

**Final Report**

**AN ASSESSMENT OF THE EFFECTS OF PUBLIC PROJECT  
ACQUISITIONS ON ADJACENT BUSINESS**

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## Executive Summary

### Introduction

Changing federal policy has caused a number of federal agencies to take a closer look at the impacts that are created by the implementation of their policy. The Federal Highway Administration, in particular, has been concerned about the impacts that are caused during the construction of highways, and, in some cases, impacts during the operations of the highways. This study has evaluated national experience with secondary impacts within the realm of 'takings', particularly as it applies to highway issues. Over the years, the legal definition and applications of takings have continually evolved, and in the current legislative environment, there is a greater emphasis in compensating for the negative impacts that are imposed on property owners.

The focus of this study was on the secondary impacts where property acquisition was not an issue. The consultant team prepared a thorough review of the academic literature on this issue, and reviewed relevant legal decisions concerning compensable and non-compensable takings. Several case studies -- both detailed and in overview format -- were completed to further augment the research.

This study focused on secondary impacts, generally considered to be those that are created by highway development on adjacent properties. The assessment defined the externalities that are created, specifically determining the negative impacts. Positive impacts were not considered; neither were the long-term net or aggregate impacts. Policy in the United States dictates that when a property is taken for a public purpose, the taking must be compensated. For secondary impacts, property is not used for development, and the impacts are largely temporary (although some are permanent) and are caused either by the construction activity or the results of operations.

Both economic and legal aspects were considered, for commercial as well as residential properties.

### Economic Issues

**Noise** -- an increase in the noise (decibel) levels near a property, particularly residential, has been shown to cause a decline in the value of the property with respect to comparable properties without the noise impact;

**Loss of Access** -- highway construction can create a situation for a business operation where the loss of access causes customers to patronize a business that is **more easily** accessible and this is reflected by a decline in business sales and activity;

**Loss of Parking** -- when the loss of parking, caused by either a partial property acquisition or construction zone use reaches a certain level, business cannot achieve an equivalent level of sales when compared to prior periods;

**Diversion of Traffic** -- closely related to loss of access, causes businesses that depend on visibility and passing motorists to experience a decline in business sales and activity, and causes the businesses' suppliers or deliveries to travel longer distances. Here also profitability is affected;

**Odors and Emissions** -- pollution is believed to affect residential property values but is difficult to quantify.

#### Legal Issues

From a legal perspective, the treatment of impacts differs. If a property is impacted by any of the factors named above, then the direct impacts are the loss of clientele **and** business volume. Clearly, this will, in turn, cause a short-term or possibly permanent decline in the value of the business or the property itself. However, the courts consider this sequence of impacts somewhat differently than would an economist or appraiser, and the final result of loss of value is treated separately.

The legal profession has taken a somewhat more comprehensive overview of secondary impacts. A review of court decisions shows that the verdicts have, during the past **50** years, been fairly consistent; but recent legislation (or pending legislation) points to the beginnings of change concerning property rights and compensation. An overview of key points is provided here:

Compensation for noise impacts and odors is rare. The courts have generally found that noise and its inconvenience is neither a trespass or physical invasion. The courts lean toward requiring that noise be unique to the plaintiff and/or create actual physical damage; and odors claimed must be distinguishable from those incurred by the general public. These decisions seem, in part, to be tied to costs that would be excessive to compensate. Loss of view has been compensated when the view is scenic.

Impacts to the accessibility to a business during construction take on many forms. Highways are normally considered by the courts to be for the benefit of the **traveling public** and only incidentally for the benefits of those engaged in business along it. Thus, diversion of traffic claims are generally denied except in some unique cases. This has been reflected in the appraisal process. Loss of visibility compensation has been rare except when there has been a taking. Awards for loss of parking have followed two tracks. Compensation has been given for parking loss that has occurred off street on the business' property, assuming that it was privately provided and required an off-set; however, the loss of on-street parking as a result of highway widening, has been interpreted to be part of government municipal powers. Only unreasonably impaired loss of access has been compensated. Yet this definition is subject to wide interpretation.

Most court cases have not awarded in favor of interim construction loss, saying that the government is not liable for temporary obstructions caused by public works -- unless the construction period is unduly prolonged.

In summary, there is a general lack of federal, state, and local statutes to compensate for indirect impacts, but secondary impacts are drawing increased attention. In this post-ISTEA era, community input regarding highway or other transportation projects can identify potentially adverse impacts. The responsible agency can

- offer technical assistance to businesses
- weigh the impacts and evaluate alternative routings
- mitigate the impacts

Overall, government priorities focus on meeting public transportation needs. At all levels, budgets are under pressure, and tax payers demand tangible products, not studies. However, while secondary impacts are less easily quantified or measured, we now see procedures being put into place to address the issues.

### Case Study Findings

Several case studies were prepared. The three key studies are summarized below:

#### **Texas**

The state DOT has begun to undertake analyses to determine aggregate cost-benefit of proposed

highway facilities, and shifts in land use/land value related to construction. A 1991 case now referred to as **Schmidt**, the plaintiff sued for secondary impact damages related to:

- diversion of traffic
- **circuity** of travel to the property
- diminished visibility
- inconvenience of construction.

Originally, damages were awarded, not related to a taking of property. In 1994, the state supreme court overturned the case (after other similar awards had occurred). A result of this experience was the introduction into the legislature of a bill outlining property owner's rights. **Schmidt** factors were incorporated. Although it was not approved, another bill, the pending **SB14** provides that there must be a Takings Impact Assessment that identifies burdens on the private property owner vs. the benefits to society, to determine if property impacts constitute a taking. Texas DOT is concerned that this trend will lead to more litigation in the right-of-way acquisition process.

## **Indiana**

The state department of transportation initiated a survey of businesses that were impacted by a highway widening construction project. The response -- both number and accuracy -- did not allow for a statistical interpretation of the results. But the conclusions showed noticeable business impacts: **50%** of the respondents reports a decline in gross sales during construction; and **20%** indicated that there was a long-term negative effect. With this information in hand, **INDOT's** Public Affairs Division implemented a program to deal with these issues. Public hearings are held for pending public works/highway projects in which participants identify expected impacts. Mitigation steps have included an informational brochure and financial incentives to the contractor for quick project completion. Still, the Indiana courts continue to rule in favor of **INDOT**, and secondary impacts typically are not compensated.

## **Wisconsin**

A 1989 study initiated by the state legislature, evaluating the impacts of a highway reconstruction and detour, determined that a few businesses were unduly burdened. The study caused a reorientation toward customer service and eight other highway projects were studied. The conclusion was that retail businesses were impacted most severely, experiencing an average **17%** sales decline during construction. Several mitigation measures have been tried; contractor



incentives, coordination of construction schedules, business district promotions, joint parking lot sharing, maps, and directional signs. An excellent video was prepared to provide direction to business owners on how to deal with construction issues. Wisconsin also now has more proactive public hearings, briefing materials, and (post **ISTEA**) closer coordination between **WISDOT** and **MPOs**. A property owner's rights bill -- with a range of scope similar to that of Congress -- was proposed but did not pass.

## Conclusions

There appears to be some foment at the state level for more property rights legislation. Change would be expected to expand the general definition of taking to include secondary impacts that offset value. As a result, **DOTs** would incur more procedural and legal obligations; more flexible tools and techniques are needed to deal with the issues. Specifically useful -- "user friendly" property acquisition and purchasing techniques.

**ISTEA** has brought changes in both federal and state **DOT** funding techniques for transportation improvements. This change occurred while broad spending cuts have been implemented. The evolving change in ideology about government influence on property rights **and** property values may create a shift in the use and effectiveness of available funding.

The ERA team has concluded that, in dealing with secondary impacts, there must be a balance between the positive and negative implications. A careful evaluation is needed to determine how increased compensation will affect **DOT's** ability to carry out their primary mission -- considering the total picture and cumulative impacts.

In the **mid-1990s** there is no consistency in state legislation, and wide variation in measuring and judging impacts. Ultimately, **FHWA** should take steps to mediate the balance between owner's rights and broad public benefits.

## **Introduction to the Study**

This study is an investigation of how several states have dealt with the secondary impacts of highway activities on adjacent properties. The concern is not necessarily with the direct impact on property that is acquired for a right of way, but rather the impact that highways and construction activities have on the value of property not taken, or on the livelihood of businesses that are outside the right of way.

The study is in part a response to proposed legislation on the federal level and among states that broaden the definition of what is a "taking." There is growing sentiment that government has encroached too far into property owner's rights and that negative impacts created by federal and state regulations or actions must be compensated for. Traditional legal definitions of what impacts are compensable and what is not compensable are being challenged and in some cases redefined by new legislation. There is concern that the ordinary duties of highway construction and maintenance will be severely hampered by increased land acquisition costs, and increased litigation.

This study began with a review of the scholarly and technical literature that examines secondary economic impacts of highway construction on businesses and property values. Detailed legal identification of these secondary impacts that are compensable were identified and a review of related case history for each of the factors was made. They include: noise, odors and emissions, diversion of traffic, loss of view, loss of visibility, loss of parking, loss of business profits and goodwill, loss of access, and interim construction loss. The legal discussion is supplemented by a review of relevant statutes and laws in the appendix. Next, procedural issues are discussed. A key element of this discussion is identification of the obstacles in addressing and mitigating secondary impacts. The procedural discussion is augmented by materials in the appendix that identify the key elements of the procedural framework prior to **ISTEA**: **NEPA**, **CEQ**, White House and HUD policy, and **FHWA** policy.

The heart of the study lies in the case studies. Case studies were conducted that focus on actual experience of states in dealing with secondary impacts. The case studies begin with how the department studies these impacts, reviews their property acquisition and appraisal process and procedures, and examines the relevant legal issues. Of particular interest was their actual experience in dealing with secondary impacts that have not traditionally been compensable. Other important issues covered are changes since **ISTEA**, public participation, and mitigation efforts.

The case study locations discussed in detail are Texas, Indiana and Wisconsin. These three states represent a range of experience. Texas is now undergoing many changes related to a landmark court case and a recent “property owners rights” movement. Indiana and Wisconsin offer very different approaches and experiences, utilizing innovative and flexible approaches to avoiding damage payments and litigation.

This draft report with initial conclusions and recommendations for future study directions. Upon discussion with relevant **FHWA** staff and the consultant team members, this report will be revised and the conclusions expanded and finalized.

This study was conducted by a multi-disciplined consulting team. The study was lead by Economics Research Associates under the direction of Cheryl Baxter, Senior Vice President. Research and writing was conducted by Julie S. Burros, **AICP**, Senior Associate, and Jeffrey Singer, Associate; legal research and writing was conducted by Daniel Mandelker, **AICP**; procedural and regulatory research and writing was conducted by Goldie and Malcolm Rivkin of **Rivkin Associates**. The consultants wish to acknowledge the assistance of many people throughout state and federal agencies who provided information for this report. Their cooperation was unfailing and most appreciated.

## Secondary Impact Issues

This general discussion of the economic effects of “secondary impacts” on property near or abutting highways summarizes the information obtained in the literature review conducted for this study. The entire literature review and a bibliography are in the appendix. Following this section is a discussion of these issues and impacts from the legal and case law perspective.

The term “secondary impacts” refers to a variety of ways that a highway, the physical structure, the construction activity, and its use, might affect the value of a piece of property. Within scholarly literature, these impacts are more traditionally known as externalities. An externality is defined as the consumption or production of a good or service that affects others not engaged in the consumption or production. This discussion identifies the negative externalities associated with highways, and attempts to generically define the impact those externalities have on both commercial and residential properties. Of particular interest are the secondary impacts for which one could realistically claim compensation or damages.

This discussion of secondary impacts is distinct from the extensive literature that exists on the beneficial secondary economic impacts of highways. These are the economic benefits that accrue to a region, state, or even a country that has a functioning transportation system. Highways and other forms of transportation help facilitate the transfer of goods and services and make it easier for people to commute. Efficient transportation keeps firms competitive (transaction costs are lowered) and makes it easier for them to grow through exporting. An examination of these benefits or the net impact<sup>1</sup> of highways is beyond the scope of this report. However, they are the subject of extensive research and it should be noted that they have been studied much more extensively than negative impacts.

Clearly an owner must be compensated when property is taken for a public purpose. It is unclear whether anything is owed when no property is taken but there is some kind of negative impact. Direct impacts on property and businesses are not the focus of this study. The key focus is on secondary impacts that have traditionally been non-compensable under court decisions and state laws.

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<sup>1</sup>The **Buffington**, et. al. study that is abstracted in the literature review shows that while there might be negative economic impacts associated with highway construction, the positive benefits that accrue in the long-run usually outweigh the negative impacts. **Buffington** and his co-authors show that there are both sales and property value increases for abutting businesses/property after a new highway is built.

Secondary impacts are either permanent or temporary in duration. For the most part this analysis focused on permanent effects, but temporary effects may be important as well, especially during the construction of a highway. For example, during construction, access to commercial property can be limited causing a company to lose sales or even go out of business. If the owner tried to sell during construction he might receive a reduced price for his property, reflecting lower income expectations for a period of time. However, if after construction is finished, access is restored or even improved, the value of the commercial property could be enhanced.

Below is a discussion of secondary impacts related to highway construction. This includes whether or not the impact affects residential and/or commercial property, the ways in which the impact can be measured/quantified, and the information collected as part of this study.

### Noise

Highway noise varies depending on the time of day and volume of traffic. For the most part, noise affects only residential property and is a permanent effect, but can be remedied with sound barriers and sound-proofing. Noise can be measured by instruments that establish the base ambient level, as well as the incremental increase produced by a highway. At times the severity of impact is also related to a property's distance from the highway. There are many studies that examine noise and its **impact** on property values, including analyses of airport noise that have some relevance to highway noise. All of these studies attempt to quantify how much noise impact has on the value of property (primarily residential). There are a wide variety of figures related to this impact, both absolute numbers and percentages.

For example, some studies use a percentage decline in property values for every decibel of noise measured (the percentages range from .08 to 1.05 %). Other studies use an absolute number for each decibel measured, although these show a decrease in value only when the noise is above a certain level -- say **\$94** for each decibel above the average.

One study examines the impact that traffic volume has on residential sales prices. While commercial businesses generally welcome a higher volume of traffic, residential properties are often bothered by high levels of traffic. The study found that high traffic levels depressed the sale prices of houses located on high traffic streets. Finally, one study simply uses distance as a proxy for noise and finds that houses closer to the highway sell for less than ones further away.

## Loss of Access

This refers to the ability to access (by automotive vehicle) the affected property. Generally this impact will only apply to commercial property and it could be either temporary or permanent. A temporary situation is likely to be related to construction and would involve restrictions on access only for the duration of the work in the area. A permanent situation would involve the elimination of an off ramp or the widening of a highway that removes a frontage road that provided access.

Loss of access can be measured by tracking records of business activity. This would include asking businesses what happened to their sales before, during, and after the construction of the highway. Several studies examined sales for businesses along a highway affected in some way by construction. (A particularly good study was conducted in Indiana, and is discussed in the Indiana Case Study. That study focused on the impact of construction, rather than on long-term or permanent impacts.) A wide variety of estimates have been developed to reflect how construction (and the subsequent completed highway) affects sales levels.

## Loss of Parking

Like loss of access, this impact can be both temporary (during construction) and permanent if the land is acquired for a right-of-way. Similar to the situation above, the impact of the loss of parking is 'felt' by a business through the loss of sales. Fewer parking spaces make shopping at that site less convenient for customers, and larger businesses that depend on destination shoppers (like a grocery store) are unable to operate if too much parking is lost. It is also possible that the loss of parking could make a property non-compliant with zoning.

Measuring the loss is straightforward and a variety of studies have actually counted before and after parking related to highway construction. Sales figures (if the business decided to remain where it was) are examined to determine the extent of the impact. As with many of the secondary impacts, it is difficult to separate a business decline due to loss of parking from other factors. The negative business impacts could be related to other construction problems or highway impacts, or even other unidentified externalities.

## Diversion of Traffic

This is closely related to loss of access, and refers to traffic that no longer travels near or by a property because of highway construction. The diversion could be temporary if it lasts only

during construction. For example, drivers avoid the delays related to construction and temporarily use alternate routes. Once construction is finished, the traffic resumes to normal or even increased levels. Diversion of traffic could be permanent if traffic patterns are re-routed because of closed or new exits or entrances.

The diversion of traffic is more narrowly focused than other impacts. Only businesses that depend heavily on visibility from traffic are affected. Even if one of these businesses retains its parking and is still accessible, the decline in the volume of traffic is still likely to cause a loss in revenue. In the literature, studies have not quantified this impact directly but instead it is discussed in the context of the impact that highway construction generally has on sales. Before and after traffic counts could be used in a model that estimates sales impacts but in the studies reviewed these models were not developed. While there is general literature on the effects new highways have on towns that are bypassed, that work is beyond the scope of this report.

#### Odors and Emissions

This can include a variety of pollutants varying from CO, from car exhausts to particulate matter. Pollution affects residential property but has a small to negligible impact on commercial property. If traffic volume remains relatively constant then so will levels of pollution, thus the impact can be classified as more permanent. While one comprehensive study discussed pollution at some length, impacts on value were difficult to determine because generally pollution defies human perception.

#### Summary

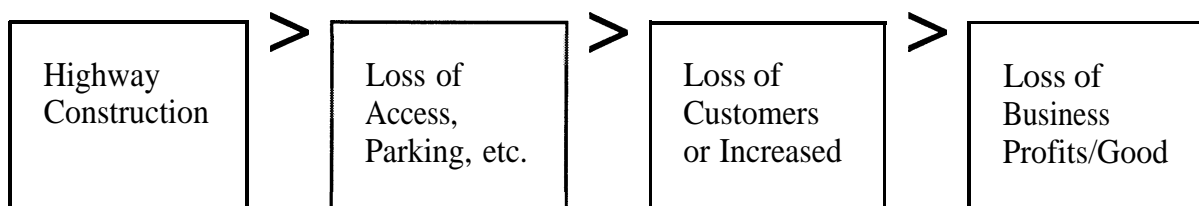
The above secondary effects could be the measure or the basis of an analysis that determines the secondary economic impact of new highway construction on adjacent property owners. Again, this discussion is separate and apart from the effects of highway construction on property owners directly in the right of way, or on the economic vitality of a region served by the new highway.

#### Differences in the Legal and Academic Definitions of Secondary Impacts

The above is a summary of the secondary impacts that were identified in the literature review of this report. These categories of impacts are slightly different from the legal impacts discussed in the following section. The legal categories treat all impacts separately, and seem unconcerned with the causal relationship between highway construction and several secondary impacts.

For example, suppose a business adjacent to a highway construction project experiences a decrease in traffic volume. In addition, access may be interrupted or changed as well. The result could be a decrease in business volume and increased costs. For example, less potential customers would be passing by, and delivery and shipping costs may increase because trucks must travel longer as a result of access limitations. In both cases, there is a causal relationship between highway construction activity and the decrease in sales or increase in costs.

Whether diversion of traffic, loss of parking, or loss of access, these elements can cause a business to either lose customers or face increased costs, both of which can lower profits. These secondary impacts are the **cause** of the eventual loss of value of a business. Below is a diagram illustrating this relationship.



However, in legal proceedings, the “loss of business profits/goodwill” is treated as separate from those effects that cause the loss. The same reasoning applies to “interim construction loss. ” The business loss a firm experiences can be caused by the impacts related to construction. Interim construction loss is the **result** of these secondary or external impacts.

Finally, there are also the “loss of view” and “loss of visibility” impacts that do not receive any real mention in the academic literature. This is likely because loss of view is difficult to measure and/or quantify. Loss of visibility is indirectly measured in studies that examine how highway construction affects sales. Consequently, while neither is mentioned above, both are discussed in the legal analysis.



## Summary of Impacts Studied

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Academic	Legal
Noise	Noise
Loss of Access	Loss of Access
Loss of Parking	Loss of Parking
Diversion of Traffic	Diversion of Traffic
Odors and Emissions	Odors and Emissions
	Loss of Business Profits/Goodwill
	Interim Construction Loss
	Loss of View
	Loss of Visibility

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## Legal Discussion of Compensable Damages

### Noise<sup>2</sup>

As a result of highway improvement, property owners often experience excessive vehicular noise as well as vibrations from the new highway. Generally, highway noise can not be claimed as a separate element of compensatory damages when no “taking” of the property has occurred. For example, in *Northcutt v. State Road Department*, the court denied compensation to a claimant for noise damages in an inverse condemnation case. The court stated: “[I]n order for the ‘taking’ or ‘appropriation of private property for public use, under the power of eminent domain, to be compensable, there must generally be a ‘trespass or physical invasion.’” This result is often reached because the loss of enjoyment or mere inconvenience suffered by a property owner is thought to be consequential and suffered by all those whose properties abut a highway.

Furthermore, courts often note the excessive cost of compensating every owner of property who is merely inconvenienced by highway noise, and the resulting impossibility of highway improvement if recovery was allowed in every case. For example in the case *Cheek v. Floyd County*, the court noted the excessive cost of compensating every owner of property who suffers noise damage. The court said: “[I]t would be an impossible burden on the various governmental entities connected with development of highways if every landowner who could hear passing traffic could recover damages. True, the noise from passing traffic makes property less desirable for a number of reasons. But highway construction would be virtually impossible if such recovery were allowed in every case.”

A number of courts have stated that absent a “taking,” if a landowner can show that the damage claimed is special or unique to that landowner, and not such that is common to all the abutting

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<sup>2</sup> For a further discussion, see: Julius L. Sackman, Nichols’ The Law of Eminent Domain § 14A.03(2); Robert A. Brazener, Annotation, *Traffic Noise and Vibration From Highway as Element of Damages in Eminent Domain*, 51 A.L.R.3d 860; David G. Mawn & James W. Springer, *Condemnation: Valuing Damage to the Remainder*, 7-APR Prob. & Prop. 19; John C. Vance, *Liability of the State for Highway Traffic Noise*, 2 Selected Studies in Highway Law 936-N1; *Northcutt v. State Rd. Dept.*, 209 So. 2d 710 (Fla. Dist. Ct. App. 1968), *cert. dismissed*, 219 So. 2d 687 (Fla. 1969); *Dennison v. State*, 239 N.E.2d 708 (N.Y. 1968); *Cheek v. Floyd County*, 308 F. Supp 777 (N.D.Ga. 1970); *Roman Catholic Bishop of Springfield v. Commonwealth*, 392 N.E.2d 829 (Mass. 1979); *Board of Education of Town of Morristown v. Palmer*, 212 A.2d 564 (N.J. 1965); *City of Yakima v. Dahlin*, 485 P.2d 628 (Wash. App. 1971); *Richmond County v. Williams*, 137 SE2d 343 (Ga. 1964).

property owners, the change in the market value of the claimant's property will be compensable. For example, in *City of Yakima v. Dahlin*, the city proposed to construct an overpass that would require a 20 foot concrete wall within 20 feet of the claimant's property. Between the concrete wall and the claimant's property, the city intended to construct a traffic lane. Although there was no physical appropriation of land, the court found that the construction would create an "echo chamber" and result in an "intolerable noise level," and therefore, compensation should be awarded. However, in practice, a court rarely finds a claimant's damages to be peculiar or unique from that of other abutting landowners.

Compensation may be awarded in an inverse condemnation case if physical damage is done to the property as a result of the noise or vibrations, such as cracks in the walls and ceilings or structural damage. In *Richmond County v. Williams*, the court awarded damages to the claimant when an overpass was constructed about 50 feet from his property line. The overpass had produced cracks in his ceiling, walls, floors, windows and doors, and seriously weakened the home's structure.

If a partial "taking" of the property has occurred, noise damage will generally be considered in determining the decline in the fair market value of the remainder of the property. In *Dennison v. State of New York*, the court recognized the general rule that "where there has been a partial taking of property... the noise element may be considered as one of several factors in determining consequential damages."

Several states impose additional requirements beyond a partial "taking" in order to receive compensation. For example, some states also require that the claimant suffer an injury that is different from the injury suffered by his neighbors or the general public to be compensated. In *Cheek v. Floyd County*, the court noted that the "...cases are not clear on the compensability of elements such as noise, fumes and light beams. At least the claimant would have to show injury that was distinguishable from the public in general along the project." Another requirement imposed by a few courts is that the claimant can recover only for damages caused by that part of the improvement that is built on the property taken from the claimant. Therefore, if the only part of the claimant's property "taken" was used to build a drainage ditch for the highway, the property owner would not be allowed compensation for highway noise.

Finally, in cases where the particular use of the property is more sensitive to the impact of noise than other properties, such as a school, church or hospital, the claimant has a much better chance in obtaining compensation. For example, in *Board of Education of Town of Morristown v.*

**Palmer**, the court awarded compensation for noise and fumes damage to a school without regard to whether any of the property had actually been “taken”. Similarly, in **Roman Catholic Bishop of Springfield v. Commonwealth**, the court awarded compensation for the functional damage to a private high school resulting from traffic noise, even though the noise damage did not arise from the property “taken” from the school.

### **Odors and Emissions<sup>3</sup>**

Another problem abutting property owners frequently experience is fumes, odors, dust and debris from a new highway. The law governing compensation of a property owner for odors and emissions is similar to the law regarding highway noise. Generally, in the absence of any actual “taking” of property, courts are unwilling to compensate a property owner for odors and emissions resulting from a highway. An exception to this general rule would be in those states which allow compensation, even absent a “taking”, if the landowner experiences unique or peculiar damage from that of other landowners. For example, in **Harding v. Department of Transportation**, an inverse condemnation case, the court noted that the raising of a 23 foot dirt embankment directly in front of the claimant’s property “certainly created a burden exceptionally peculiar to the plaintiffs”, subjecting them to dirt, dust, and debris.

If a partial condemnation does occur, the courts will normally allow compensation. The court in **Department of Transportation v. Bonnett** stated the general rule that “while a physical invasion is generally necessary, noise, odors and smoke which impair the landowners’ enjoyment of his property are also actionable nuisances, if, and only if, a partial condemnation of the property results.”

Again, in some states, compensation for odors and emissions damage will be paid in cases of partial “taking” only if the damage is distinguishable from that incurred by the general public.

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<sup>3</sup> For a further discussion, see: Julius L. Sackman, Nichols’ The Law of Eminent Domain § 6.07(1); **Department of Trans. of Georgia v. Bonnett**, 358 S.E.2d 245 (Ga. 1987); **Adams v. Department of Highways of State of Mont.**, 753 P.2d 846 (Mont. 1988); **State by State Highway Com’r v. Board of Educ. of City of Elizabeth**, 282 A.2d 71 (N.J. Super. L. 1971); **Harding v. Department of Trans.**, 205 Cal. Rptr. 561 (Cal. Dist. Ct. App. 1984); **Knight v. City of Missoula**, 827 P.2d 1270 (Mont, 1992); **Cheek v. Floyd County, Ga.**, 308 F. Supp 777 (N.D.Ga. 1970).

For example, in ***Adams v. Department of Highways of State of Mont.***, the court stated that the test for compensability for odors and noise damage as is “whether the interference is sufficiently direct, sufficiently peculiar, and of sufficient magnitude.” The court went on to deny compensation to the landowner who claimed that the increase in noise and fumes from a newly constructed bridge decreased the value of his property. The court reasoned that the claimant had not shown that his situation was “any different from any other property owner who suffers the affects of living adjacent to a roadway with increased traffic.”

### **Diversion of Traffic<sup>4</sup>**

A property owner may bring a “diversion of traffic” claim when a conventional highway on which the claimant’s business is fronted is converted into a limited-access highway, resulting in a loss of traffic passing directly in front of the business establishment. Diversion of traffic from the street in front of a claimant’s property to a controlled access highway generally does not give rise to compensable damages so long as reasonable access to the property is provided.

As early as 1933, the courts have denied compensation for diversion of traffic in inverse condemnation cases. In ***State Highway Comm’n v. Humphreys***, business owners obtained an injunction against relocating a main highway, claiming that the rerouting resulted in a “taking” or injury to their property without due process of law. The appellate court recognized that there is no vested right in the currents of travel and reversed, stating: “The highways primarily are for the benefit of the traveling public, and are only incidentally for the benefit of those who are engaged in business along its way. They build up their businesses knowing that new roads may be built that will largely take away the traveling public. This is a risk they must necessarily assume.”

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<sup>4</sup> For a further discussion, see: Julius L. Sackman, Nichols’ The Law of Eminent Domain § 6.10(3)(b), 13.18(1) and 14A.03(7); Roland F. Chase, Annotation, ***Measure and Elements of Damage for Limitation of Access Caused by Conversion of Conventional Road into Limited Access Highway***, 42 A.L.R.3d 148; ***Small v. Kemp***, 727 P.2d 904 (Kan. 1986); ***City of Sherman v. Gnad***, 337 S.W.2d 206 (Tex. Civ. App. 1960); ***City of Rock Hill v. Cothran***, 40 S.E.2d 239 (S.C. 1946); ***State Highway Comm’n v. Humphreys***, 58 S.W.2d 144 (Tex. Civ. App. 1933); ***State v. Schmidt***, 867 S.W.2d 769 (Tex. 1993); ***State Dept. of Highways v. Hunt***, 219 So.2d 602 (La. App. 1968); *State ex rel. Herman v. Wilson*, 438 P.2d 760 (Ariz. 1968).

Compensation for diversion of traffic is also generally **denied** in partial “taking” cases. In ***State v. Schmidt***, the State of Texas planned to convert the conventional highway which ran in front of the claimants’ land into a controlled access highway. As a result, most of the traffic would be diverted to the elevated main highway, requiring motorists to exit by a ramp to the lower roadway in order to reach the retail businesses on the premises. The court acknowledged that the diversion of traffic from in front of the claimants’ property diminished the market value of the two tracts of land. Nevertheless, relying on the standards set out in ***Humphrey*** and the fact that the landowners did not show injury any different from that of the surrounding area, the court denied compensation.

A slightly different standard was articulated in ***State Department of Highways v. Hunt***, another partial condemnation case. The ***Hunt*** court held, “Inconvenience to the landowner, diversion of traffic or change in attending conditions are not proper elements of severance damages unless they diminish the value of the owner’s remaining property.” However, the court went on to deny compensation to the claimant, calling the evidence of diminution of value speculative because the appraiser could cite no instance of comparable property being adversely affected by such circumstances.

In cases where the highway improvement results in the remaining commercial property fronting on a dead-end road, the courts are more willing to award compensation for diversion of traffic. In ***City of Rock Hill v. Cothran***, the city closed part of a street, turning the remainder of the street into a **cul de sac**. As a result, the traffic that had formerly passed in front of the claimant’s place of business was diverted to another street. The court determined that the owner had suffered a “special injury” from that of the general public, which amounted to a “taking” of the property, and awarded compensation. Similarly, in ***City of Sherman v. Gnadt***, the claimant’s motel was left abutting a dead end access road after a highway improvement. The court ruled that it was proper to admit testimony showing that the value of the remaining property after the taking was affected by the fact that the remainder was left fronting on a dead-end road.

Finally, some courts, while denying compensation for diversion of traffic claims, nonetheless allow evidence concerning the amount of traffic flow which passes in front of the claimant’s property to be considered in valuing the property before condemnation. In ***State ex rel. Herman v. Wilson***, the claimants operated a motel and guest ranch on property which was a scenic area of unusual rock formations. The owners of the property claimed that they relied on the flow of traffic past the ranch in order to generate much of their business. The court held that the jury was properly allowed to consider the amount of traffic flow past the affected property as support for

expert appraisers' opinions that the value of the property was diminished through loss of accessibility to such flow.

### **Loss of View<sup>5</sup>**

Loss of view involves a landowner's objection to the view from his or her property as a result of highway improvement. A claimant may bring a loss of view claim when the landscaping and other scenery of the property is removed, and a highway is substituted in its place.

In cases in which there has been no physical appropriation of land, the majority of courts have denied compensation to the landowner for loss of view. In ***Weir v. Palm Beach County***, the court recognized the right of a property owner to enjoy the view of the beach from his property. However, the court denied compensation stating that this right was "subordinate to the underlying right of the public to enjoy the public way to its fullest extent as well as the right of the public to have the way improved to meet the demands of public convenience and necessity."

Conversely, in partial condemnation cases, most courts will allow compensation for loss of view, especially if the previous view was scenic or unique. In ***Pierpont Inn v. State***, the claimant enjoyed a view of the beach and ocean from his property prior to the construction of a freeway. The court held that where a partial condemnation has occurred, the owner of the property is entitled to recover for loss of view, access to beach property, and noise because these items "are unquestionably matters which a willing buyer in the open market would consider in determining the price he would pay for any given piece of real property." Similarly, in ***Keinz v. State***, another partial condemnation case, the court awarded compensation to the landowner for loss of view of the **Irondequoit Bay** when a new highway was built. The court stated, "Two properties might be physically identical, yet their value markedly different because of the surroundings. . . The view might be a mountainside or a valley as well as a lake. In either event, the view augments the value of the premises, and if a portion thereof is taken and the view is spoiled, the market value

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<sup>5</sup> For a further discussion, see: Julius L. Sackman, Nichols' The Law of Eminent Domain §13.17; Michael A. Rosenhouse, Annotation, ***Eminent Domain: Compensability of Loss of View from Owner's Property--State Cases***, 25 A.L.R.4th 671; George P. Smith, II & Griffin W. Fernandez, ***The Price of Beauty: An Economic Approach to Aesthetic Nuisance***, 15 Harv. Envtl. L. Rev. 53; ***Weir v. Palm Beach County***, 85 So.2d 865 (Fla. 1956); ***Pierpont Inn, Inc. v. State***, 449 P.2d 737 (Cal. 1969); ***Keinz v. State***, 156 N.Y.S.2d 505 (N.Y. App. Div. 1956); ***La Plata Elec. Ass'n v. Cummins***, 728 P.2d 696 (Colo. 1986); ***Commonwealth v. Scott***, 385 S.W.2d 330 (Ken.Ct. App. 1964).

of the premises remaining is reduced. . . . [T]he constitutional policy requires that such reduction in value not be borne by the owner whose property is taken for a public purpose without his consent. "

Another noteworthy case regarding loss of view is ***La Plata Electric Association v. Cummins***. Although the ***La Plata*** case involved a suit for damages after the construction of an electric power line across the claimant's property, the court articulated the general rule regarding loss of view in condemnation proceedings. The court explained, "[W]hen a portion of a parcel of land is taken from a property owner in a condemnation proceeding, that landowner is entitled to recover all damages that are the natural, necessary and reasonable result of the taking, as measured by the reduction in the market value of the remainder of the property. " Thus, the court ruled that the evidence of aesthetic damage and loss of view was properly admitted.

Finally, the few courts which have denied compensation to a claimant for loss of view in a partial condemnation case have done so under special circumstances. For instance, in ***Commonwealth v. Scott***, the court recognized that loss of view can be a compensable factor in a condemnation proceeding. Nevertheless, the court refused to allow compensation, holding there was insufficient evidence of loss. The claimant in ***Scott*** claimed both a loss of view and a loss of the ability to construct a subdivision on the same land. Because the building of a subdivision would interrupt the same view, the court held that aesthetic damages in this case would be improper.

### **Loss of Visibility<sup>6</sup>**

Loss of visibility refers to the inability of passing traffic to view the property from an abutting street or highway. A claim for loss of visibility sometimes arises if a highway improvement is constructed on land taken from the owner or on neighboring land and the improvement obstructs the view of the premises, usually a business establishment.

Loss of visibility claims rarely arise when no "taking" of the property has occurred. When such a claim does arise, however, a landowner has a difficult time proving that he is entitled to

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<sup>6</sup> For a further discussion, see: Julius L. Sackman, Nichols' The Law of Eminent Domain § 13.16; Tracy A. Bateman, Annotation, ***Eminent Domain: Compensability of Loss of Visibility of Owner's Property***, 7 A.L.R.5th 113; ***Randall v. Milwaukee***, 249 N.W. 73 (Wis. 1933); ***8,960 Square Feet, More or Less v. State***, 806 P.2d 843 (Alaska 1991); ***State v. Schmidt***, 867 S.W.2d 769 (Tex. 1993).



compensation. For example in ***Randall v. City of Milwaukee***, a store owner claimed that the construction of a shelter for a tunnel underneath a street would obstruct the view of his store windows from the street. The landowner sought an injunction to prevent the city from constructing the structure until the city had acquired the right through condemnation. The court held that because there had been no physical taking of the landowner's property and there was no physical intrusion onto the abutting lot, the loss of visibility was not compensable.

In a partial "takings" case, a claimant has much better chance in obtaining compensation, especially if the improvement causing the loss of visibility is placed on the land taken from the claimant. In ***8960 Square Feet, More or Less v. State***, the claimant's property included a shopping center which was visible from the street. The state condemned a small portion of the property in order to widen the road. At the same time, an overpass was constructed over the road for the Alaska Railroad. The railroad overpass was constructed entirely on neighboring land, using none of the condemnee's property. The court held that the claimant was not entitled to compensation for loss of visibility due to the earth beams of the overpass constructed on neighboring railroad land. The court noted that a landowner can generally not recover from a neighboring landowner because he dislikes the use to which he puts his property. Therefore, it logically follows that a landowner has no valid legal claim against the state for loss of visibility due to construction on land not taken from the claimant.

However, the Supreme Court of Alaska awarded compensation to the claimant for loss of visibility from widening of the road. The court reasoned that, "[O]wnership of land abutting on a road gives the owner the right to control the visibility of all adjoining land further off the road. . . . Thus, when the state takes a parcel which abuts the road, it also takes the potentially valuable right to control the visibility of the remaining parcel. For this reason, we believe that the best rule in light of reason and policy is that loss of visibility to a remaining parcel is compensable where that loss is due to changes made on the parcel taken from the state. "

Conversely, another line of cases holds that loss of visibility is not compensable, even if the highway is built on land taken from the claimant. In ***State v. Schmidt***, the state appropriated part of the property of two landowners in order to convert the old highway into a controlled access facility. Both properties included several retail businesses, which became less visible to passing motorists after the construction. The court denied the landowner's claim for loss of visibility, reasoning that, "Just as a landowner has no vested interest in the volume or route of passerby, he has no right to insist that his premises be visible to them. "

## Loss of Parking'

A loss of parking claim typically arises in one of two situations. First, the claim may arise if a property owner relies on on-street parking to accommodate his business customers. When the state later improves the highway, the claimant experiences a loss of these parking privileges. Second, a loss of parking claim can arise if the state appropriates part of the claimant's land which includes the customer parking, reducing the number of customers who can be served.

Whether or not there has been an actual appropriation of land, courts almost uniformly deny compensation to a claimant for loss of on-street parking. In ***Snyder v. State***, an inverse condemnation case, the claimant operated a small veterinary hospital along a main street in Boise, Idaho. The claimant relied on the perpendicular parking allowed along the street for his customer parking. When the state provided for the inclusion of the street within the state highway system, the parking spaces along the street were eliminated to accommodate the increased flow of traffic. The court denied compensation to the claimant, noting parking privileges along a street are not part of an abutting property owner's vested rights. The court further explained, "The supervision and control of traffic on city streets necessarily inheres within the police powers of a municipality. "

Even in cases of a partial taking of land, courts refuse to compensate a property owner for off-site damages. For instance in ***City of Norwood v. Forest Converting Company***, the city appropriated part of the claimant's land and also graded down the street in front of the claimant's property so that the roadway would tunnel under preexisting railroad tracks, thereby alleviating traffic problems. The property owner claimed damages for the loss of public parking spaces on the roadway due to the change in grade. The court recognized the presence of public parking on a street which abuts property is one element a prudent buyer might consider in valuing property. Nevertheless, the court denied compensation to the claimant stating, "[T]he value associated with the presence or absence of public on-street

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<sup>7</sup> For a further discussion, see: Roland F. Chase, Annotation, Measure and Elements of Damage for Limitation of Access Caused by Conversion of Conventional Road into Limited Access Highway, 42 A.L.R.3d 148; *Snyder v. State*, 438 P.2d 920 (Idaho 1968); *City of Norwood v. Forest Converting Company*, 476 N.E.2d 695 (Ohio 1984); *State Dept. of Highways v. Nisbet Properties, Inc.*, 309 So.2d 398 (La. 1975); *State Dept. of Highways v. Roland J. Robert Distributor, Inc.*, 405 So.2d 1174 (La. 1981); *Blumenstein v. Long Beach*, 299 P.2d 347 (Cal. 1956); *People ex rel. Dept. of Public Works v. Presley*, 48 Cal. Rptr. 672 (Cal. Dist. Ct. App. 1966).

parking is so limited and indeterminate that it generally should be assigned no worth in either the pre- or post-appropriation valuations of the subject property. "

In contrast, if the "loss of parking" claim involves a loss of parking spaces on the property rather than a loss of on-street parking, the courts are likely to award severance damages to the claimant. For example, in ***State Dept. of Highways v. Nisbet Properties, Inc.***, the state appropriated part of the claimant's property for the construction of a new bridge. As a result, approximately 30 parking spaces for the business on the property were lost. The court held severance damages were appropriate in the case, recognizing the loss of parking on the premises decreased the value of the remaining property. The court explained, "This property was developed as one integrated economic unit for a specific use and lessee. Its value for this highest and best use necessarily relates to continuing the economic unit intact. Adequate parking and a potential for expansion are integral parts of the package. Reduction or limitation of these features necessarily adversely affected the value of the remaining property--adversely affected what an investor would pay for the property." Similarly, in ***State Dept. of Highways v. Roland J. Robert Distributor, Inc.***, the court awarded severance damages to a service station owner for the loss of ten of the twenty-five parking spaces on the property due to the appropriation. The court stated, "The loss of so substantial a number of customer parking spaces will clearly diminish the ability of defendant to accommodate as large a number of its customers' cars as before, and will thus reduce the amount of business that the defendant is able to conduct on the remaining property, hence reducing its value. "

### **Loss of Business Profits/Goodwill\***

"Goodwill" has been defined as the benefits that accrue to a business as a result of its location, reputation for quality or skill, and any other circumstances resulting in probable retention of patronage. A loss of business profits or goodwill may occur in a situation in which part or all of the land is taken on which the business is located, forcing the business owner to relocate. A claim for business losses may also arise if access to the business is rerouted, traffic is diverted, or the business is left fronting on a dead end street.

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<sup>8</sup> For a further discussion, see: Julius L. Sackman, Nichols' The Law of Eminent Domain §9A.04(4); Roland F. Chase, Annotation, ***Measure and Elements of Damage for Limitation of Access Caused by Conversion of Conventional Road into Limited Access Highway***, 42 A.L.R.3d 148; ***Mitchell v. United States***, 267 U.S. 341 (1925); ***State v. Hesler***, 274 N.E.2d 261 (Ind. 1971); ***State v. Hammer***, 550 P.2d 820 (Alaska 1976).

A majority of courts hold that business losses caused by condemnation of land on which a business is located are not a compensable element of damages, unless provided by statute under which the proceedings are brought. Some of these courts have stated that damages should not be allowed for the loss of profits or goodwill from the business because only the land and not the business is being taken. For example, in *Mitchell v. United States*, the Supreme Court denied compensation to a property owner for business losses when the claimant's land was appropriated for military purposes. The landowner claimed the land taken was especially adapted to the growing of a particular quality and grade of corn, and consequently he would be unable to reestablish the business elsewhere. The court refused to award compensation, stating, "There is no finding as a fact that the government took the business, or that what it did was intended as a taking. If the business was destroyed, the destruction was an unintended incident of the taking of land."

Other courts have denied compensation to the claimant because the value of business losses is too speculative and uncertain for accurate measurement. The court in *State v. Hesler* denied compensation to a claimant for damages as a result of the loss of the use of the property as a used car lot. The court held that evidence of damages for destruction of the business was not admissible because "[s]uch items are too remote and speculative to be used as criteria for the establishment of damages in a condemnation suit". Finally, other courts denied compensation even though the **condemnee** experienced business losses from the highway improvement, because this damage is intangible and not "property" as this term is used in the eminent domain statutes allowing compensation.

However, some courts explicitly reject these reasons for denying compensation for business losses. In *State v. Hammer*, the Alaska Supreme Court held that business losses were a compensable element of damages when the loss was due to the state's taking of the property on which the business was conducted. The claimant operated a bar on property that was condemned in order to build a new highway. The court recognized the reasoning adopted by the *Mitchell* court but dismissed it as an "older line of reasoning" that is "unacceptable because it fails to provide a realistic measure of what has been taken." The court next dismissed the rationale that business losses are not compensable because they are too speculative and uncertain to award. Noting that damages for loss of profits are awarded in a variety of civil lawsuits, including tort actions and breach of contract actions, the court stated, "It is incongruous that courts allow proof of loss of profits damages in most types of actions, on a case by case basis, and yet in eminent domain cases bar all such claims as inherently speculative." Finally, the court rejected the theory that business losses are not "property" as that the term is used in eminent domain statutes because the Alaska statute at issue explicitly made the loss of personal property compensable.

## Loss of Access<sup>9</sup>

Loss of access refers to the inability of a person to enter upon or leave land abutting a public road or highways. A loss of access claim may be brought by the owner of a business establishment who experiences a drop in sales after the construction of a new highway. The claim may also be brought by an individual landowner when access to enter or leave his own property is impaired as a result of highway improvement. Most courts recognize a landowner's access to his property as a vested property right, and a claimant is generally entitled to compensation when access to his property is diminished by a new highway. However, most courts hold a change which results in mere inconvenience or a **circuity** of travel is non-compensable. The difference between diminished access resulting in compensation and **circuity** of travel is usually a question of degree.

In a number of jurisdictions, the question of compensation for loss of access resulting from highway improvements is governed by statute. Under these statutes, some courts hold that abutting landowners are entitled to damages for loss of access, even though the remaining access is reasonable. Other courts interpret the statutes to require a "reasonableness" test typical of other jurisdictions without applicable statutes.

The majority of non-statutory jurisdictions hold a landowner is entitled to compensation if access to his property is unreasonably, substantially, or materially impaired by a highway improvement. However, there is disagreement among the courts on what is "unreasonable". A few of the factors courts consider in determining the reasonableness of remaining access is whether or not a service road is provided, the distance the landowner must travel to access the road to which the owner previously had direct access, and whether part of the claimant's property was taken to build the highway.

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<sup>9</sup> For a further discussion, see: Julius L. Sackman, Nichols' The Law of Eminent Domain §§ 9A.04(4) and 16.03(2); Roland F. Chase, Annotation, *Measure and Elements of Damage for Limitation of Access Caused by Conversion of Conventional Road into Limited Access Highway*, 42 A.L.R.3d 148; *State v. Munday Enterprises*, 824 S.W.2d 643 (Tex. 1992) *Palm Beach County v. Tessler*, 518 So. 2d. 970 (Fla. 1988); *Hayes v. City of Maryville*, 747 S.W.2d 346 (Tenn. 1988).

In ***State v. Munday Enterprises***, the landowner claimed damages for loss of access to his property on which an automobile dealership was located. The court awarded damages to the claimant pursuant to a Texas statute which read that “no existing State highway or city street shall be converted into a freeway except with the consent of the owners of abutting lands, or by the purchase or condemnation of their right of access thereto. . . .” Although the court did not explicitly consider the reasonableness of the remaining access, it should be noted that the property did have access to a service road after the completion of the highway and that a partial “taking” of the claimant’s land had occurred.

In ***Palm Beach County v. Tessler***, an inverse condemnation case, the Supreme Court of Florida held the claimant was entitled to compensation when her access to the property was “substantially diminished”. The claimant operated a beauty salon, and as a result of a bridge construction and road-widening project the county constructed a retaining wall directly in front of the property. The claimant and her customers were then forced to use an indirect winding route of 600 yards through a residential neighborhood in order to reach the property. Although loss of access damages is governed by statute in Florida, the court also applied a reasonableness test to determine if compensation should be awarded. The court stated, “[T]he fact that a portion or even all of one’s access to an abutting road is destroyed does not constitute a taking unless, when considered in light of the remaining access to the property, it can be said that the property owner’s right of access was substantially diminished.” The court went on to determine there had been a substantial loss of access in this case because the claimants were required to take a “tedious and circuitous route to reach their business premises which is patently unsuitable and sharply reduces the quality of access to their property. ”

However, in ***Hayes v. City of Maryville***, the court reached a different conclusion regarding whether compensation should be awarded for loss of access. Due to the construction of a median strip in the highway in front of the claimant’s property, the claimant was forced to drive 55 feet in one direction or 400 feet in the other direction in order to enter the opposite lanes of the highway ‘from his property. The court held the city’s construction of the median strip in the highway, which resulted in a more circuitous route for the claimant, was not a serious impairment of the right of access sufficient to amount to a taking of property rights.

## Interim Construction Loss<sup>10</sup>

A claim for damages often arises due to the temporary conditions of construction or repair of a highway. This situation most commonly arises when the construction of a highway results in interference with access to abutting property while the work is in progress. A claim for interim construction loss may also arise due to prolonged delay in the completion of the construction work or the accumulation of materials on and near the property and on the streets.

Whether or not there has been an actual “taking” of land, the majority of courts deny compensation to a landowner for damages from highway construction. However, an exception to this general rule may exist if the construction was unlawful, unduly prolonged or otherwise unreasonable. For example, in *City of Antonio v. Guidry*, the claimant filed an inverse condemnation action against the city when road construction temporarily restricted access to his restaurant. The court held that, “Ordinarily a governmental unit is not liable for damages resulting from temporary obstructions caused by a public works project unless there is proof of negligence or undue delay.” The court went on to award compensation to the claimant because the opening of the road was delayed 40 days beyond the original opening date. The court stated that because of this delay, “the restrictions of access were substantial and material and went beyond the reasonable and necessary.”

In *Truck Terminal Realty Co. v. Commonwealth*, a partial condemnation case, the court adopted the *Guidry* rule, but determined the temporary loss of direct access to the claimant’s property was reasonable. The claimant asserted the temporary inconvenience of indirect access imposed additional out-of-pocket costs during the one-year construction period such salaries, fuel, oil and additional wear and tear on the vehicles involved. However, the court denied compensation, noting, “Temporary interference with road access falls under the non-compensable exercise of the police power necessary to effectuate public improvement, unless the alleged interference was accomplished in an arbitrary or unreasonable manner.”

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<sup>10</sup> For a further discussion, see: Michael A. DiSabatino, Annotation, *Damages Resulting From Temporary Conditions Incident to Public Improvements or Repairs as Compensable Taking*, 23 A.L.R.4th 674; Kurt H. Garber, *Eminent Domain: When Does a Temporary Denial of Access Become a Compensable Taking?*, 25 U. Mem. L. Rev. 271; *City of Antonio v. Guidry*, 801 S.W.2d 142 (Tex. Ct. App. 1990); *Truck Terminal Realty Co. v. Commonwealth*, 403 A.2d 986 (Pa. 1979); *Filler v. City of Minot*, 281 N.W.2d 237 (N.D. 1979).

Nichols on Eminent Domain explains the rationale behind the majority rule that denies compensation for damages from highway construction. Nichols states, "The inconvenience and damage which a property owner suffers from temporary obstructions are incident to city life and must be endured. The law gives him no relief, recognizing that he recoups his damage in the benefit which he shares with the general public in the ultimate improvement which is being made." However, Nichols states the exception that "if the temporary obstruction is a result of unreasonable, unnecessary, arbitrary or capricious acts or conduct by the one in charge of the improvement or construction, the abutting landowner has a right of action for damages resulting from such interference with access to his property."

Finally, another exception to the general rule against compensation for interim construction loss is a temporary but total denial of access to the claimant's property. For example, in *Filler v. City of Minot*, the claimant's access to his property was completely cut off for a period of time during the construction of a new intersection. The court awarded compensation to the claimant, recognizing that "[w]hen a street is so obstructed during the construction of a public work that access to abutting property is wholly cut off, the fact that the injury is only temporary is generally held to be no reason for denying the owner compensation."



## Procedural Issues

### Introduction and Summary

Absent specific Federal, state, or local statutes that require direct dollar compensation for adverse impacts on properties not acquired for right-of-way, there is no legal compulsion that a transportation agency make compensation for such impacts. Direct compensation is generally required only if impacts occur on properties wholly or partially taken for the facility itself.

The subject of negative secondary impacts has, however, been drawing increased attention.<sup>11</sup> Academic literature and recent “takings” legislation point out that acquisition of land and the construction of major public facilities may generate a range of negative effects on properties in their vicinity. This raises public policy questions as to whether mitigating such effects merit consideration.

The environmental assessment (EA) process required of Federally funded actions sets forth procedures for transportation agencies to identify, address, and mitigate such secondary impacts. That opportunity is expanded in states such as California and Florida that have their own environmental assessment procedures and requirements for major public and private projects.<sup>12</sup>

The record of agency response to socio-economic impact assessment and mitigation requirements is not strong. However, post-ISTEA, numerous opportunities for community groups and individuals who believe they may be adversely affected by a proposed improvement now exist. They can bring these issues to the attention of the transportation agency before final decisions are made. Direct compensation is still unlikely in such cases without changes in law and/or in regulations. Yet the public involvement process under ISTEA may generate measures short of direct compensation that alleviate some adverse impacts of transportation improvements and

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<sup>11</sup> ***For example, noise, loss of access, loss of parking, diversion of traffic from properties dependent on such traffic (gas stations, restaurants, etc.) disruptions during construction, intolerable congestion, and air pollution.***

<sup>12</sup> ***Some state requirements go further than the federal in this area. Florida’s Development of Regional Impact (DRI) system requires developers of major commercial projects to identify impacts on affordable housing in affected areas and to provide dwellings or dollar contributions to mitigate such impacts if sufficient housing for employees is not accessible to the site.***

effectively "compensate " affected property owners.

If these issues are deemed significant, the agency now has the options:

- a. to provide technical assistance in investigating the qualitative and quantitative dimensions of the issues,
- b. to weigh such information and public input in determining whether to select alternative **routings** and/or configurations for the facility,
- c. to undertake mitigation efforts to alleviate the negative secondary impacts, and
- d. to enlist other state and/or local agencies in the mitigation effort as well.

### The Procedural Framework

There is a procedural framework in which negative secondary impacts of transportation projects can be identified, evaluated, weighed against transportation benefits, and mitigated. A detailed delineation of this framework is in the appendix. The Federal framework for addressing secondary impacts prior to **ISTEA** is: **NEPA**; **CEQ**; Community Conservation Guidance, the White House and HUD Policy of **1979**; and **FHWA** Guidance for Preparing and Processing Environmental and Section **4(f)** documents, **T6640-8A**, October 30, **1987**. A detailed review of these regulations is presented in the appendix.

### Obstacles to Procedural Implementation

During the early **1990s**, the consultants studied numerous **EA**'s, **EIS**'s (Environmental Impact Statements), and other environmental documents for transportation facilities. This was done on two **FHWA** projects on Corridor Preservation: **DTFH6 1-90-C-00080**, Corridor Preservation Criteria and Analytical Selection Process and **DTFH61-9 1-C-00023**, Corridor Preservation Techniques and Application Training Course.

While the subjects of these environmental documents differ (and include multi-modal projects as well as highways) all represent major actions. Most were in metropolitan areas where existing communities and developed land uses would be affected. An extraordinary variability of content, methodology, and emphasis in those sections of the environmental analysis that dealt with social, economic and other community impact matters were noted.

Examples of treatments ranged from a two-page discussion in an expressway by-pass of a city, to a meticulous examination for Relief Route 13 in Delaware. The Delaware FEIS (Final Environmental Impact Statement) was accompanied by a background report of more than 100 pages. The report had graphics identifying social, economic, and community facilities' impacts, proposed mitigation measures, and methodologies of analysis. The entire "package" was developed over four years of meetings of state officials, consultants, residents, businesses, and other interest groups. Information, insights, and mitigation measures derived from this dialogue were reflected in the environmental documentation. Construction of the facility and associated mitigation measures is now under way.

Little quantification of economic and social impacts was presented in these environmental documents -- except on the subject of direct business and residential displacement covered under the Uniform Act. Potential secondary impacts of the actions were rarely evaluated.

Obstacles to using the procedures in place have been:

### 1. Priorities

Considerable discretion in transportation planning and impact assessment was left to the states prior to ISTEA. Each state determines the extent to which a broad or narrow range of impact analysis and mitigation measures is assigned priority.

For example, in Oregon, the priority lies in making existing transportation systems function more efficiently, rather than investing heavily in major new highway construction. Local jurisdictions must adjust their land use plans and regulations to avoid potential secondary impacts such as demand for access that conflict with highway management. This represents a major shift away from a traditional view that providing access in support of the use and development of adjoining lands as the priority of transportation investment.

The current view accords far higher priority to the needs of the traveling public and protection of the public investment in highways. Communities may still plan and zone for shopping malls and employment centers with good visibility from the State highway. However, they can no longer assume that direct access to that highway will be available for the asking. Local jurisdictions now have to face the responsibility of providing the whole hierarchy of transportation facilities needed for primarily local or "intra-area" circulation.

## 2. Resources

Often, transportation agencies are required to perform more tasks than they have resources to do adequately. When budgets are under pressure, funding agencies and motorists alike often demand that dollars be spent on tangible products rather than for planning and studies.

ISTEA explicitly charged states and metropolitan planning agencies (MPOs) with considering long-term planning as a fundamental component of their transportation activities. Before that, the allocation of staff and funding to this matter was discretionary.

## 3. Judgmental vs. Quantitative Considerations

It is relatively straightforward to estimate the number of properties to be displaced by right-of-way acquisition and to provide relocation benefits. Identification of secondary impacts is far more uncertain. Except in dealing with noise impacts, which is easily measured, such matters as the effect of visibility loss on business profits or employment is highly speculative. Transportation agencies are accustomed to dealing with facts and projected trends, and their reluctance to address secondary impact issues may stem from a reluctance to deal in speculation.

## 4. Institutional Roles

The transportation agency, with limited legal responsibilities and resources, is not the only institution capable of addressing and mitigating secondary impacts at a project level. Other public and private agencies can be enlisted as well. For example: local governments can assist in providing replacement parking, and can provide landscaping to mitigate visual or noise impacts. Local governments can be as concerned as the transportation agency about protecting the viability of local businesses. Economic development agencies at the local or state level, chambers of commerce, through grants, loans, assistance in providing alternate sites can assist in mitigating negative effects of circuitous access or visibility loss.

Research has revealed that in the most successful examples of mitigation and abatement the transportation agency initiated cooperation with other governmental agencies and the business community. **Re-orientation** of attitudes and staff priorities was key. Such a broadening of outlook to enlist outside resources may be a “must” for adequately addressing the issues of secondary impact.

## 5. Public Input

If the transportation agency does not initiate evaluation of secondary impacts, then the subject is likely to go unnoticed unless the parties that are affected raise the matter. If affected citizens bring these issues to an agency's attention early enough in the process, the agency can weigh their significance and respond with technical analyses. In the past, however, such public participation has often come at "flash points," only when sufficient general information about project planning or design is made available in conjunction with a public hearing.

Often, individuals whose communities or properties are only indirectly affected by a proposed transportation improvement do not become aware of potential impacts (if at all) until the design and planning process is far advanced. Many, particularly minority communities, may lack the knowledge of bureaucracy, the political acumen, or resources to make credible inputs on their own. This lack of public reaction early in the game -- rather than any procedural obstacles to secondary impact assessment -- has reinforced transportation agencies' lack of attention to these matters until they have "brush fires" to fight. The extraordinary level of community involvement in decisions prior to commitments for Delaware Relief Route 13 was a rarity *before* ISTEA.

Thus, while transportation agencies may be limited by law from direct compensation for secondary impacts, procedures are now in place through which assessing the severity of such impacts can draw major attention. Objective evaluation of their influence in shaping transportation decisions can be assured, and their mitigation can command some measure of priority.

## The Case Studies

Full case studies were conducted in Texas, Indiana, and Wisconsin. They follow this brief introductory section. Shorter descriptions of interesting situations that did not develop into full case studies are detailed below, including: New Jersey, Illinois, Minnesota and New Mexico.

Several different methods were used to select the case studies in this report. Since the study was conducted over a very short period of time, an elaborate evaluation and selection process to identify case study candidates could not be used. Rather, the consultants used their knowledge of situations, relevant studies and reports, and personal contacts within the transportation industry, to quickly find case study candidates. In addition, FHWA desired to avoid certain states that had regulations or court decisions that were thought to be too unusual, and therefore, less widely applicable to other states. One effort to identify case study candidates consisted of an inquiry sent from FHWA in Washington D.C. to all Region and State FHWA offices. Based on responses to the inquiry, interesting leads were investigated. The consultants are thankful for the cooperation of FHWA staff, their response to this inquiry, and subsequent help with case study research.

### New Jersey

Route 23 in Wayne, New Jersey was reconstructed in the early 1980's. Much of the project went through busy commercial areas. Temporary detour roads affected the access to many businesses in the area. Business owners complained that the detours were detrimental to business. In response to this situation, the project agreement was revised by the legislature to "make available financial assistance not to exceed \$1 million for the purpose of compensating businesses in the general vicinity of such project that have suffered monetary losses as a result of the temporary bypass established to accommodate the construction of the project. "

This financial agreement is referred to as the Roe Amendment. Roe was a state representative who happened to own property in the effected area. The amendment applied only to this project, and no other similar business access payments of this kind have been authorized since. The department established detailed criteria to identify businesses who would be eligible for payments. The payments did not apply to businesses or properties that had been compensated as a result of eminent domain, relocation assistance, purchases, payments or other reimbursements. Applications for payments had to provide prior years sales tax data, which was then projected to determine if there had been measurable losses to the business during the detour period. By completion of the project 29 payments totaling \$612,300 were made, and an additional \$44,000 was spent for administration and consulting fees.

The project was completed over ten years ago, and very little institutional memory regarding this project remained at **NJDOT**. Records were not available, and the\* consultants were unable to identify staff who had been involved in the project. However, as summarized below, staff did detail other relevant aspects of DOT experience relating secondary economic impacts of highway activities.

NJ recently passed an Access Management Act that gives **NJDOT** control of access onto all State Highways. The act was signed into law in February of **1989**, and the regulations went into effect in **1992**. This legislation is an important advancement for the department, which is now in the process of observing how access management fares in the courts. The Act says that if direct access is lost and that a “reasonable” alternate access is provided, the affected owner gets no compensation. This Act allows the State to purchase an easement to provide alternate access to lots that have lost direct access, and helps mitigate damages when access is lost. Along with acquiring the easement, **NJDOT** must make all improvements related to the replacement access, such as the grading and paving. The essence of this legislation is the definition of “reasonable.” It is expected that this will slowly be tested in the courts. **NJDOT** hired a consultant to assist in developing regulations, and did technical research, but did not look at impact or property value issues.

If access is changed from direct to a more circuitous route, the department will mitigate with signs. (For example, an arrow indicating access to a shopping center, would be provided for up to a year.) Many effects are not compensable. For example, if a road has a median opening or is not divided, and it is closed or becomes divided, the impact on property or business is not compensable. If an existing traffic light is changed or removed, the impact on a property or business is not compensable. Where a road is being improved and existing driveways are not up to standards, if access points are changed or become shared, compensation is not given. These policies are similar to those in other states.

Lawsuits regarding access as governed by the act have been filed, however, they are too recent to have been decided and are still in the courts. A few are DOT project related, and at least one is development related, such as where one developer’s project produces an impact on another development.

## Minnesota

One project in the Twin Cities area well illustrated impacts on businesses. The reconstruction of Route 12 from a limited access highway to Highway 394, a fully controlled access freeway lasted from 1984 to 1993. The average amount of time that the project lasted in any particular section was from two to three years. This radial highway went from downtown Minneapolis to Wayzata, approximately 12 miles, and over two-thirds of the project went through commercial areas. MnDOT staff noted that some businesses closed, while others continued as before or improved during construction period. The department experienced many lawsuits from businesses that failed. However, the department found it difficult to determine if business failures were solely the cause of the construction project.

Generally, Minnesota law requires that MnDOT only pay compensation or damages if an acquisition is made. If property is not acquired, damages are not paid. If they do not touch the property they do not pay damages. However, in a lawsuit, damages may be awarded, in conflict with the preceding statement. For example, in some cases owners have been awarded damages for **circuity** of travel (where no property was acquired.)

Within the last five years MnDOT had a state supreme court case, referred to as “Woodridge,” that awarded damages for a change in profile grade, i.e., loss of visibility. In this kind of situation, if the department acquires only a portion of the property and significantly changes the grade, or has an impact on the visibility of the remainder of the site, DOT could be in the position of paying for the value of the remainder even though the owner keeps the property. This has had a major impact on DOT design. Now in aligning an original or widened right-of-way, DOT carefully considers exactly what properties are needed.

DOT found that business failures along I-394 during construction garnered bad press, even though failures blamed on the construction were later **determined** to have been caused by other factors, As well, similar businesses in the same vicinity experienced very different impacts. As a result, no formal conclusions could be drawn.

## New Mexico

A very high profile case in New Mexico illustrates the extreme to which secondary impacts can be taken. The Department of Energy and FHWA together funded the construction of the Santa Fe Relief Route. This was part of the Waste Isolation Pilot Project (WIPP) planned to take low level “**trans-nuclear waste**” to remote storage sites along special routes. A landowner along the



route claimed that the value of the remainder (approximately 380 acres) would be damaged because of the perceived danger of transporting nuclear waste through it. The ***City of Santa Fe v. Komas*** case went to the New Mexico Supreme Court and **Komas** was awarded significant damages. The key evidence supporting the award was a poll that the plaintiff commissioned demonstrating that people would pay less for land adjacent to a road that carried nuclear waste. Subsequently, **FHWA** commissioned an appraisal and valuation study of the Relief Route area before and after construction. The study found that a whole new area had been opened up to development, and that property values had in fact increased substantially along the route.

## **Texas Case Study**

This case study highlights how secondary economic impacts to adjacent properties due to highway construction have been studied, handled, and experienced in actual practice within the State of Texas' transportation improvement process. Texas was chosen as a case study in part because they had commissioned several studies of secondary impacts on business activities, and also because this year they experienced a flood of property owner's rights bills introduced in the legislature. Because the proposed changes in legislation closely mirror efforts to broaden the definition of takings on the federal level, Texas was a timely and appropriate choice to study. In the course of conducting this case study, many people at **TXDOT** and other state agencies were contacted and queried by telephone, and in-depth interviews were conducted in person with selected personnel. A complete list of those interviewed is located in the bibliography. In addition, many people were kind enough to provide the consultants with copies of reports, statutes, and other relevant materials. Their cooperation was greatly appreciated.

This case study begins with a brief summary of a study conducted for **TXDOT** on the economic impacts of highway reconstruction projects on business activities. Changes in the department since **ISTEA** are then discussed. The case study explores Texas' land acquisition and appraisal procedures as well as applicable legal issues involved with eminent domain and damage claims. Included is a discussion of how the landmark Schmidt case, proposed legislation, and newly passed legislation will have an impact on how the department deals with secondary impacts. The case study finishes with some conclusions and implications of how Texas' experience may be more widely applicable to this larger study effort.

### **The Study**

Several transportation improvement projects have been studied in Texas for their impact on businesses. Most of these studies were conducted by Jesse Buffington of the Texas Transportation Institute at Texas A&M University. One study estimated the impact of widening U.S. Highway **80** in Longview, Texas. Buffington and his co-authors examined the literature on the economic impacts of highways. They compiled information to estimate how a 'typical' highway project would impact the adjacent property owners/businesses, the regional economy, and highway users. These estimates are then used for two case studies of highway construction proposed for Fort Worth and Wichita Falls, Texas. In both cases, a number of route alternatives were being proposed for the projects, the estimates were used to calculate the economic impact of each, and determine which route had the highest cost-benefit ratio.

The estimates include the effect of highway construction (both during and after) on gross sales and viability (how many businesses close). Interestingly, most of their final results show an increase in gross sales after the construction of a highway. This suggests that positive long-run impacts outweigh any initial negative impacts on sales as a result of construction.

Buffington and his co-authors point out that there “is a close relationship between land uses and land values. If land values change, land use usually changes later. Previous studies have shown that a new freeway in an area will change the accessibility to abutting or nearby properties. Increased accessibility causes a change in the during- and after-construction period land values, thereby changing the land uses. ” They then used estimates of the effect of highway construction on property values to calculate the total change in land values for each proposed route alternative. Again, an overall increase in land values for every route alternative was established.

The rest of the impacts they examine are related either to macro fiscal or economic changes or the benefits or costs that users ultimately experience when a new highway is built. The fiscal impacts flow directly from changes in gross sales or property values and can be calculated easily once the figures exist for the latter.

It was noted by **TXDOT** staff that some of the Buffington studies were commissioned in response to the Schmidt case. (Discussed below.) During the couple of years that the case was in appeal, the studies were completed and it was speculated that the results of the studies helped to overturn and “win” the Schmidt case.

### Changes Since ISTEA

There have been some overall departmental and administrative changes since **ISTEA**. On the organizational and administrative level, many of these changes involved changes in funding categories. Where formerly they used four or five funding categories, since **ISTEA**, they have had to change to about **26** categories. They have had to do some major shifting to ensure that projects come under the proper category to gain funding.

Corridor preservation efforts have been greatly expanded, with the creation of a new multi-modal operations office. They have actively acquired abandoned rail rights of way, and some have gone to the rails-to-trails program. When a rail corridor had been established by easement rather than by outright ownership, **TXDOT** has at times had to deal with paying damages to underlying property owners.

The department is now undergoing a process of “retooling” aimed at increasing efficiency and streamlining processes. This is in part a response to funding pressures, but is also part of a continuing effort to be more effective through the use of such business management techniques as Total Quality Management (TQM), and Continuous Improvement. This effort has served to decentralize power and give the individual districts more decision-making power, giving more authority to lower levels of operation, decreasing layers of “red tape” at all levels of review, and offering more flexibility on title insurance costs. Their objective is to make the entire negotiation, relocation and acquisition process easier.

### Land Acquisition and Appraisal Procedures

In the past, Texas has not used much of its federal transportation funding for right-of-way activities or for property acquisition. The bulk of the federal dollars have been used to fund construction. However, with increasing budgetary pressure, and new legislation that may increase the costs of acquiring property, it is likely that the department will have to begin using federal funds for ROW.

The TXDOT Right of Way office operates on a “firm offer” method. That means that they legally cannot offer the property owner more money than their section has determined as fair market value. This rules out the use of any administrative settlements. Several TXDOT officials speculated that they are likely the only state in the union that does not use administrative settlements. As a part of a current re-tooling effort, serious consideration is being given to implementing the use of administrative settlements. It is recognized that the use of administrative settlements will not be a cure-all, and that they will still condemn property. There is a desire to develop strict guidelines for the use of settlements. They do not want to be in the position of “just throwing money at problems until they go away.” (In contrast to Wisconsin’s policy of “when in doubt, pay.”)

There are concerns that the use of administrative settlements will create situations that are not equitable to property owners. That is, those who accept the department’s first offer, will get less than those who hold out for an administrative settlement. They are also concerned that when “word gets out” that an owner can reliably get more money, that the acquisition process will become unmanageable.

Under the firm offer system, the acquisition section does not negotiate over price, however there are several factors over which they do negotiate. Often a property owner will negotiate a lease-back arrangement. If the department acquires land that it will not use immediately, the occupant

can often stay on the property until it will be needed by the department. The disposition of existing improvements that are tangible assets can also be at issue. For a residential property, the former owner can often arrange to move the house from the property for its salvage value. Other kinds of improvements such as surplus real estate improvements can be sold.

Practically all appraisals are done for **TXDOT** on a fee basis by outside contractors. On low value properties the department is contemplating switching from full appraisals to less complicated “estimates of value.” The department does not typically acquire “uneconomic remainders.” That is, if a property owner is left with a remainder of land that is not a functional economic unit, the department will not go ahead and acquire the entire property.

In fiscal 1994, approximately \$66 million was spent on property acquisition through condemnation by **TXDOT**. Most of this property is located in urban areas. Rates of condemnation vary based on geography, urban or rural, the value of the land, etc. It was estimated that across state about 20% of all property acquired by DOT goes through the condemnation process. It was speculated that in the Austin Metropolitan area (Travis and Williamson Counties) the percentage is as high as 25%.

The percentage of condemnation cases that actually go to full trial varies considerably by location. These cases are tried in the County Court system. Those in central Texas, especially Travis County and Williamson County, are much more likely to go to trial. Of the total condemnation cases that are referred to the Attorney General’s (**AG**) office, between 70% and 80% are settled in the administrative commission process, the remaining estimated 20 % to 30 % do proceed to full trial. However, it was estimated that in Travis County alone, between 40 % and 50 % of cases referred to the **AG** go to full trial. In Houston, where eminent domain cases share a much more crowded court docket, the court often forces parties to enter mediation (non-binding) in order to expedite the process. Since there is not as extensive of a court backlog in Austin, more of the cases actually get to court.

Proposed legislation would have specifically added **Schmidt**<sup>13</sup> factors for consideration in appraisals for just compensation. As part of a fiscal impact analysis of proposed legislation, both standard appraisals and appraisals including “Schmidt factors” were prepared. The department used them to estimate the added magnitude of cost due to these newly compensable factors. It was found that the addition of the “Schmidt factors” added approximately 75 % to the appraised

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<sup>13</sup> See the discussion in the following section, “Legal Issues.”

value of the property.

At the other end of the property acquisition spectrum, it was noted that often there are many donations of land to rights of way. In particular for new alignments, adjacent owners are often anxious to have the improvements built sooner so value enhancements that accompany new roads can accrue to them sooner. This is often the situation with large commercial landowners. The department also does a limited amount of advance acquisitions, protective buying, or hardship acquisitions.

The department has begun to use state-of-the-art video imaging in the public participation process, as well as in the negotiation and trial processes. This technique takes before pictures and renders very realistic after images to illustrate how taking property or the construction of improvements will physically impact properties.

### Legal Issues

A landmark 1936 case, *Carpenter*, established much of the legal basis and rationale for establishing just compensation for property and damages to the remaining property acquired in eminent domain proceedings. *Carpenter* established that the “damages to [the] remainder of [a] tract not taken are determined by ascertaining [the] difference between market value of the remainder of tract immediately before taking and market value thereof immediately thereafter, taking into consideration [the] nature of improvement and use to which land taken is to be put. ” This is very similar to other states. (As discussed in the case studies that follow.)

The *Carpenter* case makes the distinction between “community” and “special” benefits. This relates to enhancement in market value, and how it can offset damages to a remainder. “Special” benefits or injuries that are unique to that land owner or parcel can be considered, however, larger “community” benefits or injuries that affect value cannot be considered. The rationale is that the landowners should not have to pay the cost of “community” impacts, nor should they be the sole beneficiary from impacts either.

In the 1986 *Enterprise* case it was ruled that the benefit value to a remainder of condemned property could not be subtracted from the compensation paid for the part taken. This established that the compensation paid for what is taken and the damages paid for (or the value enhancement of) the remainder are to be completely separate elements of compensation. While it is tempting to try to capture the value created when the remainder benefits from the improvements on the property taken, to do so in this manner was ruled to be unconstitutional.

In the 1993 Schmidt case, property owners sought compensation for the diminution in value of their remaining property specifically due to the following four factors (referred to Schmidt factors): 1) diversion of traffic, 2) increased **circuity** of travel to property, 3) lessened visibility to the passersby, and 4) inconvenience of construction activity. It was found that the “owner’s damages did not result from the taking of property, but from the state’s new use of its existing right of way and of property taken from other landowners to widen it.” The four Schmidt factors mentioned were judged to be “community” injuries that were not subject to compensation.

The original State v. Schmidt case was tried in Travis county court in 1991. This decision awarded damages to Schmidt for the four factors. The state appealed and the Texas Court of Appeals upheld the county court decision in 1993. A writ of error was filed and the Texas Supreme Court reversed the Court of Appeals judgment in late 1993. A rehearing was overruled in early 1994. The Assistant Attorney General noted that because this case took so long to finally be decided in the Supreme Court, many claimants were awarded damages for Schmidt factors in the interim. Many of these were appealed and subsequently overturned.

The Assistant Attorney General and TXDOT see the reversal of the Schmidt case as a limited victory. Although none of them passed, many of the property owners’ rights bills introduced this session specifically sought to include Schmidt Factors as compensable damage or valuation elements. The Schmidt case does leave the door open for future claims however by stating: “the fact that we have never allowed recovery for severance damages like those claimed here, we are reluctant to hold that such damages can never be recovered. ”

The Attorney General’s office feels that there is still plenty of discretion as to the applicability of Schmidt over differing sets of circumstances. Regarding factors of value there is much room for subjectivity. Other staff noted that had Schmidt been upheld, the department likely could not have continued to build necessary improvements. As the appraisal section demonstrated in the years between decisions, appraisals conducted that included Schmidt factors were on average 75 % higher than ordinary valuations.

### Proposed Legislation

The Texas Department of Transportation has a legislative affairs office that develops positions regarding pending or existing legislation or regulation on both the federal and state levels. The legislative affairs staff communicates concerns and positions to relevant lawmakers, and acts as a lobbying entity on behalf of the department. ERA met with TXDOT’s manager of state legislation, who believes that the property owners’ rights movement will have sufficient

momentum to carry over into the next legislative session starting in January of 1997. Since so many related bills were introduced this past session, and only two passed, it is believed that many will be **re-introduced** in the next session. In particular, there were bills that only failed by a couple of votes that may pass the next time around.

In the 1993 legislative session two property owner's rights bills failed. Their failure was influenced by then governor Ann Richard's strong environmental stance. In the 1995 session, an anti-environmental "backlash" has been encouraged by new Republican representatives and a Republican governor. From the experience of legislative affair's office in speaking with lawmakers, three specific incidents were repeatedly mentioned as **motivators** behind the property owners rights bills. Interestingly enough, Schmidt was not mentioned, but rather environmental related situations were. These three environmental actions have added (or would have added) several layers to water quality regulations, expected to have major impacts on development activity:

1. The Edwards Aquifer pumping regulations,
2. A thirty-three County Critical Habitat designation, and
3. Five rivers and streams slated for **ONRW** designation. (Outstanding Natural Resource Waters)

Other legal staff thought that the property owners' rights movement was in part a direct response to the Schmidt case. Schmidt case factors were found in over thirty of the bills introduced this session. It was thought that this push came from the lawyers who had drafted legislation, rather than directly from the lawmakers themselves. It was regarded as common knowledge locally that many **of** the same attorneys who were involved with the Schmidt case were also involved with drafting "Schmidt Factor" legislation.

### New Legislation

The two property owner's rights bills that were passed do relate to this study, however they do not involve any "Schmidt Factors." One involves the appraisal process, and the other involves determining the takings impact of agency actions. **TXDOT** staff are now working on implementing new rules and determining their impact on the agency.



## SB 390

This new law states that any and all existing appraisals have to be disclosed to a property owner when an entity with eminent domain authority wants to acquire a property. Likewise, the property owners also have to disclose appraisals that were used in determining the final valuation offer. This takes effect on September 1, 1995. During our visit, the appraisal section chief was drafting implementation rules for distribution to the district offices. This represents quite a departure from their previous methodology, but is seen as a step that could eventually help them to begin using an administrative settlement process for acquiring property. On the other hand it was also feared that by having access to the appraisal that property owners would simply have more information to use against the state in a condemnation dispute or trial.

## SB 14

This is known as "The Real Property Rights Preservation Act. " Major features of the law are highlighted below:

- Parties can sue under this to determine if a government action resulted in a taking
- This does not apply to the formal exercise of the power of eminent domain For action taken on or after September 1, 1997
- Cannot recover losses under this and also recover under another law for the same economic loss
- Claimants have to file within 180 days from when they knew or should have known that their property right was restricted or limited
- Whoever prevails in the case is awarded "reasonable and necessary attorney's fees and court costs"

The department is uncertain how this will affect their activities. The Attorney General's office is charged with developing guidelines that will assist agencies in identifying and evaluating those actions that may result in a taking. SB14 charges agencies to prepare a "takings impact assessment" of a proposed government action. This assessment has to detail:

- The specific purpose of the action
- Identify how and whether the proposed action advances its stated purpose
- Identify the burdens imposed on private real property
- Identify the benefits to society resulting from the proposed use of private real property
- Determine if the action will produce a taking
- Describe reasonable alternative actions, and
- Determine whether alternatives would constitute a taking

One major concern of DOT is that under **SB14** they will face more litigation. It is still to be determined in what circumstances a Takings Impact assessment will be applicable. Will it be just for new projects not yet begun, will it be for new policies and regulations and not actual projects? The department is now actively trying to be very involved in creating guidelines for implementation and interpretation of the new law.

## Indiana Case Study

This case study highlights how secondary economic impacts to adjacent properties due to highway construction have been studied, handled, and experienced in actual practice within the State of Indiana's transportation process. Indiana was chosen as a case study because they had conducted a comprehensive study of secondary impacts on business activities.

In the course of conducting this case study, many people at **INDOT** and other state agencies were contacted and queried by telephone, and in depth interviews were conducted in person with selected personnel. A complete list of those contacted is located in the appendix. In addition, many people were kind enough to provide ERA with copies of reports, statutes, public information literature and other relevant materials. Their cooperation was greatly appreciated.

This case study begins with a synopsis of the study that **INDOT** conducted on the economic impacts of highway reconstruction projects on business activities. Then the public participation process is discussed followed by Indiana's land acquisition and appraisal procedures as well as the applicable legal issues involved with eminent domain and damage claims. Conclusions and implications of how Indiana's experience may be more widely applicable to **this** larger study effort are summarized in the concluding section of the case studies.

### The Study

#### Background

The Indiana Department of Transportation (**INDOT**) identified the need to examine the effects of road reconstruction on adjacent or nearby businesses and commissioned the Transportation Research Center at Indiana University to prepare a study. While the final draft has yet to be approved by **INDOT**, a 'draft technical summary' called "Effects of Road Reconstruction on Adjacent Economic Activities: A Retrospective Study," has been completed. The draft was published in March of 1995 and is written by James A. Palmer, J. Philip Cornwell, and William R. Black -- all professors at Indiana University.

After a review of this draft study, Economics Research Associates (ERA) determined that Indiana would make a good case study of how a state identifies and responds to the secondary impacts created by highways. ERA contacted **INDOT** officials, as well as the Attorney General's office. The attorney general handles any litigation related to property values and just compensation. In-person interviews were conducted with each of the specialists and relevant supplemental data was

collected and incorporated into this case study.

The decision to study the road reconstruction impacts was prompted by an experience that **INDOT** had during a road widening in the South **Bend/Mishawaka** area. According to the agency's Executive Assistant to the Commissioner for Marketing, State Route **23**, a two-lane road, was scheduled to be widened to five lanes with a continuous left turn lane. During the public hearing process, the owner of a fast food restaurant along **SR 23** complained that the construction would create tremendous negative business impacts to his operation and possibly put him out of business. The construction project involved a partial take of his property, reportedly a small piece of land, and access to his business was possible at all times. The property owner maintained that he would go out of business because of the interruption that construction would cause, and demanded compensation.

The State had no legislative guidelines or analytic approach for responding to claims that construction would hurt businesses in the area. The staff needed defensible impact analysis and information to help in determining if the claims concerning business losses were valid or not. The situation created issues for both **INDOT** and property owners adjacent to **SR 23**. The highway had been in place for some time and most of the businesses along it were traffic dependent companies. Their original siting decision was believed to be linked to their accessibility. However, growing traffic demands required expansion of the roadway, creating short-term access issues for the affected businesses. Some -- as indicated by those who were most outspoken -- perceived the construction activity and related disruption as threatening to their business viability. However, **INDOT** has typically found that the complaints are short lived and do not resurface once the project is complete.

Quantitative analysis was needed to determine if the business claims were valid and realistic; and to provide the agency with a tool to use in future instances.

## Methodology

The purpose of the study was to “identify the impact of major reconstruction projects on adjacent (nearby) economic interests. To what extent did these businesses and other establishments lose revenue and customers? Were they forced to close temporarily or permanently? Were the number of employees reduced, either temporarily or permanently? Once the reconstruction project was completed, were the negatively affected establishments able to recover economically? As twelve reconstruction projects across the State of Indiana were included in this study, of obvious interest were the economic impact similarities and dissimilarities from one project to another. Of interest,

as well, was whether differences existed by economic activity type.<sup>14</sup>

The study team tried to look at projects that lasted at least one year and that had been finished for at least two years; but only four projects (out of the twelve identified) met this requirement. However, as mentioned above, all twelve projects were used in the end and face-to-face interviews were conducted with businesses along each highway project. The questionnaire used was developed through a series of tests. (See the appendix for a copy of the survey instrument.)

Unfortunately, the precision that the study hoped to achieve was never realized. For a variety of reasons the results of the study “rest entirely on the perceptions supplied by 417 interviewees. ” Because there was frequent turnover in managerial staff at the businesses providing the information, there was little institutional memory of events or their impacts. Also, the people responsible for monitoring the sales and financial data were “often located off-site,” making it difficult to secure the information. For the most part, there was no way of checking the veracity of the figures supplied by the businesses -- a problem with all surveys that attempt to solicit financial information. Finally, it proved very difficult to contact the owners of establishments that went out of business. The people at the “new” or replacement business “often did not know or could not recall the owners or business names of the failed entities. Even if names and telephone numbers were acquired, there was no guarantee of cooperation or, for that matter, actual contact. Expenditures of time and money to trace and contact owners of failed businesses was simply not cost effective or efficient. ”

## Results

Below is a summary of the study conclusions based on the 417 responses:

- Almost two-thirds of the businesses affected by a reconstruction project did not own their properties. This is important both because it shows secondary impacts can affect property owners and their tenants. As a result, transportation agencies that want to help businesses mitigate secondary impacts must contact both the property owner and tenants.
- Only one in eight businesses attended the **pre-construction** public hearing and only one in

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<sup>14</sup> ““Effects of Road Reconstruction on Adjacent Economic Activities: A Retrospective Study”, prepared for the Indiana Department of Transportation (March 1995) -- James A. Palmer, J. Philip Cornwell, and William R. Black, page I-1.

twenty submitted written comments -- again a problem if the transportation agency wants to mitigate secondary impacts.

- Two-thirds of the businesses experienced problems attributable to a construction project. The major problems they identified were: the restriction of access to entrances to their facilities; traffic congestion and delays; and closure, blocking, or moving of entrances to the business.
- One-half of the businesses had a decrease in gross sales during construction -- the average loss in gross sales per business during construction was **13.1%** of the **pre-construction** gross sales. The worst losses were experienced by gasoline service stations, car washes, and other non-repair automotive service establishments (which suffered a **41.7%** decline); groceries, bakeries, and other food stores (down **30.6%**); and home furniture and furnishings, consumer electronics, music, and computer stores (down **28.4%**).
- Nearly one-half of all businesses lost customers during the construction project.
- Most businesses that lost gross sales and customers during a construction period achieved full recovery within two years (i.e., they returned at least to their **pre-construction** sales and patronage levels).
- However, one-fifth of all businesses indicated they had experienced long-term negative effects (most often continued loss of customers or gross sales) as a result of construction activities. Gasoline service stations, car washes, and other non-repair automotive service establishments were especially vulnerable to continued negative impacts as a result of the reconstruction projects.
- Most businesses attempted to retain both part- and full-time employees during the construction project. The rate of employee reductions by all surveyed businesses was lower than would have been expected by the reported decreases in gross sales and customers.
- More than one-half of the businesses experienced long-term positive effects as a result of the completed construction project. The most frequently cited positive effects were smoother, faster traffic flow that accommodated more traffic and easier or better access to the businesses.

## Recommendations

The survey results of the study apparently indicate that while there was economic harm done during a typical construction project in the target areas, it was usually short-term and affected certain businesses more than others. The study concludes with some recommendations to help mitigate the negative economic effects of road reconstruction. The recommendations focus on ways that **INDOT** can improve its communication with impacted businesses and work with them to mitigate the negative economic impacts.

### Public Participation

The experience of **INDOT** with the business mentioned above highlights the important first step in any road/highway project -- public relations. It is the legal mandate of the Public Affairs Division to hold hearings that inform the community of upcoming construction and allow people to comment on the project. In Indiana, the comments are used by **INDOT** to help mitigate the impacts of highway construction, although the agency has no one centralized program or process or place for the mitigation of economic impacts. Instead, as a response to comments at public hearings and in response to complaints once a project begins, mitigation is performed on a case-by-case basis. The mitigation effort is referred to by **INDOT** as "customer service."

Examples of customer service include the following. On a massive interstate project in the Indianapolis area, brochures were produced for businesses. The brochures contained information on the scope of the project, the construction timetable, who to contact if there was a problem, etc. **INDOT** found that if they effectively got the information out to the businesses, complaints were reduced. As a public relations experiment, **INDOT** once had summer interns stationed at various rest areas showing how people could avoid construction areas. Apparently this was very popular, especially with travelers who were alerted in time to alter their route. But the State has yet to duplicate it. Another public relations effort included an outreach campaign for a project near the Indianapolis airport. Again, brochures were produced, and this time they were given to all relevant airport businesses such as airlines, car rental companies, travel agencies, etc. These businesses appreciated **INDOT** informing them of what was going on and as a result the number of complaints was reduced.

Another successful mitigation effort occurred in **Jeffersonville**. The main ramp into downtown from the **I-65** Bridge required reconstruction and service and access was expected to be disrupted for **27** days. Prior to construction, there were extensive complaints from businesses in downtown. As a mitigation measure -- of a sort -- the contract for the work had an incentive

clause. If the contractor finished the work in less than 27 days, a bonus would be available. The rationale is that with such a major disruption it makes more sense to complete the construction as quickly as possible.

Finally, the consultant asked if ISTEA had changed INDOT's public participation or transportation planning process at all. It gave the agency more money for funding of projects in general, but there was not more money earmarked for additional public relations or public participation activities. So despite the guidelines of the ISTEA legislation, nothing had really changed in Indiana.

### Land Acquisition and Appraisal Procedures

A second aspect of this case study involved soliciting information from the Appraisal Section of the Division of Land Acquisition at INDOT. The division comprises a staff of 30 appraisers who appraise property that INDOT plans to acquire for highway projects. The division generally follows the guidelines in the 49 CFR Part 24 regarding property acquisition when appraising property. The rules tend to be more stringent than those of the State and as a result supersede them. INDOT has developed an appraisal manual for staff use based on the federal regulations and their appraisal policies and procedures also adhere to any applicable state laws.

Once the property is appraised it is the job of the Buying Section to actually contact the property owner and make an offer. Once the appraisal for a piece of property has been completed, the State contacts the property owner and offers INDOT's appraised value for the property. The property owner can disagree with the appraised value, and if there are valid reasons for the dispute, INDOT will enter into negotiation with the owner. From this negotiation INDOT can increase the offer as an "administrative offer/settlement" and hopefully this new offer will resolve the issue with the property owner. INDOT buyers have the discretion to enter into the negotiation process and can also file what is known as a "10 day letter." This is simply a letter sent to the Attorney General's office letting their lawyers know INDOT has a dispute with a property owner and may have to file for condemnation.

Administrative settlements usually do not involve a great deal of money and can be related to a variety of unique factors. Frequently the settlement is more like a "cost to cure" (see below) because the property owner felt that there was something special about his property that added value to what was determined to be fair market value. The settlement is also often related to "hardship" because the real estate market is depressed or the economy is doing badly at the time of acquisition. INDOT has to be careful with this process because there is an acknowledged risk



to paying a premium for something that cannot be accounted for in an appraisal. Settlements normally will not be used or are less effective when **INDOT** needs to acquire property for contiguous or concurrent projects. If nearby landowners learn that another property owner received an award from **INDOT** beyond the appraised value, they are likely to demand their own inflated award whether it is justified or not.

These settlements are not considered ‘corrections’ of the appraisals. If the property owner has an informed critique of the original appraisal, **INDOT** can order a review of the appraisal that could end up changing the value of the property.

As mentioned above, appraisals follow federal regulations on standard appraisal procedures and methods to determine the value of a property. The owner of the property is entitled to compensation (see below for more on the legal ramifications) for only the appraised value of the property taken by **INDOT**. If **INDOT** does not take a parcel of property that is still affected by the highway construction (i.e. a secondary impact) the agency does not award damages or compensation for economic losses. In the following section, there is a more detailed description of **INDOT**’s legal responsibilities. In the case of a partial taking, the compensation is either the appraised value of the piece taken or the difference in the value of the property before and after the taking.

One interesting exception to this is the case of an “uneconomic remnant. ” The **49 CFR Part 24** requires that if “the acquisition of only a portion of a property would leave the owner with an uneconomic remnant, the Agency shall offer to acquire the uneconomic remnant along with the portion of the property needed for the project. ”

The disputes that arise in this situation are often centered on the application of the concept “uneconomic remnant. ” In Indiana, these disputes are largely settled through negotiation. If tried, cases go to a jury trial, and face the likelihood that the jury will side with the property owner. As a result, there is a strong **dis-incentive** for the State to try these cases and a strong incentive to settle. The State is not legally responsible in these cases for what is known as “substitution costs. ” **INDOT** pays the owner only the agreed-upon value of the remnant and **does not** pay for the owner to move and set up a business somewhere else.

However, there is money available for homeowners to find a new house and move. Homeowners who lose their property to a right of way are known as “displaced persons” and are entitled to replacement housing. (By Subparts C & D of **49 CFR Part 24**.) **INDOT** has a staff person whose sole responsibility is to help displaced persons and administer relocation benefits.

INDOT has compiled some figures on property acquisition for this report. INDOT's condemnation rate is approximately 10%. In a typical year INDOT acquires about 1000 parcels of property. About 5 % of their acquisitions are obtained through administrative settlements. These settlements are essentially money above and beyond the appraised value of the property; but the amount of money involved is relatively small. About half of the settlements are for less than \$1000 and most of the remaining are for less than \$5000. Very few settlements are for more than \$5000.

### Legal Issues

The consultant, as part of the field research for this case study, met with the Deputy Attorney General for the State of Indiana. Indiana has a long case history related to litigation dealing with secondary impacts. In almost every case the courts have ruled in Indiana's favor and have said that these impacts are not compensable. The legal reasoning is that property owners are "not entitled to the free flow of traffic in front of their property" and as a result should not be compensated for its interruption or removal. This legal opinion is the foundation for the State's policy on secondary impacts. Clearly, its key implications are linked to such things as visibility, accessibility and their relationship to business viability. Other secondary impacts like noise and emissions are not covered.

The court's reasoning is similar to the locational issues regarding how transportation routes accommodate business. Specifically, businesses choose to locate near a highway, not the other way around. Over the long term, the net benefits to business are believed to be positive -- with favorable impacts surpassing short-term negative impacts related to construction. Business contributions to the maintenance and construction costs of the highway through taxes do not match the benefits created by the adjacent highway. INDOT does not charge the business for these benefits. As a result, INDOT does not expect to pay damage awards to the business inconvenienced by the highway.

A recent court case reaffirmed that loss of profits to a business during construction is not compensable. The case, ***Town of Newburgh v. Pecka***, decided in 1993, involved a farm owned by the **Peckas**. About one acre of this farm was needed by the Town of **Newburgh** for a sewer line. The Town compensated the **Peckas** for the land they took. The **Peckas** argued that farming profits lost as a result of the construction of the sewer should be considered as an element of damages, in addition to the value of the land. The court, in deciding in favor of the Town of Newburgh, explained that the "problem with this case is obvious. Lost profits awarded as consequential damages due to an expectation of diminished crop yields, coupled with an award

based on the reduction of value in the land based on the identical diminished ability of the land to produce crops, results in a **duplicitous** recovery. **Duplicitous** recoveries are heavily **dis-favored** in law. "

Even more relevant for our purposes, the court made it clear that Indiana case law did not allow property owners to be compensated for lost profits and lost income. The court cited a 1971 case known as **State v. Heslar** in which the admission of evidence of lost profits constituted "reversible error. " In deciding this case, the Indiana supreme court found a previous case (**State v. Stabb**) at fault in that it:

contained language that any consequential damages were allowable.. . [W]e here expressly overrule **State v. Stabb** as it relates to damages for loss of profits and to its definition of consequential damages. Our policy should not be such as to place an undue burden upon the State in acquiring land for such public improvements as highway construction when such improvements are considered to be in the public interest. Allowance of such remote and highly speculative items as loss of business or profits would do just that.

Therefore the court found both that evidence of lost profit was "too remote and speculative." Because the **Peckas'** lost income from the farming operation was reflected in the lower value of the land, to award lost profits would have permitted a **duplicitous** recovery.

Along those lines, interim construction losses to businesses are not compensable in Indiana although **INDOT** will pay for "costs to cure. " This means that certain costs incurred by a business related to a construction right of way will be compensated by **INDOT**. For example, if the needed right-of-way requires the pumps of a gas station, not only will **INDOT** pay for the land the pumps are on, but they will also pay for the replacement of the pumps. This assumes that the "cost" is not worth more than the entire property. In that case **INDOT** would just offer to buy out the property owner.

When a property owner is unwilling to sell to **INDOT** (for whatever reason) then **INDOT** must invoke their power to take the land. In any case, **INDOT** must first make a good faith effort to offer the property owner fair market value for their property. Once **INDOT** feels this has been done, and the property owner is unwilling to negotiate or sell, then the agency files a complaint with the court seeking to take the property from the owner. The complaint must show that the taking serves a public purpose and is necessary for the completion of the public project. The property owner can then object to the complaint if it does not serve a public purpose or is

considered unnecessary (both are legal tests) or if **INDOT** did not follow the proper legal procedure. If the complaint is legally sound the property owner is still entitled to their 'day in court.' However, most cases are either settled or entered into mediation.

Mediation has been embraced by the court system in Indiana and mediators are court appointed and vested with legal authority to settle disputes related only to compensation. The mediation process is really just an informal discussion with both sides presenting their case and the mediator attempting to reach a dollar figure that both sides will accept. If either side is dissatisfied with the result they can appeal the mediator's decision. Mediation has become a popular way in Indiana of handling eminent domain cases although the process is too new to determine its effectiveness cost saving for the State.

## **Wisconsin Case Study**

This case study highlights how secondary economic impacts to adjacent properties due to highway construction have been studied, handled, and experienced in actual practice within the State of Wisconsin's transportation process. Wisconsin was chosen as a case study in part because they had conducted a study of secondary impacts on business activities, and because they have a model noise barrier and siting mitigation program.

In the course of this case study, many people at **WisDOT** and other state agencies were contacted by telephone, and in depth interviews were conducted in person with selected personnel. A complete list of those interviewed is located in the bibliography. In addition, many people were kind enough to provide the consultants with copies of reports, statutes, public information literature and other relevant materials. Their cooperation was greatly appreciated.

This case study begins with a synopsis of the study that **WisDOT** conducted on the economic impacts of highway reconstruction projects on business activities. Then the public participation and public information process are discussed. The case then explores Wisconsin's land acquisition and appraisal procedures as well as applicable legal issues involved with eminent domain and damage claims. Finally, there is a discussion of the various mitigation efforts that have been recommended and implemented. The case study finishes with some conclusions and implications of how Wisconsin's experience may be more widely applicable to this larger study effort.

### The Study

#### Background

In 1987, the Wisconsin State Legislature requested that the department identify problems associated with highway detours during construction and reconstruction projects, and to study impacts on the economy of highway improvement projects. A report was completed in 1989, entitled "Legislative Report: Highway Reconstruction and Detour Impact Study." It was conducted by the Wisconsin Department of Transportation Division of Planning and Budget, Division of Highways and Transportation Services. (No author is listed on the report.) The report examined detour and construction impacts on businesses and residents located adjacent or near highways as well as on motorists. The impacts on motorists, while important, were thought to be not relevant to the scope of this project, and are not addressed in this case study.

The consultants had access only to the legislative report. A more extensive departmental draft report with technical sections was produced in June of 1989, but was not available from the department library. According to the director of public improvements for WisDOT, there are only two people still with the agency who were involved with the study. It was noted that the examination of peripheral impacts on business was a particular focus because of local opposition to a bridge reconstruction project in central Wisconsin. As recounted, there was one business in particular that felt "unduly burdened" by the project. They sought compensation for the loss of sales. However, Wisconsin law is quite clear prohibiting this kind of payment. Through the political process the study was requested, funded and initiated. (The request was an attachment to a bill.)

It was not felt that the bill or the request represented any trend or particular focus on property owners' rights. However, the staff noted that at any given time there is always some kind of property owner's rights issue circulating through the state house.

The study coincided with a larger effort to **re-orient** the department towards a customer service mentality. At the time the study was initiated in the late mid 1980's, the department was moving into a policy for "quality management of projects." This effort included what is referred to as "system performance." Within this system, reconstruction or improvements to existing roads are examined in terms of condition, mobility and safety. As discussed in a later section, this effort to focus on a customer service orientation also extends through the public participation process.

## Methodology

The WisDOT report studied eight highway projects that had been completed between 1985 and 1987. These projects were chosen to represent a cross section of settings, and to avoid a strong bias of any one type of project or situation. The types of projects included, "long detours with and without local access; construction while maintaining traffic and no detour; detours resulting from the replacement of a bridge; projects with **incentive/dis-incentive** provisions in the contract; projects with local community support and nonsupport, and projects through central business districts, strip development or recreational areas."

The project engineers worked to identify businesses and property owners that were adjacent or were likely to face impacts. As part of the **pre-engineering** phase they did field surveys and classified the businesses by types. Then the businesses were surveyed regarding changes in sales volume and employment and the overall effectiveness of the department's mitigation measures. One of the studies found in our literature review -- a study conducted in Leeds, England that cited

the unreliability of self-supplied retail sales data. However, there was no mention as to the reliability of sales data provided by businesses. (See the appendix for literature review.)

## Results

General findings were that retail businesses experienced the worst impact. If the business was in trouble before the construction, the construction impact was likely to “finish them off.” If the businesses were vital and thriving before and implemented aggressive survival tactics, they came out even stronger. The severity of impact was found to be directly related to the duration of the construction project. Businesses that worked to mitigate and minimize impacts themselves had a lower reduction in sales and a quicker return to normally projected growth levels. Impacts varied greatly by business type, with restaurants and retail being the hardest hit on average. Professional services and wholesale activities suffered only minor losses in contrast. The survey found very little change in employment among impacted businesses.

Among the study’s projects, the average period of construction lasted four months. Businesses suffered an average of **10.8%** drop in sales volume during construction. Within that average however, the impact varied widely by type of business. On average, the percentage loss in sales for retail businesses was **17%**, for restaurants and taverns was **16%**, for gas stations and convenience stores was **13%**, for wholesale businesses **3%**, and for professional services **2%**. The impact on employment during construction was far less severe. Eighty-nine percent of the businesses surveyed reported no change in employment during the construction period. Nine percent reported a decrease in employment, and **2%** reported an increase in employment during construction.

The survey also asked business owners about the longer-term impact on sales resulting from the reconstruction project. (For example, did sales return to normal, stay down, or increase after construction.) Fifty-three percent reported no long-term impact on sales, **31%** reported a positive impact, and **16%** reported a negative impact. Those who reported a negative impact were generally found to have also suffered negative changes in access or loss of parking.

Efforts to mitigate the impacts of construction were implemented for four of the eight projects studied. Two affected areas in particular pursued very aggressive measures, and showed the least impact, and experienced the quickest recovery after construction. Mitigation measures included local participation in contractual incentive clauses, the coordination of construction schedules with slow business periods, business district promotions, sharing of joint parking lots, maps showing changed access mailed to customers, directional signs, and other promotional efforts.

## Conclusions and Implications

The report expressed a desire to “develop a process for evaluating individual projects to determine the potential for economically justifiable mitigation measures. ” From interviews with many DOT staff members apparently a comprehensive process such as this was not developed. However the department did initiate just such a process for one impact in particular: noise. The retrofit program for siting and determining eligibility for noise barriers is discussed later in this section.

Other changes were accomplished after the study. The Facilities Development Manual was changed to include a process for identifying potential issues and impacts during highway construction. Included in the manual is a table called a “Public Information Action Worksheet. ” The table features several categories of impacts. Their identification in very initial stages of planning serves as an advance indicator of public concern and identifies future potential issues for overall planning and project design approaches.

Other efforts that are in line with the customer service orientation have been implemented. For example, just before construction, the project engineer will visit and give his business card to all property and business owners in an affected area. People are given maps, schedules and phone numbers for all locations, i.e. the district office, the construction shed, a mobile phone. If there are any immediate concerns or problems that arise, people feel as though they can always reach someone or at least leave a message. This has been very well received by the road building community.

The report identified other mitigation strategies and recommendations. It was recommended that a video be produced explaining the construction process. In response to this, a group of people was convened comprising road industry building people, residential land owners, business owners, agency representatives, and other interest groups. With their input instructional videos were produced: “The Facilities Development Process, Building Our Future: A Guide to Highway Reconstruction, and “In This Together: How to Survive and Thrive Through Roadway Reconstruction. ” “Building our Future” details the construction process and what affected businesses and property owners could expect during the life of the project. This was to allay many fears, mostly of the unknown. It offers strategies and recommendations, all centered on continued communication with the project engineers and applicable department personnel. “In This Together” features business owners who described their actual experience with reconstruction impacts and mitigation projects. This video is excellent because all manner of business owners tell it like it is, the good and the bad.



Other recommendations made in the study have been implemented, although staff noted that development coordination with utilities was still a problem because it is difficult to get local governments to work with the State.

### Public Participation

In general, the department is trying to become more attuned to public needs. As mentioned earlier, the department instituted a quality improvement program that produced changes in orientation to be more focused on customer service. Public participation and public information are part of the overall process by which concerns (especially regarding potential economic impact) are initially heard, and by which public concerns are continuously allayed.

From a public information standpoint, WisDOT's community affairs and public relations approach is different for every project. WisDOT uses brochures and pamphlets to help inform businesses and property owners, and for very large or long projects special measures are taken. For example, for the East-West Freeway project in Milwaukee an advertising agency was hired to design a comprehensive public information campaign about the project.

Public participation is guided by a set of practice standards. Many of these standards are dictated by regulations, such as those in ISTEA that mandate opportunities for public involvement in the transportation planning process. A cartoon diagram that maps the development process and all opportunities for public participation is included in the appendix. This is used by public information officers to show the public how any public improvement project proceeds from start to finish.

From this diagram, it is apparent that there are at least seven public meetings or hearings throughout the process. This does not include meetings with property owners and businesses in the project area who receive additional meetings of their own. In addition to the "official" hearings and public meetings, often extra meetings will be conducted with impacted individuals or business groups in the project area. Although WisDOT holds all required public hearings, most people who will be affected by a construction project will be talked to one on one. The hearings tend to attract more special interest groups who want to know in a general sense how the project will proceed. When WisDOT goes into the community to explain a project to individuals or groups they always bring an engineer and the contractor so that people can ask them technical questions directly.

Another pamphlet produced by the State Department of Industry, Labor and Human Relations and the Attorney General's office, fully explains the "Rights of Landowners Under Wisconsin Eminent Domain Law." It offers a very clear description of all the steps involved in eminent domain and land owner's rights for most public improvements. It also has a glossary of legal and appraisal terms used that is most helpful. A copy of this pamphlet is reproduced in the appendix.

Wisconsin uses both the traditional formal and new style informal public meetings. In the formal setting one testifies by addressing the assembled group by microphone from the audience after the presentation of information. Informal public meetings feature displays and information on the project and then audience members simply sit with various court reporters in the room and give them their testimony. Citizens can also fill out comment cards that become part of the official record. They have found that the informal meetings are popular with people who would otherwise be intimidated by the formal meetings. The informal meetings are also referred to as "open house" or "Georgia Style" for having originated there.

**ISTEA** has forced **WisDOT** to work closely with local **MPOs**. In addition, the whole **ISTEA** process helps orient public involvement. The creation of the **MPO's** (as mandated by **ISTEA**) helped to create a framework through which the public involvement and participation process could flow. It also helps to create a coordinating entity between the public and the state, as well as a more accessible focal point around which citizen groups can get information or organize their concerns. The involvement of **MOO's** tends to vary largely with the size of the public improvement or the extent of the impact of the project. In response to a request from the US. Department of Transportation, **WisDOT** recently documented their fulfillment of public participation as mandated by **ISTEA**.

The Wisconsin Public Affairs office was asked to participate in a **FHWA** study of the public participation process conducted by Parson's **Brinkerhoff**. This study is called, "Innovative Techniques for Public Involvement in Transportation Planning and Project Development." This effort will result in a revision of the **FHWA** training manual on public meetings and hearings and production of a large catalogue of public involvement techniques.

## Land Acquisition and Appraisal Procedures

In general, WisDOT's appraisal staff and land acquisition people worked under the policy of "when in doubt we pay for it." Negotiation is always preferable to condemnation. Corridor planning is used as a tool to avoid the use of condemnation. When planning a new corridor or upgrading an old one, WisDOT encourages public participation so that people can voice their concerns about noise, dirt, etc. before the project begins. This helps WisDOT to design the improvement in a way that, if possible, can decrease the need for condemnations.

The property acquisition process under Wisconsin Law works as follows: First a property or portion thereof is appraised for "fair market value." For partial takings or remainders, the amount of compensation is based on the value before and after the date of taking, assuming completion of the project. Any damages due to construction are part of the "after" value of the property. Any difference between before and after value is compensation due to the owner. The property owner receives a copy of the approved appraisal along with a copy of the official plat.

If they are not **happy** with the appraisal, they can hire an appraiser for a second opinion, at DOT's expense. They then have **60** days for negotiations if the second opinion is different or they are not happy with the second opinion. If the **acquisition continues voluntarily**, they have six months to make any claims.

If the acquisition is not voluntary it goes through the eminent domain/condemnation process. The property owner then has forty days to contest the right to acquire. When going through the Eminent Domain process, owners have two years to make a claim for additional compensation.

The condemnation process is regulated under Wisconsin State Statute (Chapter 32). (Note that per division FHWA in Madison, changes are soon to be made in this procedure.) The statute only discusses partial takings and refers to the award of damages resulting from the "severance of land." It says that this award should consider damages "which may arise during construction of the public improvement, including damages from noise, dirt, temporary interference with vehicular or pedestrian access to the property and limitations on use of the property." Those damages stated do closely parallel many of the secondary effects that are the subject of this study. This language is a relatively new addition to Wisconsin's Statutes, having been added sometime in the 70's.

The Attorney General's office did not recall a partial taking case in which the owner tried to claim severance damages related to noise, dirt, circuitry of travel, etc. It is hard to prove or quantify exactly what those damages should be. Just compensation is usually determined by figuring out the difference in value of the property before the project, and then after the project is finished. The problem with the secondary effects such as noise, dirt, etc. is that they are hard to quantify as actual effects, and it is hard to prove how they directly affect the value of the property.

The State has a 5 % condemnation rate. That means that 95 % of property acquisition proceeds on a voluntary basis. Of the condemnations that do take place, it was estimated that about half of them end up in court. It was believed that this rate is one of the lowest in the US and is probably due to WisDOT's encouraging the use of second opinion appraisals. The department has found that some lawyers urge their clients not to get a second opinion on value. They then file a lawsuit and do not negotiate with WisDOT until the case goes to court.

By Wisconsin statute, if a case goes to trial and a jury finds that the value offered is **\$700 and 15 %** higher than the award, DOT has to pay all legal costs incurred by the property owner. This legal cost provision has created an ironic situation for DOT property acquisition. Often the legal costs will far out strip the difference in the value of land or even the entire value of the land at issue. Therefore DOT has a very strong **dis-incentive** to try cases and has a very strong incentive to settle cases. As stated earlier, they tend to operate on the policy that "when in doubt, pay" as a strategic policy to avoid the costs of condemnation and trial.

Regarding the proposed changes in federal legislation, there was some discussion as to whether the diminution in value impact related to only regulatory actions, or to any legislative, agency or administrative actions. For example, environmental regulations that create a severe diminution in value or limit on land use, were contrasted with the construction of a highway along a given alignment, which is not a regulatory action, but more of an agency administrative action. This distinction has big implications for all state and federal agencies, especially as it applies to the provision of what is thought of as basic infrastructure for society.

### Legal Issues

As mentioned earlier, last year a "property owners' rights bill" was introduced in the state legislature. The bill was not passed but had language similar to Congress' language and said that the State had to compensate property owners for action that caused a **50%** diminution in property value. According to the Attorney General, one of the strong motivational factors behind the bill was restrictive coastal zoning laws that affect the ability to build on lakefront property.

The **EIS** (Environmental Impact Statement) for projects includes **socio-economic** impacts. Although typically there is not much in-depth economic analysis in an **EIS**, the process is sometimes used by businesses or residents to hold up a project because they think it will have a negative economic impact on the area. An environmental stumbling block is easier to invoke than an economic one, even if the motivating factors behind the opposition are economic in nature.

The Wisconsin Attorney General's office is only involved if there is a taking involved. When there is no land acquisition involved, but a property owner seeks damages or compensation, DOT handles the issue through negotiation. The law is clear on not allowing damages unless there is an acquisition, that usually negotiation is sufficient. (Negotiation is not meant to imply that they gain compensation, but rather that their concerns are allayed.)

The legal reasoning for compensation cases is that businesses and residences are not charged by the State for the benefits they receive from highways. They are not entitled to "the free flow of traffic." As a result, unless the State actually takes property for a highway project the adjacent or nearby business is not entitled to compensation for a loss in profits related to the construction, nor is a residential property owner entitled to compensation for a loss in value without there being a taking of rights or a loss of interests.

### Mitigation Efforts

In general terms, when a department action does not touch the property they do not pay for any damages or mitigation. At times the department will grant permission for temporary signs to be erected within a ROW to show a detour to a store, for example, but they would not pay for the sign.

The one major secondary effect in our study that Wisconsin does address is noise. Wisconsin Administrative Code -- "**TRANS 405**," which closely follows the Federal Highway Administration's policy in **23 CFR 772**. It became effective in September of **1989**. **TRANS 405** has been audited by the federal general accounting office, who found nothing wrong with them. It is so good, that the federal government is basing its noise laws on **Wisconsin's**. The department has been giving out information about the program to departments around the country. Now that federal guidelines will be coming out that deal with noise, Wisconsin may have to modify their rules slightly. Since the federal rules are apparently based on Wisconsin as a model, modifications will likely be minor.

The law has its origins in a prior noise abatement effort that was ad hoc, disorganized, and ineffective. The disorganization of the process led to a great deal of debate and dispute as to who was eligible for what kinds of mitigation. The goal was to create criteria by which projects could be evaluated for being eligible for noise abatement, and prioritized for mitigation. **TRANS 405** set criteria for eligibility for noise barriers based on specific increases in the decibel level from a highway.

Since the criteria for noise impact are around + **15dB's**, it is mostly new roads that are likely to create an impact that could call for mitigation. However, if the new road is in an unpopulated area, there may be no “receptors” for the noise, and hence no actual impact. As for future impacts, this is calculated for the design year plus the twenty-year projected traffic level. Noise contours for planned alignments are mapped and local jurisdictions are alerted as to the areas that would likely experience future impacts, should development occur within noise contours. Noise contours are not part of the **plat** or official records of jurisdictions. Once DOT sends the information to the jurisdiction, their obligation ends. For example if a developer neglects to inform homeowners that their home is within a future noise contour, and then the road is built, DOT is not liable for any noise damages if the jurisdiction had been properly informed of future plans and impacts. Developers who build in areas with existing roads and noise contours have to comply with the laws and rules of **TRANS 405**.

The law spells out very clearly what levels of noise and what magnitude of change or incremental increase would dictate that there is an impact. Existing guidelines had left some discretion, actually too much of what was termed “wobble room.” There is still some discretion in the criteria, so that future levels can be accounted for in impact projections. For example the language is stated as, “approach or exceed.” However, simply because there is an impact they do not always mitigate it with barriers.

Within the design process, noise reduction measures are also investigated. For example, the alignment of an improvement could be shifted to have a less detrimental noise contour at a far lower cost than erecting barriers. The limit for noise barrier spending as stated in **TRANS 405** is **\$30,000** per impacted dwelling unit. This sets a threshold for deciding what projects are just too expensive for the benefits of mitigation. (The local jurisdiction has to contribute the remaining funds beyond the **\$30K/DU** level if noise barriers are still desired.) By using dwelling units as a measure, the mitigation tends to focus on the most densely populated areas that may be affected. In this way, they try to get the most intensive mitigation for the use of program funds.

As a part of the whole codification of noise procedures, the department studied existing roads and noise impacts and determined where barriers would be eligible across the entire state. This "**retro-fit**" study was completed in May of 1990. The retrofit program identified all existing highway areas that would have qualified for mitigation or barriers had **TRANS 405** existed years ago. After the program, no other existing projects are eligible for mitigation. Under the retrofit program, the state had offered the City of Madison six barriers. The city elected to not participate in several of the projects either one for lack of resident support, or lack of local funding. (In some cases, the local residents preferred to maintain their views.) It was felt that **TRANS 405** could possibly be applied to other transportation modes. Light rail would be especially applicable but current technology makes them relatively quiet to operate. For airports where noise can at times be a contentious issue, there are different measures and criteria than are found in **TRANS 405**. For airports, air noise contours are mapped. Property subject to impact are sometimes acquired, or at times payments are made for insulation or damages. For airport noise, vibration is also a secondary effect impact, although this is somewhat beyond the scope of this study.

The Department indicated that since the implementation of **TRANS 405** and the retrofit program, the process for dealing with impact of highway noise has been **smooth**. To put noise mitigation in context, it has been the experience of the noise engineer that noise is not really a major issue. Rather, safety is the most important over-arching issue.

## Conclusions

Transportation planning and implementation seem to be facing a paradoxical situation. On the one hand, the government and states are reducing spending and cutting budgets, and on the other hand, federal and state agencies may be required to pay damages for many more kinds of negative impacts. In the name of providing more equitable treatment **and** reducing government regulation and government influence on property and the private citizen, it seems as though agencies actually have more and more procedural and legal obligations to meet. With smaller budgets but more claims and higher legal costs, transportation funding many soon become inadequate to carry out fundamental maintenance and improvements.

From the preceding research and case studies it appears that a key approach to dealing with more regulatory standards, the compensation of negative impacts on property value or businesses, and the exposure to litigation, is to adopt more flexible tools and techniques for dealing with these issues at every stage within the agency or department. This can range from adopting more inclusive and “self conscious” project design and public participation in initial planning, using flexible and “user friendly” property acquisition approaches and purchasing techniques, creating more opportunities to settle disputes before they go to trial, and putting an end to abuse of the legal system for gaining compensatory damages.

Techniques for dealing with secondary economic impacts cannot be examined without considering the larger context of transportation funding. **ISTEA** created sweeping and fundamental changes in how the government and the states fund all transportation improvements. Five years later, full implementation of these changes is only now being realized, and the impact of these changes is still not widely understood. However, **ISTEA** will soon be facing **re-authorization**, and still more changes are anticipated. Superimposed on that are growing concerns in Washington that spending must be cut in all departments and agencies to reduce the federal deficit. Ideological shifts about the acceptable amount of government influence on property rights that are mainly anti environmental in origin, additionally threaten to further complicate the use and effectiveness of funds for transportation improvements.

Ultimately, the treatment of secondary economic impacts should be considered within a balance between negative and positive results. First, it is essential to evaluate how the potential for additional compensation for damages will affect the ability of highway agencies to fulfill their primary missions. Then, secondary impacts should be quantified and addressed in terms of the before, during, and after, for a complete understanding of how impacts are experienced over time, not simply at one point in time. This creates a more balanced and realistic view of what kind of cumulative impact highway activities actually have on property value and business.



It is clear that there is no consistency in policy concerning the mitigation of negative economic impacts caused by highways. The review of case law shows wide variation in what the courts judge to be compensable impacts, reflecting differing legislation and translation of the law. Part of the problem rests with the amorphous state-of-the-art of quantifying impacts and the difficulty in determining causal relationships between highway construction and operation and loss of revenue or property value. The courts have had challenges in linking secondary impacts with business profits. Findings are speculative, because indeed, business profits are speculative, they say. Another key area that will require clarification is “To what are property owners entitled?” Some courts have ruled that property has no right to access to transportation facilities; therefore if access or visibility is disrupted for a period of time, the resulting impact deserves no compensation. The thinking is that the “public” paid for initial highway improvements **and** if a property owner benefitted from this, it is a windfall -- not considered a negative impact on the property value if the windfall disappears.

The ultimate philosophic/legal area to be addressed is: what rights do property owners have in the broader context of the public interest; and should the compensation policies be weighed in light of the cost of (or) restrictions this places on the aggregate need for transportation and access. Clearly some of these answers will be determined in the political arena.

Policy decisions are driven by priorities. A key question that the above information hopes to address is: Are the only impacts that matter negative, or are there other measures, perhaps of net impacts, that can inform policy directions. Again at the federal level there is the need to establish guidelines that set standards and define methodologies that can better measure impacts so that if policy continues to change, there are in place tools to quantify the issues and help direct policy.



## **Appendices**

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## Appendix 1: Literature Review

### “Valuing Localized Externalities”, *Journal of Urban Economics* (1992) -- Raymond B. Palmquist

This article discusses the general use of hedonic techniques (which is just a way of estimating the price of something as a function of various characteristics) in measuring localized externalities, specifically highway noise”. Housing is made up of a bundle of characteristics, and many of these characteristics cannot be altered easily at a particular site. Therefore a regression equation using these characteristics as well as a noise variable will effectively calculate the marginal willingness to pay for quiet, in relation to the price of the house.

Data was collected from the Seattle area on house prices and various characteristics of the houses, all of which were in neighborhoods that were divided by a heavily traveled interstate highway that was at least six lanes wide. The neighborhoods were similar in character and there were no other locally undesirable land uses in the area. The three neighborhoods were selected to represent different levels of income for the residents: upper middle class, lower middle class, and low-income,

The results showed a statistically significant effect of noise in both the upper middle class neighborhood and the lower middle class neighborhood. In the upper middle class neighborhood property values **were** reduced by .48 % for each decibel of highway noise. In the lower middle class neighborhood property values were reduced by .3 % per decibel. The fact that there was no statistically significant effect in the poorer neighborhood makes sense given that we would expect to **find** that for low-income residents the marginal willingness to pay for quiet is very low.

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<sup>15</sup> There is a nice summary of this concept that is found in the Allen paper reviewed later. Here are excerpts: “. . . **households**, in choosing their residential location, are forced to reveal their preferences (willingness to pay) for certain characteristics or attributes of housing, including levels of noise. In other words, if people value quiet, the market will reflect that preference. Given this basic premise, the residential choice problem can be formalized mathematically into an equation by which the relationship between the market price of housing and noise can be tested empirically. . . **an** economic relationship can be shown to exist between housing services and market price, where housing services refer to the idea that the market value of dwelling reflects the quantity of services that a house will supply to a user. This relationship implies that for consumer equilibrium in the housing market -- that is, for a given consumer to remain at a particular location -- there must be price differentials among various house locations that compensate consumers for the differences in the housing services at those locations. Stated another way, consumer equilibrium, which will result because of mobility and the ability to buy and sell in the housing market, requires that for identical housing at locations 1 and 2, where noise at 1 is greater than noise at 2, the price of housing at location 1 must be less than that at location 2 by an amount to compensate buyers for the additional noise. . . **arguments** in the housing literature that consider housing as a bundle of diverse items analogous to the description of food as a basket of goods are presented by a number of authors. . . **this** approach allows one to control empirically for differences in housing services when estimating the influence of such factors as noise or public expenditures on the market price of property. It is known technically as hedonic pricing. . . **the** attributes of a house serve as surrogates for the flow of services associated with that house when one attempts to relate housing price to the flow of services. To the extent that observable attributes capture differences in perceivable service flows, they will help explain variations in price.

“Highway Noise and Property Values”, *Journal of Transport Economics and Policy* (1982) --  
Jon P. Nelson

This article is a survey of previous studies examining the effect of highway noise on property values. Nine separate studies are reviewed and their results are compiled using a “noise depreciation sensitivity index”. This index is calculated by taking two residential properties that differ only in their level of exposure to noise and dividing the difference in total noise discount by the difference in noise exposure. Then that number is divided by the price of a basic house and multiplied by 100 to get the noise depreciation sensitivity index or NDSI. The NDSI is then adjusted for the fact that the different studies employ different noise measures.

The range of NDSIs for the nine studies is .08 to 1.05 % per decibel, with a weighted mean of about 0.4 % per decibel. This means that a residence exposed to 83 decibels would sell for 8 % less on average than the same house exposed to only 63 decibels.

Nelson goes into great detail about the assumptions of a hedonic price model, the measurement of traffic noise, and specification issues related to the nine studies. He also examines three studies at the end of his paper that look at the relationship between residential mobility and highway noise. Interestingly, one of the studies reviewed by Nelson is a study by Palmquist from 1980. This study was published by the National Technical Information Service and it must have been updated by Palmquist when he did the article for the Journal of Urban Economics because the articles use the same data set. Below, is a summary of three articles that were cited by Nelson.

“The Influence of Highway Environmental Effects on Residential Property Values”, Institute  
for Research on Land and Water Resources, The University of Pennsylvania (1974) --  
Gamble, Hays, et. al.

In this study, four residential communities bisected by interstate highways “were examined to determine the effects of regional accessibility and highway generated disturbances on property value. ” For the purposes of this FHWA study, ERA focused on the highway disturbances portion of this very lengthy report. The “disturbances” studied are similar to several of the secondary effects of interest to FHWA. In this study they are also referred to as indirect costs, external costs, social costs, or external diseconomies. This study examined the “disturbances” of noise and pollution. Within the category of pollution included were measures of Carbon Monoxide, Oxides of Nitrogen, Hydrocarbons, and Particulates.

The results show: “the relationship between highway environmental effects, distance, and property values; and the relationship between perceived and measured highway environmental disturbances. Noise was the disturbance that was most objected to, and actual perceptions of pollution could not be determined because none of the effects mentioned were detectable by the average property owner or resident. It was found that negative impacts are narrowly localized and dependent on relation of house to highway (distance, orientation, abut or not.) Changes in property value were found to be linearly related to changes in dBA (noise levels measured in decibels), but not related to distance from the highway. This was because changes in noise were not uniform with changes in distance from a highway. With the use of the measured regression coefficient for noise pollution level, that there was a decrease in property value per unit increase in noise above ambient levels. The actual magnitude of property value loss per unit of noise increase varied by area studied.

“Highways and Property Values: The Washington Beltway Revisited”, *Transportation Research Record* (1980) -- C. John Langley, Jr.

This study examined the impact of Washington Capital Beltway (I-495) on residential property values in the adjacent community of North Springfield, Virginia. 17 years of data were used to determine if single-family homes near the highway exhibited any price differential from homes that were over 1125 ft. away from I-495. Housing sales data was used and house prices were converted into a price index showing the aggregate property values over time.

The author found that there was significant difference in the rate of property value price index increase, with properties near the highway increasing at a rate less than those more distant from the highway. The differences in index numbers were converted into dollar differences and the results show that properties in proximity to the highway sell for approximately \$3000-\$3500 less than equivalent properties located farther from the highway.

"Highway Noise, Noise Mitigation, and Residential Property Values ", *Transportation Research Record* (1980) -- Gary R. Allen.

Allen used regression equations to estimate the effect of noise on housing prices in neighborhoods contiguous to Interstate-495 in Northern Virginia and neighborhoods near Interstate-66 in the Tidewater Virginia area. He used a variety of measures of noise finding that most had no significant effect on housing prices.

The one measure he used for I-495 that was significant showed about a \$94/decibel effect for noise levels above the average, In this case the average was 63 dB(A), so a house experiencing 80 dB(A) would have an estimated reduction in price of  $17 \times \$94 = \$1598$ . For the Tidewater area the effect of noise was even more insignificant, with only a low level of confidence producing similar results to I-495 (in this case \$88/decibel).

Interestingly, he goes on to talk about the cost of erecting noise barriers and argues that given the small impact noise has on housing prices (based on his work) the barriers can't be justified with cost-benefit analysis. For example, he mentions a barrier that cost just over \$7000 a house, which is obviously much more than the typical benefit since typically a barrier reduces the noise level by 10 dB(A)/house. Using the above figures that's a \$940 benefit.

"Effects of Highway Noise on Residential Property Values ", *Transportation Research Record* (1978) -- Fred Hall, et. al.

This article examined some of the work already done on the economic impact of noise (and it also mentioned an article that deals with health effects from noise). They cite a study that shows an average loss of \$2050 in value for residential property abutting the highway. The data they use comes from Ontario and is restricted to parallel rows of very similar housing adjacent to a major road.

Their findings point to a significant economic impact on housing prices from highway traffic. However, this only holds true for high sound levels (above 73-dB(A) daytime  $L_{eq}$  or higher). Lower levels of sound, say 60 and 65 dB(A) are shown to be associated with annoyance but do not affect housing prices. So for these high levels of noise there is an impact of about \$650 to \$700/dB. A noise barrier that produces a 15-dB(A) reduction would be worth approximately \$10,000/housing unit.

"Traffic-Related Noise as a Factor in Eminent Domain Proceedings in Florida", *Transportation Research Record* (1986) -- Win Lindeman

The article explores the eminent domain process in Florida as it relates to the Florida Department of Transportation and traffic noise, The author examines five case studies and looks at the impact noise has had on these condemnation cases. According to the source this author cites, noise is treated as consequential damage which means it is a direct result of the condemnor (i.e. if the state didn't build a highway there would be no noise). For the most part, Florida will not compensate



a property owner for damages related to noise unless the owner can prove the noise caused severe damage, which the courts treat as a taking. What constitutes severe damage is unclear and based on these cases it has to be really bad (for example in one case the property owners wound up right next to a new stretch of Interstate which they alleged caused structural damage to their house and the traffic caused “excessive shock waves, vibrations, and noises, at all hours of the day and **night** which impaired their health and caused them to lose sleep, become ill and nervous and deprived them of the use and aesthetic beauty of their property, causing it to lose its value for residential purposes so that it cannot be sold or financed for any use or purpose” -- the courts ruled that the owner had not shown he was severely damaged).

The other significant point the article makes is that when there is a taking and noise becomes an issue the courts may award severance damages (presumably this is when the noise is not severe but bad enough to warrant some form of damage award). Florida courts ask the question what was the value of the property before the taking and what is the market value now after the taking to help them determine what the award should be.

“Nuisance From Road Construction: A Study at the A31 Poulner Lane Diversion, Ringwood” and “Nuisance From Road Construction: Studies at Oldham and Bracknell”, both published by the **Transport and Road Research Laboratory** (1980 and 1982) -- C. J. Baughan and R. F. F. Dawson respectively.

Both of these studies examined how residents who lived near a road were bothered by road construction. The A31 study did not examine any takings issues or whether or not the same residents were pleased with the road once it was completed. The studies simply interviewed residents using a questionnaire that asked them about nuisance they experienced “during the last few weeks” and “over the whole time since the [construction] started”.

Specifically, the A31 study asked whether or not residents were bothered “very much” by a variety of nuisances associated with construction including: **dust, noise, traffic problems, mess, vibration, damage, access difficulties, security and danger, services, and overall bother**. The study separated the residents into three groups based on how far they were from the construction. It turns out that access difficulties and traffic problems were the most important sources of nuisance during the last few weeks as a criterion. Finally, the A31 study discussed ways in which people were informed of the construction and asked them if they were satisfied with way in which they were informed. This would be relevant if we were interested in making the nuisances more tolerable.

The **Oldham** and **Bracknell** study basically followed the same format as the **A31** study using two different residential communities that were experiencing road construction. Again, the issue of takings was not explored, however, in this study they asked residents if they looked forward to having a new road once it was finished. People in **Oldham** thought it would make the neighborhood better, and people in **Bracknell** thought it would make the neighborhood worse.

In these studies most of the same nuisance categories were used with some minor variation, for example instead of 'mess' the term 'general mess' was used. In both communities the most predominant nuisance was 'general mess' with problems of access a close second. Another interesting question that was not asked in the **A31** study was whether or not residents would prefer more nuisance if it meant the work was finished sooner? There was a strong preference for a quicker job at the expense of more nuisance.

"Transport, Rights-of-Way and Compensation: Injurious Affection from an Economic Perspective and some Australian Evidence of Freeway Impacts", **International Journal of Transport Economics** (1993) -- A. W. Williams

Williams treats highways as an externality (in the economic sense where the consumption and production activity of consumers and firms on the welfare of others not directly involved in the activity is considered) and uses hedonic regression analysis like many of the above mentioned studies to measure the effect highways have on property values. His data is from Australia and he examines residential house sale prices around a freeway in Brisbane that was being constructed and later operating over a two year period.

The model he uses is not very accurate, statistically speaking, but it does have some interesting features. He examines both the distance a house is from the freeway, and how far away it is from the nearest entry or exit ramp. He also uses a dummy variable to control for the differences between construction and operation. In fact he finds that the "presence of construction activity adjacent to a house sale would increase the value of an average-priced house by \$2718, compared to one sold during freeway operation. This suggests that freeway operation depresses property value." He also found that as distance to the highway increased so did the sale price increase, and as distance to an exit or entry ramp increased sale price decreased (by a lesser magnitude). He finished the study by talking about its implications around the world.

“Traffic Externalities and Single-Family House Prices”, *Journal of Regional Science* (1992) -- William T. Hughes, Jr.

This article examines not noise, but levels of traffic to find out whether high levels of traffic have an impact on housing prices. The author used regression equations for his estimates and examined two neighborhoods within the Baton Rouge, Louisiana area. One neighborhood is located 2-4 miles from the Central Business District (CBD) and the other is located 6-9 miles away. Both were in the city limits.

A model was created that used a dummy variable for streets with high traffic (traffic data was obtained from the Louisiana Department of Transportation) and in other equations the actual number of cars that traveled on high traffic streets was used to try and obtain an estimate of the cost per car (for high traffic streets) on housing prices.

The author found that houses on high traffic streets sold for about 8.8 % less than houses on low traffic streets. The effect of each additional car for houses closer to the (CBD) is 1.05 % per 1000 cars and for houses further away the effect decreases to .54 % per 1000 cars. Interestingly, the homes closer to the CBD are also worth more which indicates that traffic has a higher proportional effect on higher valued properties.

“Methodology for Estimating Economic Impacts of Highway Improvements: Two Case Studies in Texas”, *Transportation Research Record* (1992) -- Jesse Buffington, et. al.

Buffington and his co-authors examined the literature on the economic impacts of highways. They compiled information to come up with estimates for how a ‘typical’ highway project would impact the adjacent property owners/businesses, the regional economy, and the highway users, Then these estimates are used for two case studies of highway construction that was being proposed for Fort Worth and Wichita Falls (Texas). In both cases a number of route alternatives were being proposed for the projects, so they use the estimates to calculate the economic impact of each alternative and compared them to see which route had the highest benefit to cost ratio.

The estimates include the effect of highway construction (both during and after) on gross sales and viability (how many businesses close). Interestingly, most of their final results show an increase in gross sales after the construction of a highway. This suggests that positive long-run impacts outweigh any initial negative impacts on sales as a result of construction.

Buffington and his co-authors point out that there “is a close relationship between land uses and land values. If land values change, land use usually changes later. Previous studies have shown that a new freeway in an area will change the accessibility to abutting or nearby properties. Increased accessibility causes a change in the **during-** and after-construction period land values, thereby changing the land uses. ” They then use estimates of the effect of highway construction on property values to calculate the total change in land values for each proposed route alternative. Again, interestingly they show an overall increase in land values for every route alternative.

The rest of the impacts they examine are related either to macro fiscal or economic changes or the benefits or costs that users ultimately experience when a new highway is built. The fiscal impacts flow directly from changes in gross sales or property values and can be calculated easily once the figures exist for the latter.

“Effects of Road Reconstruction on Adjacent Economic Activities: A Retrospective Study”, prepared for the Indiana Department of Transportation (March 1995) -- James A. Palmer, J. Philip Cornwell, and William R. Black.

This study is summarized in the previous Indiana Case Study, however, it also includes an excellent literature search that abstracts three Texas studies These studies examine the economic impact of highway projects on business activities, not property values. There is a lot of detail on mitigation measures.

US 287: looked at five alternatives and their impact on business activities (gross sales) during construction, and after construction

US 80: various widening and improvement project and their impact on businesses. This study looked at more factors. Also this was examined during construction and post construction for two projects one in 1987 and one in 1992:

1. Usable parking spaces
2. Parking capacity influence on sales
3. Customers per day
4. Full-time and part-time employees
5. Gross sales
6. Net profit

US 59: three year reconstruction and widening, and addition of HOV lane. Used a full time public relations officer to contact businesses, etc. The study looks at localized effects and possible regional effects.

1. Sales Analysis (Comptroller quarterly records)
2. Business Survey

“Monitoring Traffic Management on Retailing Activities: Problems and Possible Solutions”,  
*Transportation Research Record* (1981) -- May, A.D., et. al.

This article describes a study on retailers in York England to measure the impact of a bridge closing during reconstruction for several months. It was found that the impacts were uneven and temporary. It was found that accurate sales data was difficult to obtain, and causal relationships in variation in trade and the increased difficulty of access were not firmly established. Part of the difficulty was that they relied on the businesses themselves to provide information about sales, rather than official sales data. The main lesson from this article is that it is very difficult to reliably quantify “damages to business” from loss of access if it is not an immediately adjacent situation.

“Access Issues in Right of Way Condemnation Proceedings: The Traffic Engineer’s Role”,  
*Westernite* (May/June 1993) -- Schaefer, Mark.

This article reviews the role of the traffic engineer as an expert witness in Colorado, in court cases where compensation for damages to businesses are an issue. Changes in access can sometimes garner compensation. In Colorado, as long as “reasonable” access is maintained, no damages will be awarded. Reasonable really means that only if a property has no access at all and becomes land-locked, will there be compensation due. Even if it diminishes value of a business by the inconvenience of customers get to a property, no compensation was awarded. Ultimately, damages hinge on the evaluation of the influence of access on economic value. (Specifically the value of a property in its before/after highest and best use.)

NOT COMPENSABLE:

- Partial loss of access
- Circuitry of Route or inconvenience
- Loss of view

#### TEST FOR REASONABLE ACCESS:

- Single economic unit or multiple with particular access needs
- Use of the property
- Location of improvements
- Contiguity of highway
- Land topography
- Other relevant characteristics

“Residential Proximity Damage Study”, **Right of Way** (1988) -- Lang, William.

This was actually a speech given to the International Right of Way Association International Seminar. Lang is an independent fee appraiser who was hired for a **12-block** street widening project. Properties taken ranged **from** one foot to twelve feet deep, and involved **182** parcels. Approximately sixty-five percent were residential\* One hundred-six properties were appraised and twenty-eight were considered “damaged.” Twenty-five percent of the existing residential properties were closer than twenty-five feet to the right of way line. The criteria for deciding what depth of remainder would be considered damaged was determined by the mean distance from the right of way line to the closest occupied wall of a house. If the ROW line hit a house at all that was deemed a “**100% damaged.**” The appraisers conducted a market study to determine the relationship between loss of front yards and loss in value. They plotted percentage loss in value against feet of the remaining front yard and drew a median curve. This curve helped the appraisers estimate fair payments of damages to remainders. Out of the total one hundred-six house appraisals and acquisitions, none went to condemnation.

“Legislative Report: Highway Reconstruction and Detour Impact Study”, Wisconsin DOT, Division of Planning and Budget, Division of Highways and Transportation Services (November, 1989).

This report is discussed in the Wisconsin Case Study.

## Appendix 2: The Procedural and Regulatory Framework

The following Federal instruments, actions, and procedures represent the framework for addressing secondary impacts in place prior to passage of ISTEA.

### 1. N-EPA

Sec. 101 b includes among NEPA's objectives to:

- (2) assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings.**
- (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.**

Sec. 102 directs that, in carrying out the NEPA mandate, Federal Agencies:

- (A) utilize a systematic) interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment.**

As part of the interdisciplinary approach to analyses, NEPA requires the integration of natural and social sciences to improve Federal decision making. However, little consideration has been given to the analysis and incorporation of economic and social information in the NEPA process. In the near future, CEQ will initiate an assessment of the current state of analysis of economic effects in NEPA analysis. From this assessment, CEQ may develop general guidance to assist agencies in integrating economic information in the NEPA process.<sup>1</sup>

### 2. CEQ Guidelines

CEQ has gone somewhat further than NEPA itself to establish directives for agencies preparing Environmental Impact Statements to identify, treat, and alleviate indirect or secondary impacts. In addition to the section on mitigation cited above, the following instructions are relevant.

Section 1502.6 Interdisciplinary Preparation

***Environmental impact statements shall be prepared using an interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts . . . The disciplines of the preparers shall be appropriate to the scope and issues identified in the scoping process.***

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<sup>1</sup> ***The National Environmental Policy Act and the Role of the President's Council on Environmental Quality.*** in The Environmental Professional, NAEP, Volume 15(1): 1-160 1993, p 5

Section 1502.14 Alternatives Including the Proposed Action

In addition to examining alternatives and identifying the preferred choice, the sponsoring agency should  
**(f) include appropriate mitigation measures not already included in the proposed action or alternatives.**

Section 1502.16 Environmental Consequences

This identifies the material to be discussed in assessing consequences of alternatives and includes:

- (a) Direct effects and their significance.**
- (b) Indirect effects and their significance,** and
- (h) Means to mitigate adverse environmental impacts (if not fully covered under Section 1502.14(f))**

Section 1508.8 Effects

- (a) Direct effects, which are caused by the action and occur at the same time and place.**
  - (b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.**
- Effects and impacts as used in these regulations are synonymous. Effects include ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems) aesthetic, historic, cultural, economic, social, or health, whether direct, indirect or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.**

Section 1508.14 Human Environment

**"Human environment" shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of "effects" in 1508.8) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.**

Section 1508.27 Significantly

**"Significantly as used in NEPA requires considerations of both context and intensity.**

- (a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short and long-term effects are relevant.**
- (b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:**

- (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial., and**



***(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.***

***(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.***

Thus, the CEQ guidelines establish a procedural context for FHWA and other agencies to assess and propose mitigation measures for negative secondary effects of a transportation action.

### **3. FHWA Guidance for Preparing and Processing Environmental and Section 4(f) documents, T6640-8A, October 30 1987.**

FHWA issued this Technical Advisory to achieve “uniformity and consistency” in environmental analysis. The document is circulated within FHWA and is available to state and local governments. It is required reading in FHWA's environmental training courses. It requires evaluation of both impacts and mitigation measures in accordance with the CEQ guidelines on NEPA, and spells out even more detailed directives on matters where secondary impacts may be involved.

Below are sections of particular directives that relate to the evaluation of secondary impacts.

#### **1. Land Use**

***The secondary social, economic, and environmental impacts of any substantial, foreseeable, induced development should be presented for each alternative, including adverse effects on existing communities. Where possible the distinction between planned and unplanned growth should be identified.***

#### **2. Farmland Impacts**

***Where farmland would be impacted, the draft EIS should contain a map showing the location of all farmlands in the project impact area, discuss the impacts of the various alternatives and identify measures to avoid or reduce the impacts. . . . If avoidance is not possible, measures to minimize or reduce the impacts should be evaluated and, where appropriate, included in the proposed action.***

#### **3. Social Impacts.**

***Where there are foreseeable impacts, the draft EIS should discuss the following items for each alternative commensurate with the level of impacts and to the extent they are distinguishable.***

***(a) Changes in the neighborhoods or community cohesion for the various social groups as a result of the proposed action. These changes may be beneficial or adverse, and may include splitting neighborhoods, isolating a portion of a neighborhood or an ethnic group, generating new development, changing property values, or separating residents from community facilities, etc.***

***(c) Impacts on school districts, recreation areas, churches, businesses, police and fire protection, etc. This should include both the direct impacts to these entities and the indirect impacts resulting from the displacement of households and businesses.***

***(e) General social groups specially benefitted or harmed by the proposed project. The effects of a project on the elderly, handicapped, non-drivers, transit-dependent and minority and ethnic groups are of particular concern and should be described to the extent these effects can be reasonably predicted. . .***

***The discussion should address whether any social group is disproportionately impacted and identify possible mitigation measures to avoid or minimize any adverse impacts . . . for projects with major community impacts, a survey of the affected area may be needed to identify the extent and severity of impacts on these social groups.***

#### **4. Relocation Impacts**

***(e) An estimate of the numbers, descriptions, types of occupancy (owner/tenant), and sizes (number of employees) of businesses and farms to be displaced. Additionally, the discussion should identify (1) sites available in the area to which the affected businesses may relocate, (2) likelihood of such relocation, and (3) potential impacts on individual businesses and farms caused by displacement or proximity of the proposed highway if not displaced.***

***(f) A discussion of the results of contacts, if any, with local governments, organizations, groups, and individuals regarding coordination needed to reduce general and/or specific impacts. These contacts are encouraged for projects with large numbers of relocatees or complex relocation requirements. Specific financial and incentive programs or opportunities (beyond those provided by the Uniform Relocation Act) to residential and business relocatees to minimize impacts may be identified, if available through other agencies or organizations.***

#### **5. Economic Impacts**

***Where there are foreseeable economic impacts, the draft EIS should discuss the following for each alternative commensurate with the level of impacts:***

***(a) The economic impacts on the regional and/or local economy such as the effects of the project on development, tax revenues and public expenditures, employment opportunities, accessibility, and retail sales . . .***

***(b) The impacts on the economic vitality of existing highway-related businesses (e.g. gasoline stations, motels, etc.) and the resultant impact, if any, on the local economy. For example, the loss of business or employment resulting from building an alternative on new location bypassing a local community.***

***(c) Impacts of the proposed action on established business districts, and any opportunities to minimize or reduce such impacts by the public and/or private sectors. This concern is likely to occur on a project that might lead to or support new large commercial development outside of a central business district.***

## **6. Noise Impacts**

***The draft EIS should contain a summary of the noise analysis including the following for each alternative under detailed study:***

***(a) A brief description of noise sensitive areas (residences, businesses, schools, parks, etc.), including information on the number and types of activities which may be affected. This should include developed lands and undeveloped lands for which development is planned, designed, and programmed.***

***(c) Noise abatement measures which have been considered for each impacted area and those measures that are reasonable and feasible and that would "likely" be incorporated into the proposed project. Estimated costs, decibel reductions and height and length of barriers should be shown for all abatement projects . . . .***

***(d) Noise impacts for which no prudent solution is reasonably available and the reasons why.***

### **Appendix 3: Statutes Providing For Compensation Of Property Losses**

This section contains statutes found in a search of legislation in Florida, Illinois, Indiana, Texas and Wisconsin that compensate for property losses not usually compensated in eminent domain actions for highway projects. No statutes were found in Indiana. The statutes differ considerable in the losses that are covered, and only the 1995 Texas statute compensates for a substantial number of these losses.

The property losses for which legislation was searched are noise, odors and emissions, diversion of traffic, loss of view, loss of visibility, loss of parking, loss of business profits and good will, loss of access, and interim construction losses.

#### **I. FLORIDA**

##### **1. ACCESS MANAGEMENT**

**Fla. Stat. §335.181 (1994)**

**(1)** It is the finding of the Legislature that:

(a) Regulation of access to the State Highway System is necessary in order to protect the public health, safety, and welfare, to preserve the functional integrity of the State Highway System, and to promote the safe and efficient movement of people and goods within the state. .

. .

**(2)** It is the policy of the Legislature that:

(a) Every owner of property which abuts a road on the State Highway System has a right to reasonable access to the abutting state highway but does not have the right of unregulated access to such highway. The operational capabilities of an access connection may be restricted by the department. However, a means of reasonable access to an abutting state highway may not be denied by the department, except on the basis of safety or operational concerns as provided in s. 335.184.

(b) The access rights of an owner of property abutting the State Highway System are subject to reasonable regulation to ensure the public's right and interest in a safe and efficient highway system. This paragraph does not authorize the department to deny a means of reasonable

access to an abutting state highway, except on the basis of safety or operational concerns as provided in s. 335.184. Property owners are encouraged to implement the use of joint access where legally available. . . .

(4) Nothing in this act shall affect the right to full compensation under s. 6, Art. X of the State Constitution.

(5) Nothing in this act limits the power of eminent domain vested in the department pursuant to s. 337.27.

(6) This act does not create any additional property rights. The denial of reasonable direct access to an abutting state highway pursuant to s. 335.184 is not compensable under the provisions of this act unless the denial would be otherwise compensable absent the provisions of this act. The denial in and of itself of an access permit by the Department of Transportation shall not be the only substantive allegation in support of a petition to state a cause of action pursuant to s. 6, Art. X of the State Constitution. . . .

## 2. NEGOTIATIONS FOR ACQUISITIONS.

### Fla. Stat. §337.271 (1994)

(1) The department shall negotiate in good faith with the owner of a parcel to be acquired and shall attempt to arrive at an agreed amount of compensation to be paid for the parcel. . . .

(5) If the business owner intends to claim business damages pursuant to section 73.071(3)(b), he or she may, within 120 days after receipt of the notice required by subsection (2) or at a later time specified by the department, submit to the department a complete estimate of business damages to the property. The fee owner may waive his or her right to the 120 days to obtain an estimate of business damages by providing the department with written notice of such waiver. If an estimate is submitted, it shall explain the nature and extent of such damages and shall be prepared by either the owner or a certified public accountant. If the business owner elects to submit an estimate of business damages to the department, he or she shall also permit the department to copy and examine, at the owner's convenience, such of the owner's business records as the department determines to be necessary for it to arrive at an estimate of business damages. . . .

### 3. Jury trial; compensation; severance damages.

#### Fla. Stat. §73.071 (1994)

(1) When the action is at issue, and only upon notice and hearing to set the cause for trial, . . .

(3) The jury shall determine solely the amount of compensation to be paid, which compensation shall include:

(a) The value of the property sought to be appropriated;

(b) Where less than the entire property is sought to be appropriated, any damages to the remainder caused by the taking, including, when the action is by the Department of Transportation, county, municipality, board, district or other public body for the condemnation of a right-of-way, and the effect of the taking of the property involved may damage or destroy an established business of more than 5 years' standing, owned by the party whose lands are being so taken, located upon adjoining lands owned or held by such party, the probable damages to such business which the denial of the use of the property so taken may reasonably cause; any person claiming the right to recover such special damages shall set forth in his or her written defenses the nature and extent of such damages; . . .

## II. ILLINOIS

### ACCESS

#### 605 Ill. Comp. Stat. 5/4-210

Except where the right of access has been limited by or pursuant to law every owner or occupant of property abutting upon any State highway shall have reasonable means of ingress from and egress to the State highway consistent with the use being made of such property and not inconsistent with public safety or with the proper construction and maintenance of the State highway for purposes of travel, drainage and other appropriate public use.

## III. TEXAS

The 1995 legislature amended the Property Code §21.041, to include individual characteristics that affect a property's value, including the property's location, visibility, and highest and best use and the access to and from the property among evidence to be admitted in

assessing actual damages to a property owner from a condemnation. The statute overrules a Supreme Court decision. The text of the statute is not available at this time.

IV. WISCONSIN

1. RULES GOVERNING DETERMINATION OF JUST COMPENSATION

Wis. Stat. §32.09 (1994)

In all matters involving the determination of just compensation in eminent domain proceedings, the following rules shall be followed: . . .

(2) In determining just compensation the property sought to be condemned shall be considered on the basis of its most advantageous use but only such use as actually affects the present market value. . . .

(5) (a) In the case of a total taking the condemnor shall pay the fair market value of the property taken and shall be liable for the items in s. 32.19 if shown to exist. . . .

(6) In the case of a partial taking of property other than an easement, the compensation to be paid by the condemnor shall be the greater of either the fair market value of the property taken as of the date of evaluation or the sum determined by deducting from the fair market value of the whole property immediately before the date of evaluation, the fair market value of the remainder immediately after the date of evaluation, assuming the completion of the public improvement and giving effect, without allowance of offset for general benefits, and without restriction because of enumeration but without duplication, to the following items of loss or damage to the property where shown to exist:

(a) Loss of land including improvements and fixtures actually taken.

(b) Deprivation or restriction of existing right of access to highway from abutting land, provided that nothing herein shall operate to restrict the power of the state or any of its subdivisions or any municipality to deprive or restrict such access without compensation under any duly authorized exercise of the police power.

(c) Loss of air rights.

(d) Loss of a legal non-conforming use.

(e) Damages resulting from actual severance of land including damages resulting from severance of improvements or fixtures and proximity damage to improvements remaining on condemnee's land, In determining severance damages under this paragraph, the condemnor may consider damages which may arise during construction of the public improvement, including damages from noise, dirt, temporary interference with vehicular or pedestrian access to the property and limitations on use of the property. The condemnor may also consider costs of extra travel made necessary by the public improvement based on the increased distance after construction of the public improvement necessary to reach any point on the property from any other point on the property.

(f) Damages to property abutting on a highway right-of-way due to change of grade where accompanied by a taking of land. . . .

(7) In addition to the amount of compensation paid pursuant to sub. (6), the owner shall be paid for the items provided for in s. 32.19, if shown to exist, and in the manner described in s. 32.20.

(8) A commission in condemnation or a court may in their respective discretion require that both condemnor and owner submit to the commission or court at a specified time in advance of the commission hearing or court trial, a statement covering the respective contentions of the parties on the following points:

(a) Highest and best use of the property.

(b) Applicable zoning. . . .

(i) A recitation of all damages claimed by owner. . . .

## 2. RELOCATION ASSISTANCE

Wis. Stat. §32.19 (1994)

[Note: Only the sections covering assistance for businesses are reproduced.]



(1) The legislature declares that it is in the public interest that persons displaced by any public project be fairly compensated by payment for the property acquired' and other losses hereinafter described and suffered as the result of programs designed for the benefit of the public as a whole; and the legislature further finds and declares that, notwithstanding sub-ch. II, or any other provision of law, payment of such relocation assistance and assistance in the acquisition of replacement housing are proper costs of the construction of public improvements. . . .

(2) In this section and ss. 32.25 to 32.27:

(a) "Business" means any lawful activity, excepting a farm operation, conducted primarily:

1. For the purchase, sale, lease or rental of personal and real property, and for the manufacture, processing, or marketing of products, commodities, or any other personal property;

2. For the sale of services to the public;

3. By a nonprofit organization; or

4. Solely for the purpose of sub. (3) for assisting in the purchase, sale, resale, manufacture, processing, or marketing of products, commodities, personal property, or services by the erection and maintenance of an outdoor advertising display or displays, whether or not such display or displays are located on the premises on which any of the above activities are conducted. . . .

(c) "Comparable replacement business" means a replacement business compared with the business premises being acquired by the condemnor, is adequate for the needs of the business, is reasonably similar in all major characteristics, is functionally equivalent with respect to condition, state of repair, land area, building square footage required, access to transportation, utilities and public service, is available on the market, meets all applicable federal, state or local codes required of the particular business being conducted, is within reasonable proximity of the business acquired and is suited for the same type of business conducted by the acquired business at the time of acquisition.

(e)1. "Displaced person" means, except as provided under subd. 2, any person who moves from real property or who moves his or her personal property from real property:

a. As a direct result of a written notice of intent to acquire or the acquisition of the real property, in whole or in part or subsequent to the issuance of a jurisdictional offer under this subchapter, for public purposes; . . .

(g) “Owner displaced person” means a displaced person who owned the real property being acquired and also owned the business or farm operation conducted on the real property being acquired.

(h) “Person” means:

1. Any individual, partnership, limited liability company, corporation or association which owns a business concern; . . .

(i) “Tenant displaced person” means a displaced person who owned the business or farm operation conducted on the real property being acquired but leased or rented the real property. . . .

(3) Any condemnor which proceeds with the acquisition of real and personal property for purposes of any project for which the power of condemnation may be exercised, or undertakes a program or project that causes a person to be a displaced person, shall make fair and reasonable relocation payments to displaced persons, business concerns and farm operations under this section. Payments shall be made as follows:

(a) Moving expenses; actual. . . . [The statute provides a number of options for paying moving expenses for businesses and other displaced persons.]

(4m) Business or farm replacement payment. (a) Owner-occupied business or farm operation. In addition to amounts otherwise authorized by this subchapter, the condemnor shall make a payment; not to exceed **\$50,000**, to any owner displaced person who has owned and occupied the business operation, or owned the farm operation, for not less than one year prior to the initiation of negotiations for the acquisition of the real property on which the business or farm operation lies, and who actually purchases a comparable replacement business or **farm** operation for the acquired property within 2 years after the date the person vacates the acquired property or receives payment from the condemnor, whichever is later. An owner displaced person who has owned and occupied the business operation, or owned the farm operation, for not less than one year prior to the initiation of negotiations for the acquisition of

**the real** property on which the business or farm operation lies may elect to receive the payment under par. (b) 1 in lieu of the payment under this paragraph, but the amount of payment under par. (b) 1 to such an owner displaced person may not exceed the amount the owner displaced person is eligible to receive under this paragraph. The additional payment under this paragraph shall include the following amounts:

1. The amount, if any, which when added to the acquisition cost of the property (other than any dwelling on the property) equals the reasonable cost of a comparable replacement business or farm operation for the acquired property, as determined by the condemnor.

2. The amount, if any, which will compensate such owner displaced person for any increased interest and other debt service costs which such person is required to pay for financing the acquisition of any replacement property, if the property acquired was encumbered by a bona fide mortgage or land contract which was a valid lien on the property for at least one year prior to the initiation of negotiations for its acquisition. The amount under this subdivision shall be determined according to rules promulgated by the department of industry, labor and human relations.

3. Reasonable expenses incurred by the displaced person for evidence of title, recording fees and other closing costs incident to the purchase of the replacement property, but not including prepaid expenses.

(b) Tenant-occupied business or farm operation. In addition to amounts otherwise authorized by this subchapter, the condemnor shall make a payment to any tenant displaced person who **has owned** and occupied the business operation, or owned the farm operation, for not less than one year prior to initiation of negotiations for the acquisition of the real property on which the business or farm operation lies or, if displacement is not a direct result of acquisition, such other event as determined by the department of industry, labor and human relations, and who actually rents or purchases a comparable replacement business or farm operation for the displaced business or farm operation within 2 years after the date the person vacates the acquired property, At the option of the tenant displaced person, such payment shall be either:

1. The amount, not to exceed **\$30,000**, which is necessary to lease or rent a comparable replacement business or farm operation for a period of 4 years. The payment shall be computed by determining the average monthly rent paid for the property from which the person was displaced for the **12** months prior to the initiation of negotiations or, if displacement is not a direct result of acquisition, such other event as determined by the

department of industry, labor and human relations and the monthly rent of a comparable replacement business or farm operation, and multiplying the difference by **48**; or

**2.** If the tenant displaced person elects to purchase a comparable replacement business or farm operation, the amount determined under **subd. 1** plus expenses under par. (a) **3**.

**(5)** Nothing in this section or **ss. 32.25 to 32.27** shall be construed as creating in any condemnation proceedings brought under the power of eminent domain, any element of damages.

### **3. EXPENSES INCIDENTAL TO TRANSFER OF PROPERTY**

**Wis. Stat. §32.195 (1994)**

In addition to amounts otherwise authorized by this subchapter, the condemnor shall reimburse the owner of real property acquired for a project for all reasonable and necessary expenses incurred for: . .

**(6)** Reasonable net rental losses where **a)** the losses are directly attributable to the public improvement project and **b)** such losses are shown to exceed the **normal** rental or vacancy experience for similar properties in the area. . . .

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## **People Interviewed for State Case Studies**

### Texas

Jack Edwards, Texas **FHWA**, Right of Way Division.

John Moran, Texas **FHWA**, Right of Way Division.

A. James Henry III, Assistant Director, Right of Way Division, Texas Department of Transportation.

Robert **Dunlap**, Appraisal Section, Right of Way Division, Texas Department of Transportation.

Suzanne **M.** Roach, Director of Legal Section, Right of Way Division, Texas Department of Transportation.

John L. (Buck) **Ritts**, Assistant Attorney General, State of Texas.

Jefferson Grimes, Manager, State Legislation, Texas Department of Transportation.

### Indiana

Carol **Erler**, Manager, Appraisal Section, Division of Land Acquisition, Indiana Department of Transportation.

**Yasmin Lamberson**, Section Chief, Tort & Real Estate Litigation Sections, State of Indiana -- Office of the Attorney General.

**Kevan McClure**, Manager, Buying Section, Division of Land Acquisition, Indiana Department of Transportation.

Tommy **Nantung**, Special Projects Engineer, Division of Research, Indiana Department of Transportation.

Phil **Schermerhorn Jr.**, Executive Assistant to the Commissioner, Marketing, Indiana Department of Transportation.

### Wisconsin

Mike **Perino**, Contracts Unit, Wisconsin Attorney General's Office.

Ronald **Polacek**, Litigation Coordinator, Division of Highways and Transportation Services, Wisconsin Department of Transportation.



Robert St. **Clair**, Office of State Highway Programs, Bureau of Program Management,  
Division of Highways, Wisconsin Department of Transportation.

Barbara Underwood, Public Information Officer, Bureau of Public Affairs, Division of  
Highways, Wisconsin Department of Transportation.

Jay **Waldschmidt, P.E.**, Noise and Air Quality Engineer, Office of Environmental Analysis,  
Division of Highways, Wisconsin Department of Transportation.

## **Appendix 5: Information from the States and Reports**

## FOREWORD

This pamphlet is published by the State Department of Industry, Labor and Human Relations in cooperation with the Attorney General, pursuant to sec. 32.26 (6), of Wisconsin statutes. The pamphlet must be given to property owners or their representatives by the condemnor prior to initiation of negotiations for property being acquired for a public project.

The material in this pamphlet provides information on how the condemnation process works in Wisconsin. It should serve as a reference for you, but it is not intended to cover every possible eventuality or every right you may have in individual cases.

In summarizing and condensing a large and fairly complex body of law, it was impossible to cover all possible questions and concerns that you may have. The goal was conciseness and clarity. A further source of information is Chapter 32, of the Wisconsin statutes which contains the law that is summarized in this pamphlet.

Legal counsel is another avenue you may wish to pursue to protect your rights in the condemnation process.

Direct questions about this pamphlet to the Relocation Services Unit, Equal Rights Division, Department of Industry, Labor and Human Relations, 201 E. Washington Ave., P.O. Box 8928, Madison, WI 53708. (608) 266-6860.



# THE RIGHTS OF LANDOWNERS UNDER WISCONSIN EMINENT DOMAIN LAW

PROCEDURES UNDER  
sec. 32.05 Wisconsin  
Statutes

for  
HI&WAYS  
STREETS  
STORM & SANITARY SEWERS  
WATERCOURSES  
ALLEYS  
AIRPORTS  
&  
MASS TRANSIT FACILITIES

## **INTRODUCTION**

in recent times there has been an increasing demand placed upon government for services in transportation, education, utilities, recreation, housing and other areas of public concern. At the same time the available supply of land for these projects has been shrinking dramatically. Consequently, the government has had to resort to its right to acquire private land for public uses even without the consent of private owners-the eminent domain power.

This power derives from the Wisconsin Constitution, Art. IX, sec. 3. The Legislature delegated this power by statute to numerous agencies and has specified the purposes for which such power can be used. Generally, departments, municipalities, boards, commissions, public officers, and various public and quasi-public corporations are delegated this power. Some of the purposes for which the Legislature has specified condemnation can be used are highway construction or improvement, reservoirs, dams, public utility sites, waste treatment facilities, city redevelopment and energy lines.

This pamphlet describes the statutory procedures for acquisition and condemnation of property for streets, highways, storm or sanitary sewers, watercourses, alleys, airports, and mass transit facilities. It does not generally apply to town highways or condemnation by the City of Milwaukee if it proceeds under the Kline Law. It may apply to the City of Milwaukee in takings for housing or urban renewal.

Wisconsin has long had statutes regulating the exercise of the eminent domain power. This pamphlet is intended to give citizens information about Wisconsin's eminent domain procedure, the workings of the condemnation process, and the rights of property owners in this process. It is, by necessity, of a general nature and is not a substitute for legal advice in individual cases, since many aspects of Wisconsin law cannot be covered in general terms. Another source of information for citizens is the particular agency which is acquiring the property.

The goal of this pamphlet is to achieve equality of information for both parties during the negotiation process and to reach satisfactory settlements, equitable to both the property owner and the public, through the statutory process.

## **FEDERAL LAW**

When a project is receiving federal financial assistance, the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (P.L. 91-646) may provide additional or different protections than those outlined in this pamphlet. You should receive supplemental information from the condemnor.

## **INSIDE**

### **THE LANGUAGE OF EMINENT DOMAIN**

- 1. BEFORE NEGOTIATIONS TO ACQUIRE PROPERTY BEGIN**
- 2. THE NEGOTIATION PERIOD**
- 3. PARTIAL TAKINGS and EASEMENTS**
- 4. THE JURISDICTIONAL OFFER TO PURCHASE**
- 5. THE AWARD OF COMPENSATION**
- 6. HEARING BEFORE THE COUNTY CONDEMNATION COMMISSION**
- 7. APPEAL OF JUST COMPENSATION TO CIRCUIT COURT**
- 8. ACTION TO CONTEST THE RIGHT OF CONDEMNATION**
- 9. LITIGATION EXPENSES and COSTS**
- 10. OCCUPANCY**

# 1 BEFORE NEGOTIATIONS TO ACQUIRE PROPERTY BEGINS

After you have been contacted by the condemning authority, you will be provided with a **full narrative appraisal** of the property sought to be acquired. This appraisal is done by an appraiser hired or employed by the agency, and the law requires the appraiser to confer with the owner or the owner's representative, if reasonably possible, when making the appraisal. Any and all appraisals made by the agency must be provided to you.

You have the right to have your own full narrative appraisal made by a qualified appraiser of the property sought to be acquired. The reasonable cost of this appraisal may be submitted to the acquiring agency for payment, if the appraisal meets the standards set forth in sec. 32.09 of Wisconsin statutes. But, if you have such an appraisal made and wish to be paid for its cost, it must be submitted to the agency within **60 days** after you receive the agency's full narrative appraisal. Your appraisal will be considered during negotiations.

The acquiring agency is required to file a **relocation order** with the county clerk in the county in which your property is located, unless the appraisal estimates that compensation will be less than \$1,000 in the aggregate. This order describes the layout of the project, old and new locations, and the property interests sought to be acquired. It must be filed within **20 days** after its issuance by the agency, and is available for public inspection.

If a public project, other than a town highway, involves the taking of any interest in any farm operation of more than 5 acres, the Department of Agriculture, Trade and Consumer Protection may be required to prepare an **agricultural impact statement** prior to the taking of any land. Even if the taking is less than 5 acres, the Department may prepare a statement if the condemnation will have a significant effect on the farm operation.

If an environmental impact statement is required by another statute, the requirements of the agricultural impact statement may be met by the environmental impact statement. Also, if an easement for an electric transmission line, excluding a high voltage line, is being acquired over a farm operation, an agricultural impact statement is not required.

A "farm operation" is defined by law as an activity conducted primarily for the production of commodities for sale or home use in such quantity that the commodities contribute materially to the support of the farm operator.

The condemnor may gather the necessary information for the impact statement. The Department of Agriculture must prepare the statement within **60 days** after receiving the information from the condemnor. After preparation, the statement must be published by the Department of Agriculture. For a **30 day** period after publication, the condemnor is precluded from negotiating with the property owner or making a jurisdictional offer.

The law also requires that the agricultural impact statement be distributed by the Department of Agriculture to various offices and individuals. You can obtain a copy from your local library or from any local unit of government in the area affected. You may also request a copy from the Department of Agriculture.

# 2 THE NEGOTIATION PERIOD

After a relocation order has been filed and appraisals are completed, the acquiring agency must attempt to negotiate with the owner or the owner's representative for purchase of the needed property. The statutes require that you be provided an informational pamphlet on eminent domain procedure **before** negotiation begins. If you are also displaced as a result of the acquisition, the law requires that **you** receive a pamphlet on **relocation benefits**. The owner's full narrative appraisal must be considered as a part of this negotiation. To receive payment for **your** appraisal it must be submitted to the agency within **60 days**. Also, any rights you may have for additional items payable (**relocation benefits**) can be included in the negotiations.

During negotiations, the acquiring agency must provide a map showing all property affected by the proposed project. Along with this map you must be given the names of at least 10 neighboring landowners to whom offers are being made. If less than 10 are affected, the names of all must be given. Any maps in the possession of the agency showing the property affected can be inspected, and copies made available at reasonable cost. At this point, condemnation is not involved, only negotiations for purchase.

If you agree to a negotiated purchase, the condemnor **must** record the conveyance with the register of deeds in the county where the land is located. Also, all owners of record should receive by certified mail a copy of the conveyance and a notice of their right to appeal within **6 months** after the date of the recording of the conveyance. Such an appeal would challenge the amount of compensation received by the property owner. The procedure used for this appeal is described in **6**, and **7**, of this pamphlet, except that an appeal from a negotiated price must be taken within 6 months. The date the conveyance is recorded is the date of taking.

# 3 PARTIAL TAKINGS and EASEMENTS

If only a part of your property is taken, other than for an easement, two different calculations may be made to determine the fair market value of the part taken. In such partial takings, fair market value is the **greater amount** of either the fair market value of the part taken **or** the difference between the value of your property **before** the taking and its value **after**, giving effect to severance damages set forth in sec. 32.09 of Wisconsin statutes.

If only part of your property is taken and you are left with an **uneconomic remnant**, the condemnor must offer to acquire the uneconomic remnant along with the property being taken. You must consent to the acquisition of the uneconomic remnant in order for the agency to acquire, but the remnant can be acquired as part of the purchase or condemnation of your property.

When an easement is taken over your property, the compensation required is the difference between the value of your property immediately **before** the date of evaluation and its value immediately **after** the date of evaluation. Severance damages may also be paid where such damages exist and are allowed by statute.

If your land is zoned or used for agricultural purposes and an easement is taken for a high voltage transmission line or a fuel pipeline, you will be entitled to choose between a lump sum payment for the easement or an annual payment representing just compensation for the taking of the easement for **one year**: The condemnor should be able to answer any questions on your eligibility for this choice and the terms of each alternative. Sec. 32.09 (6r) (a), (b), and (c) of Wisconsin statutes detail the law on lump sum versus annual payments.

## 4 THE JURISDICTIONAL OFFER TO PURCHASE

If negotiations do not lead to a purchase of the needed interest by the acquiring agency, a **jurisdictional offer** must be given to the owner and to any mortgagee of record. You will receive the notice by personal service or by certified mail.

This very important document will provide you with vital information on the acquisition of your property. Items that must be included are a statement of the nature of the project, a description of the property to be taken, and a statement of the proposed date the condemnor will occupy the property. Included in the document is the amount of compensation to be paid for your property, and a statement that any additional items payable may be claimed for relocation assistance. An owner has **20 days** from the receipt of this offer to accept or reject it.

Within fourteen days from the day you receive the jurisdictional offer, a **lis pendens** will be filed with the register

of deeds in the county where the property is located. The **lis pendens** provides notice to any interested party of the possibility that the property may be acquired for a public use.

If you accept the jurisdictional offer, title will be transferred and you will be paid the amount specified in the offer within 60 days. This 60 day period can be extended by mutual written consent of the condemnee and the condemnor, incidental expenses under sec. 32.195 of the statutes relating to transfer of your property to the condemnor will also be paid by the condemnor.

If the owners of record of the property sought to be taken reject the jurisdictional offer in writing, or do not act upon it within the 20 day period, the condemnor may make an award of compensation.

## 5 THE AWARD OF COMPENSATION

This procedure allows the condemnor, after the jurisdictional offer is rejected or not accepted, to make a written declaration stating the amount of compensation to be paid, the description of the property, the date of occupancy and other information. The amount of compensation offered must be **equal to or more than** the amount of the jurisdictional offer. You will receive a copy of the award by personal service or certified mail.

You will then receive payment for your property, by check, for the amount of compensation provided in the

award less any outstanding tax liens and prorated taxes. The condemnor may **mail** the check to you or deposit it with the clerk of the circuit court for your benefit.

After payment is made, the award will be recorded with the register of deeds in the county where the land is located. **This action passes title** to the property described in the award to the condemnor. This date becomes the "date of taking" and any questions as to the value of your property will be resolved based on the value on this date.

## 6 HEARING BEFORE THE COUNTY CONDEMNATION COMMISSION

A property owner may appeal an award of compensation to the **county condemnation commission** within 2 years after the date of taking. This is accomplished by applying to the circuit or county judge in the county where the land is located. Alternatively, this procedure may be waived and a property owner may appeal directly to circuit court. (See 7)

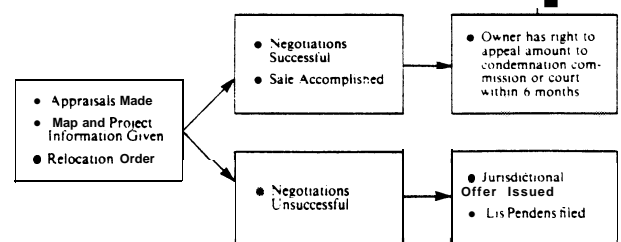
A county will have 6 to 12 commissioners, depending on the county population. They are local residents of the county or adjoining county, and are appointed by the circuit court. They serve staggered 3 year terms and generally sit in groups of 3.

Within 7 days after the chairperson of the commission is notified of the petition by the judge, 3 of the commissioners are selected to hear the case. The date of the hearing, the time and the place are fixed by the chairperson, and will not be less than **20 days** nor more than **30 days** from the day the court assigned the appeal to the chairperson. At least 10 days prior notice will be given to all parties. The commission proceedings are more informal than court proceedings, and are governed by statute. The amount of the jurisdictional offer or award of compensation cannot, by law, be disclosed to the commission. You have a right to appear and to present evidence. A majority of the members have the power to make all decisions. **Within 10 days** after the end of the hearing, a written award is made and filed with the clerk of circuit court. The clerk will notify the parties of the award.

A condemnor who accepts the award of the commission must pay the award, plus legal interest from the date of taking, to the owner within **70 days** of the filing of the

commission award. A condemnor may also pay the amount to the clerk of circuit court for the benefit of the owners, and notify the parties of the payment. Interest is paid on any amount that is awarded by the commission in excess of the award from the date of taking until the date of the commission award, if the amount is paid within **14 days** of the commission award. If it is paid by the condemnor **after 14 days**, interest on the excess accrues from the date of taking until the date of payment.

THE CHART BELOW PROVIDES A BRIEF DESCRIPTION OF HOW THE EMINENT DOMAIN PROCESS NORMALLY FLOWS. PLEASE REFER TO THE TEXT FOR MORE COMPLETE INFORMATION



If you or the condemnor are dissatisfied with the award of the commission, either can appeal to the circuit court.

This must be done **within 60 days** of the filing of the commission's award. In case of such appeal by you or the condemnor, the amount of compensation awarded by the commission is not paid pending outcome of the appeal.

## 7 APPEAL OF JUST COMPENSATION TO CIRCUIT COURT

A property owner has 2 years from the date of taking to appeal the amount of just compensation. An owner may choose to go first to the condemnation commission (see 6), or go directly to circuit court.

The statutes require certain notices and papers to be filed to accomplish an appeal. It would be advisable to secure legal counsel to aid you in your appeal. The procedure may be found in sec. 32.05 (IO), of Wisconsin statutes. You have a right to a jury trial on the issue of just compensation. **Generally, the measure of just compensation is the fair market value of your property on the date of taking.**

You have a right to appeal from the judgement of the circuit court to the court of appeals within **6 months** of the notice of the entry of judgement of the circuit court.

## 8 ACTION TO CONTEST THE RIGHT OF CONDEMNATION

This action challenges the right of the agency to condemn the property described in the jurisdictional offer. This action must be commenced in circuit court **within 40 days** from the postmark of the certified letter containing notice of the jurisdictional offer.

**If you do not challenge the condemnor's right to take your property within this 40 day period, you will lose your right to do so.**

In addition, if you accept and retain any money awarded for your property, you may not challenge the condemnor's right to take.

In this proceeding, you can challenge both any defects in the procedure the agency has used and/or the "public" nature and necessity of the proposed use.

## 9 LITIGATION EXPENSES and COSTS

The law provides for the payment of litigation expenses by the condemnor under **any one of** the following circumstances:

- if it is determined by a court that the condemnor does not have the right to condemn.
- if the award of the condemnation commission is **greater** than the jurisdictional offer, or the highest written offer prior to the jurisdictional offer, by at least \$700, and 15%, and the award is not appealed.
- if the jury verdict approved by the court exceeds the jurisdictional offer, or the highest written offer prior to the jurisdictional offer, by at least \$700, and 15%.
- if the condemnor appeals an award of the condemnation commission which exceeds the jurisdictional offer or the highest written offer prior to the jurisdictional offer, by at least \$700 and 15%, and the court-approved jury verdict **exceeds** the award of the condemnation commission by at least \$700, and 15%.
- if the condemnor appeals an award of the condemnation commission, and the court-approved jury verdict is \$700, and 15% greater than the jurisdictional offer or the highest written offer prior to the jurisdictional offer.
- if the condemnor appeals an award of the condemnation commission which is **not** 15% greater than the jurisdictional offer or the highest written offer prior to the jurisdictional offer, and the court-approved jury verdict is at least \$700, and 15% higher than the jurisdictional offer or highest written offer prior to the jurisdictional offer.

Unless you come under one of these specific categories, you will not be able to recover litigation expense; from the condemnor.

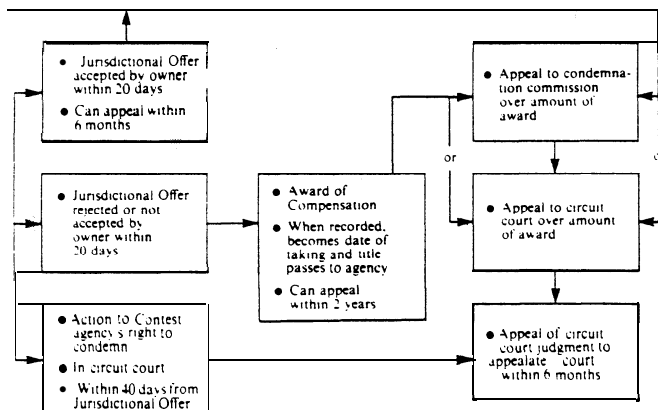
However, the Legislature has provided "costs" [statutorily determined payments to successful parties] in proceedings challenging just compensation] to litigants who are successful but who do not fit into any of the categories mentioned above. If the just compensation awarded by the court or condemnation commission exceeds the jurisdictional offer or the highest written offer prior to the jurisdictional offer, the condemnor will be deemed the "successful" party. You may be required to pay "costs" to the condemnor if you are unsuccessful in challenging the compensation you have received or the condemnor's right to take the property. "Costs" are defined in Ch. 814 of Wisconsin statutes.

## 10 OCCUPANCY

No occupant may be required to move from a dwelling or move a business or farm without at least 90 days' written notice from the condemnor. An occupant shall have rent free use of the property for 30 days beginning with the 1st, or 15th, day of the month after title vests in an agency, whichever is sooner. Rent charged for use of a property between the date of acquisition and the date of displacement may not exceed the economic rent, the rent paid by a tenant to the former owner or the occupant's financial means if a dwelling, whichever is less.

The condemnor may not require the persons who occupied the premises on the date title vested in the condemnor to vacate until a comparable replacement property is made available.

If you damage or destroy property that has been taken after the date that title vests in the condemnor, you may be liable for the damage.



# THE LANGUAGE OF EMINENT DOMAIN

## This glossary defines terms used in the pamphlet

### **ADDITIONAL ITEMS PAYABLE**

Compensation, beyond the "just compensation" required by the Constitution, which the legislature has provided to persons displaced by the condemnor for expenses of moving and finding a comparable replacement for the property taken.

### **'APPRAISAL**

A written report by a professional and disinterested person skilled in valuation, describing the property that is to be acquired and coming to a documented conclusion as to the fair market value of such property.

### **AWARD OF COMPENSATION**

A document which is served upon a **condemnee** after a refusal of a jurisdictional offer, stating the amount of just compensation. It names all persons with an interest in the property, describes the property taken, and includes the date of occupancy by the condemnor. The recording of this document passes title in the property to the condemnor. This term also describes the payment made to the **condemnee** for the property. For negotiated sales, the amount of compensation is stated in the conveyance.

### **CONDEMNATION COMMISSION**

A group of local residents, appointed by the circuit court of a county for fixed terms, who have the authority to decide appeals from an award of compensation.

### **CONDEMNEE**

A private property owner whose property is being acquired for a public use.

### **CONDEMNOR**

A public or quasi-public entity vested with the constitutional or statutory power to acquire private property for a public use.

### **DATE OF TAKING & DATE OF EVALUATION**

The day on which the award of compensation is recorded in the office of the register of deeds in the county where the land is located. The fair market value of the property on this day is just compensation to the **condemnee** for the taking. For negotiated sales, the date of taking and the date of evaluation is the date the conveyance is recorded with the register of deeds.

### **EASEMENT**

An interest in real property which gives the acquiring agency the legal right to use the property for a specific purpose or to restrict the property owner's use of the land. Ownership and title to the property remain with the property owner.

### **EMINENT DOMAIN**

The power of the state to take private property for a public use.

### **FAIR MARKET VALUE**

The amount for which property could be sold in the open market between a **willing** buyer and a **willing** seller.

### **FULL NARRATIVE APPRAISAL**

A detailed and comprehensive report describing the property to be acquired and providing a documented conclusion of its fair market value. The report must contain the appraiser's **rationale** for determining value and be documented by market data which supports the appraiser's rationale.

### **INCIDENTAL EXPENSES**

Reasonable and necessary amounts, defined by statute, payable to the owner of real property acquired for a public use. Generally, **incidental** expenses compensate for expenses you may incur in transfer of your property to the condemnor. They include recording fees, mortgage prepayment penalties, rent loss, and other items.

### **JURISDICTIONAL OFFER**

A written notice given by the condemnor to the owner of property and any mortgagee of record which informs the recipients of the proposed public use, what property is being taken, and the amount of compensation to be paid.

### **KLINE LAW**

A special condemnation procedure provided by the legislature for condemnations by the City of Milwaukee.

### **LIS PENDENS**

A notice filed with the register of deeds within 14 days of the jurisdictional offer to notify all interested parties that the property described is in the process of being acquired for a public use.

### **LITIGATION EXPENSES**

The sum of the costs, disbursements and expenses including reasonable attorney, appraisal and engineering fees necessary to prepare for, or participate in, actual or anticipated proceedings before a condemnation commission or any court.

### **RELOCATION ORDER**

An order issued by the condemning agency describing the proposed public project. It describes the old and new locations and includes all property needed for the project. Within 20 days after its issuance it must be filed with the county clerk in the county in which the lands are located.

### **SEVERANCE DAMAGES**

Damages which may result when only part of a person's property is condemned. Generally, these items of damage compensate for any loss in value of the remaining property due to the taking.

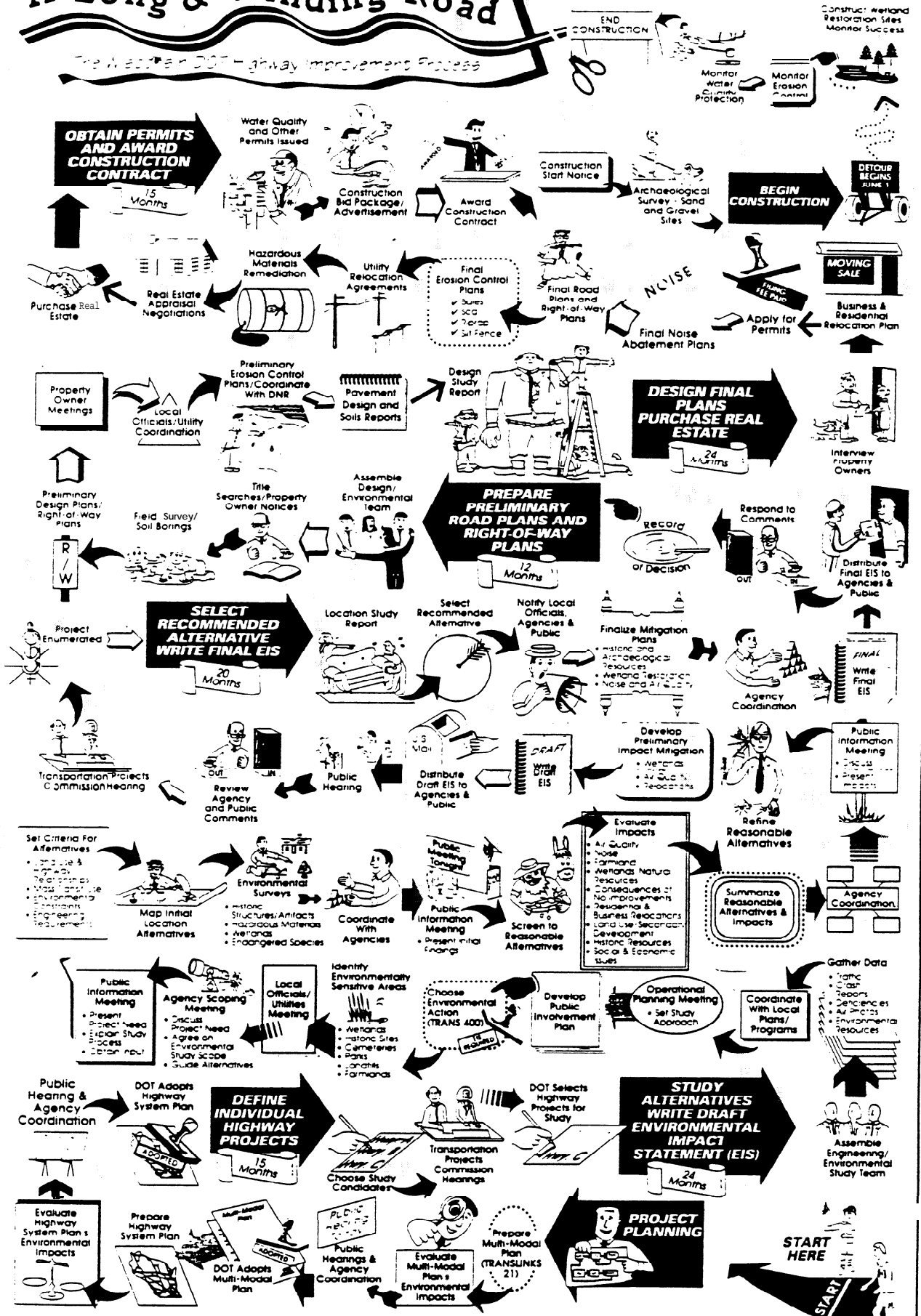
### **UNECONOMIC REMNANT**

Any portion of the property remaining after a partial taking which is of little value or substantially impaired economic viability due to its size, shape or condition.



# A Long & Winding Road

The Wisconsin DOT Highway Improvement Process



**Effects of Roadway Reconstruction on Adjacent Businesses**

**. \* . INTERVIEW GUIDE . \*\***

Project **Location** \_\_\_\_\_

Business **Name** \_\_\_\_\_

Address \_\_\_\_\_ **In Zone**    **In Fringe**

   **Interview** conducted    **Contact person not located**    **Contact** person declined **interview**

Contact Person Name \_\_\_\_\_

Position \_\_\_\_\_ Telephone No. \_\_\_\_\_

Business Activity Type \_\_\_\_\_ **SIC Code** \_\_\_\_\_

**Federal ID Number/SSAN** \_\_\_\_\_

Interviewer \_\_\_\_\_ **Interview Date** \_\_\_\_\_

1. Was the business here during the **construction project**? *[Y/N/DK/NR]* *If yes, go to Q-2.*

1a. Do you know who the occupant was during the construction? *[Y/N/NR]*

*Business name:*

*Contact person:*

*Telephone no.:*

*. +\* stop interview \*\*\**

2. How long has your **business been at this location**? [    years /    months / DK / NR]

3. Do you **own or lease the business property**? *[O / L / DK / NR]*

4. How did you **first learn about the construction project**? *[letter / personal visit/newspaper/radio/W / other business /construction activity/ other: \_\_\_\_\_ / DK / NR]*

5. Which government agency **was responsible for the construction project**? *[federal / state / local / DK / NR]*

6. Did anyone from the business **attend a public hearing or meeting** conducted by the **state before the construction began**? *[Y/N/DK/NR]*

7. Did you submit a written comment to the state? [Y/N/DK/NR] If other than yes, go to Q-8.

7a. What were you concerned about?

8. How well were you kept informed during the construction about what was planned and when it would occur (such as the closing of any entrances to your business)? On a scale of 1 to 5, with 1 = not informed at all and 5 = fully informed, how well were you kept informed? [1/2/3/4/5/DK/NR] If the answer is not 2 to 5, go to Q-9.

8a. Who provided the information?

9. What did you expect the financial impact on your business to be during the construction period? On a scale of 1 to 5, with 1 = a very negative effect and 5 = a very positive effect, what was your expectation? [1/2/3/4/5/DK/NR]

10. Was your business actually affected financially during the construction as you had expected? On a scale of 1 to 5, with 1 = much worse than expected and 5 = much better than expected, how was your business actually affected? [1/2/3/4/5/DK/NR]

11. Did the construction project cause any problems for your business? [Y/N/DK/NR] If other than yes, go to Q-12.

11a. What were the problems?

1.

2.

3.

11b. Which was the greatest problem?

11c. Did you try to have the problem taken care of? [Y/N/DK/NR] If no, go to Q-12.

11d. What did you do?

11e. Were you satisfied with the way the problem was handled? [Y/N/DK/NR] If yes, go to Q-12.

11f. What you think should have been done?

12. Were there any positive effects on your business during the construction period? [Y/N/DK/NR] If other than yes, go to Q-13.

**12a.** What were the benefits?

- 1.
- 2.
- 3.

**13.** Were your gross sales affected by the construction? [Y/N/DK/NR] If other than yes, go to Q-14.

**13a.** What was the percentage increase/decrease in gross sales? [ \_\_\_\_\_% /DK/NR] If there was no decrease in gross sales, go to Q-14.

**13b.** Within two years after the construction ended, were your gross sales as high as they were before the construction started? [Y/N/DK/NR]

**13c.** What percent of your pre-construction gross sales did you achieve after two years? [ \_\_\_\_\_% /DK/NR]

**14.** Did you lose customers during the construction? [Y/N/DK/NR] If other than yes, go to Q-15.

**14a.** What percent of your customers did you lose? [ \_\_\_\_\_% /DK/NR]

**14b.** Within two years after the construction ended, did you have as many customers as you did before the construction started? [Y/N/ DK/ NR]

**14c.** What percent of your pre-construction customers patronized your business after two years? [ \_\_\_\_\_% /DK/NR]

**15.** Did you reduce the number of full-time or part-time employees because of the construction? [yes full-time / yes part-time / no full-time / no part-time] If no, go to Q-16.

**15a.** Was the reduction temporary or permanent? [full-time temporary/full-time permanent / part-time temporary/part-time permanent]

**16.** Were your hours of operation affected by the construction? [Y/N/DK/NR] If other than yes, go to Q-17.

**16a.** How were the hours affected?

**17.** Did you close the business at any time because of the construction? [Y/N/DK/NR] If other than yes, go to Q-18.

**17a.** Was the closure(s) temporary of permanent? [*temporary / permanent / DK / NR*] If permanent, go to Q-18.

**17b.** How many times did you close? [*\_\_ times / DK / NR*]

**17c.** What was the longest period of time you were closed? [*\_\_ hours / \_\_ days / DK / NR*]

**18.** Was vehicle access to your business **ever** completely closed during the construction? [*Y / N / DK / NR*] If other than yes, go to Q-19.

**18a.** How many times was access closed? [*\_\_ times / DK / NR*]

**18b.** What was the longest period of time access was closed? [*\_\_ hours / \_\_ days / DK / NR*]

**19.** Was customer parking restricted at any time during the construction? [*Y / N / DK / NR*] If other than yes, go to Q-20.

**19a.** How was parking restricted?

**19b.** How many times was parking restricted? [*\_\_ times / DK / NR*]

**19c.** What was the longest period of time parking was restricted? [*\_\_ hours / \_\_ days / DK / NR*]

**20.** Did your competitors gain an advantage because of the construction? [*Y / N / DK / NR*] If other than yes, go to Q-21.

**20a.** Was it a temporary or permanent advantage? [*temporary/permanent/ DK / NR*]

**21.** Did you take any steps to reduce the effect of the construction on your business and your customers (such as special promotions or sales or notices to your customers as to the best routes to your business)? [*Y/N/ DK / NR*] If other than yes, go to Q-22.

**21a.** What did you do?

**22.** Would you do anything differently to prepare for a similar construction project in the future? [*Y / N / DK / NR*] If other than yes, go to Q-23.

**22a.** What would you do?

**23.** Have there **been any long-term negative** effects on your **business as a result of the construction project?** [Y/N/DK/NR] *If other than yes, go to Q-24.*

**23a.** What were **they?**

- 1.
- 2.
- 3.

**24.** Have there been any long-term positive effects on your business as a result of the construction project? [Y/N/DK/NR] *If other than yes, go to Q-25.*

**24a.** What were **they?**

- 1.
- 2.
- 3.

**25.** Was this construction project **necessary?** [Y/N/DK/NR]

**26.** Is there anything that the state and its construction contractors could do to be more responsive to the needs of businesses affected by roadway reconstruction projects? [Y/N/DK/NR] *If other than yes, stop interview.*

**26a.** What do you recommend?

- 1.
- 2.
- 3.



