallel solutions, *Control of Highway Access* will be an influential treatise for the land-use planners of the next decade.

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10. Netherton, *op. cit. supra* note 5, at 342.

11. *Id.* at 378.

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