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1. HIGHWAYS, DIRECTOR OF—DUTY TO DESIGN, CONSTRUCT AND MAINTAIN STATE HIGHWAYS, INCLUDING REGULATION OF ACCESS SO MAXIMUM DEGREE OF SAFETY WILL BE AFFORDED TRAVELING PUBLIC—OBLIGATED SO FAR AS POSSIBLE WITHIN LIMIT OF POWERS CONFERRED BY GENERAL ASSEMBLY AND WITH FUNDS AVAILABLE.
2. DIRECTOR, IN INTEREST OF PUBLIC SAFETY, HAS AUTHORITY TO LIMIT AND RESTRICT ABUTTING OWNERS RIGHTS OF ACCESS—ACCESS REASONABLE AND CONVENIENT TO HIGHWAY—EXERCISE OF SUCH AUTHORITY MAY BE SUBJECT TO JUDICIAL REVIEW.

## SYLLABUS:

1. So far as it is possible to do so within the limit of the powers conferred by the General Assembly, and with the funds available, the Director of Highways has the duty of designing, constructing and maintaining the state highways including the regulation of access thereto, so that the maximum degree of safety will be afforded the traveling public.

2. In the interest of public safety, the Director of Highways has the authority to limit and restrict an abutting owner's right of access, so long as such owner has reasonable and convenient access to the highway. The exercise of such authority may be subject to judicial review.

Columbus, Ohio, September 24, 1948

Hon. Earl L. Reeb, Director of Highways  
Columbus, Ohio

Dear Sir :

I have your request for my opinion which reads as follows :

“The design of modern highway facilities to care for present day volumes of traffic is presenting a problem in the location and degree of access from abutting property which needs legal interpretation.

The right of an abutting owner to reasonable access to an existing highway is inherent ; however, the location and degree of such access presents the problem since it ranges in character from the private dwelling to the tourist camp, cemetery, drive-in theatre and other types of commercial installation which generate heavy or difficult to control traffic.

Many highways carry traffic volumes meriting multiple lane or the divided type of design but must, for some years to come and for varying reasons, be continued in operation as two lane pavements. It is at once obvious that the regulation of access to a two lane highway from abutting property is as vital to traffic safety as in the multiple lane highway where opposing flows of traffic can be separated.

Incidental to the determination of the location and degree of access in the multiple lane type of highway is the median or dividing strip by means of which opposing flows of traffic are separated. The location and number of openings in the median to permit cross movements into the opposing flow of traffic, both from the pavement lanes and from abutting property, are carefully studied both as to present and future needs. Rigid control of the movement of cross traffic is as vital in the safe operation of a highway of this type as the control of access to the pavement lanes from abutting property.

Interpretation of Section 1178 and related sections of the General Code would clearly indicate the Director of Highways is obligated to provide safe transportation facilities for the traveling public and that safety is to be achieved through proper design and the regulation, under his police powers, of the location and degree of access from abutting property.

Since it is conceded that an abutting owner has a right of access to an existing highway, it seems logical to assume that so long as the determination of the Director as to the location and degree of such access is reasonable, no compensable damages

accrue. This viewpoint would seem justified by reason of the fact that the Director has the right, in the interest of the general public, to relocate a highway without compensable damages so long as reasonable access from abutting property to the new location is provided.

In view of the fact that the principles of design to provide safety in heavy traffic volume highways are based on the proper collection, distribution and control of traffic, both on the main highway and that entering from abutting property, your formal advice is requested, first, as to whether or not the Director of Highways is obligated to provide safety to the travelling public in the design, construction, maintenance and regulation of access to state highways; if such is his obligation, is he proceeding within the scope of his authority in regulating or restricting such access providing his determination therein is based upon accepted engineering practice, and that the location and degree of such access is reasonable."

While the statutes of Ohio do not enjoin an express obligation upon the Director of Highways to provide safety to the travelling public by building highways to proper design, by careful maintenance and by regulation of access to the highway, such obligation is implied from the powers and authority vested in the office. Obviously this obligation is limited by the authority conferred upon the office by the General Assembly and by funds available for use by the Department of Highways. Section 1178-2, General Code, sets forth general powers and duties of the Director of Highways. This section reads in part as follows:

"The director shall have general supervision of all roads comprising the state highway system. He shall have power and is hereby authorized to alter, widen, straighten, realign, relocate, establish, construct, reconstruct, improve, maintain, repair, and preserve any road or highway on the state highway system, and, in connection therewith, to relocate, alter, widen, deepen, clean out or straighten the channel of any water course as he may deem necessary, \* \* \*"

The exercise of these powers by the Director will normally result in providing improved and safer highway facilities.

While the language of Section 1178-2, General Code, does not expressly require the Director to exercise the power and authority conferred therein, a duty is thereby created. In this connection Section 76, 32 O. Jur., 938, reads in part as follows:

“Powers conferred upon a public officer are generally construed as mandatory even though the language may be permissive where the public is concerned in their execution.”

Inasmuch as the public has a vital interest in the state highway system, it would appear that the Director is obligated to exercise the powers and authority conferred upon the office by the General Assembly, subject to the limitations I have described above.

It is clear that the General Assembly intended that the Director of Highways should concern himself with all the matters you have described in your request. Section 1178, General Code, which section describes the functions of the Department of Highways, reads in part as follows:

“The functions of the department of highways shall be to establish state highways on existing roads, streets and new locations and to construct, reconstruct, widen, resurface, maintain and repair the state system of highways and the bridges and culverts thereon; to cooperate with the federal government in the establishment, construction, reconstructions, improvement, maintenance and repair of post roads and other roads designated by the federal authorities; to conduct research, in matters pertaining to highway design, construction, maintenance, material, safety and traffic: \* \* \*”

The more difficult problem you present is whether the Director possesses authority to regulate and restrict access to the highway in the interest of public safety. Section 1178-21, General Code, providing for limited access highways, reads in part as follows:

“The director of highways shall be authorized to lay out, establish, acquire, open, construct, improve, maintain, regulate, vacate or abandon ‘limited access highways’ or ‘freeways’ within this state in the manner or manners in which said director may now or hereafter lay out, establish, acquire, open, construct, improve, maintain, regulate, vacate or abandon highways within the state. The director also shall have any and all other additional authority and power relative to such ‘limited access highways’ or ‘freeways’ as he now or hereafter may possess relative to highways including the authority and power to acquire by gift, purchase, condemnation or otherwise land required for right-of-way.

Where an existing highway in whole or part has been designated as, or included within, a ‘limited access highway’ or ‘freeway,’ existing easements of access may be extinguished by purchase, gift, agreement or by condemnation. \* \* \*”

It is apparent that the Director has authority to extinguish easements of access in the establishment of a limited access highway or freeway. In the enactment of Section 1178-21, General Code, supra, the General Assembly recognized that an abutting owner has a vested right of access to the highway, which can only be extinguished by purchase, gift, agreement, or condemnation.

The right of access of an abutting owner is discussed in Section 154, Volume 25, Am. Jur., 448, which section reads in part as follows:

“The right of access to and from a public highway is one of the incidents of the ownership or occupancy of land abutting thereon. Such right is appurtenant to the land, and exists when the fee title to the way is in the public as well as when it is in private ownership. It is a property right of which the owner cannot be deprived without just compensation. This easement extends to the full width of the street. It is subordinate, however, to the public convenience, of which the public authorities having control of the streets are the judges, and is subject to such reasonable use of the street, not inconsistent with its maintenance as a public highway, as may be necessary for the public good and convenience and does not seriously impair it. The public authority may therefore impose reasonable regulations governing the exercise of such right. It cannot, however, by virtue of such power of regulation, be prohibited or unduly restricted. \* \* \*”

It might be argued with some force that, since the General Assembly has recognized in each abutting owner an easement of access and has provided the Director the means of extinguishing such rights, so far as the Director is concerned the means so prescribed is the measure of the Director's power. However, in reading Section 1178-21, General Code, supra, it is at once apparent that the basic purpose of the enactment was to authorize the Director to establish limited access highways, vesting in the Director such powers as were necessary to make such improvements a reality. Rather than limiting or fixing a measure of power, Section 1178-21, General Code, confers new and additional power.

I am unable to find that the question of the authority of the Director of Highways to restrict the access of an abutting owner in the interest of public safety has ever been before the courts of Ohio for consideration.

A question similar to the one you present was before the Supreme Court of Louisiana in the case of *State, ex rel. Gebelin v. Department of Highways*, 8 So. Rep. (2nd), 71, decided March 30, 1942. There the

relators sought a writ of mandamus compelling the Department of Highways to permit them to cut the highway curb and construct entrances to their property, it appearing that subsequent to the construction of the highway, relators had subdivided their lands and desired to establish driveway entrances to the several lots abutting upon the highway. The Court held that the Department of Highways had authority to limit the number of access connections to such extent as the Department deemed necessary for public safety. The Court considered that the judgment of the officers of the Highway Department was entitled to great deference because of their professional and superior knowledge of the necessities of the case and of the danger to the public, but that the authority of the Department was not above and beyond that of the courts.

An abutting owner's right of access to the highway was before the District Court of California in the case of *Genazzi v. Marin County, et al.*, 263 Pac., 825. There the plaintiff commenced an action for mandatory injunction and damages for the reason that the defendant was constructing a drainage ditch along and upon the highway in front of the plaintiff's land for a distance of 500 feet. The plaintiff contended that the construction of the ditch prevented ingress and egress to his property without the use of bridges. In the course of his opinion at Page 826 the Court stated:

"Generally speaking, an abutting owner on a public highway has a special right of easement and user in the public road for access purposes, and this is a proper right of easement which cannot be damaged or taken from him without due compensation. But an owner is not entitled, as against the public, to access to his land at all points in the boundary between it and the highway although entire access cannot be cut off. If he has free and convenient access to his property, and his means of ingress and egress are not substantially interfered with by the public, he has no cause of complaint. \* \* \*"

In view of the foregoing and in specific answer to your inquiry, you are advised that:

1. So far as it is possible to do so within the limit of the powers conferred by the General Assembly, and with the funds available, the Director of Highways has the duty of designing, constructing and maintaining the state highways including the regulation of access thereto, so that the maximum degree of safety will be afforded the traveling public.

2. In the interest of public safety, the Director of Highways has the authority to limit and restrict an abutting owner's right of access, so long as such owner has reasonable and convenient access to the highway. The exercise of such authority may be subject to judicial review.

Respectfully,

HUGH S. JENKINS,  
Attorney General.