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LIMITING HIGHWAY ACCESS

By ROBERT R. BOWIE

The threat of commercial exploitation along the newly-completed Ritchie and Philadelphia highways has recently focussed public attention on the problem of unrestricted roadside development,1 but the problem itself is not new. For many years, as traffic has increased, the blight of such development has spread unimpeded along the main traffic arteries of the State. Gasoline stations, lunch rooms, stores, dance-halls, billboards and other commercial enterprises have multiplied until, in extreme cases such as the Baltimore-Washington Boulevard, they stretch in practically unbroken series along the whole length of the highway.2

Until lately, criticism of such development was confined largely to garden clubs and similar organizations, and it centered on the destruction of the natural beauty of the rural landscape. Since over one-half of all motoring is estimated to be for recreational purposes, the preservation...
of such scenery is a desirable end in itself and, in addition, is a valuable economic asset in attracting tourists.\(^3\)

Within recent years, however, additional detrimental effects of this roadside blight, besides the esthetic, have been pointed out by traffic engineers and safety groups. Various studies have shown that the numerous entrances to the highway, the frequent drawing in and out of the traffic stream, the parking, and the increased pedestrian traffic, all engendered by commercial use of the roadside, jointly conspire to reduce substantially the traffic capacity of the highway and to promote congestion, and to cause a large proportion of the highway accidents.\(^4\)

This toll in congestion and accidents, as well as blight of the rural amenities, seems an excessive price for unrestricted roadside development. Unless such progressive deterioration can be prevented, existing and future major highways will rapidly become obsolescent and require replacement by newer highways doomed in their turn to similar decay. Thus, to relieve the present conditions on the Washington Boulevard will require a completely new road largely paralleling the existing one.\(^5\)

The cost of modern highways makes such a course too extravagant to be justified unless their permanence is assured. Some method to preserve the safety, traffic capacity, and attractiveness of the highways is therefore essential.

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\(^3\) Motor travel for recreational and social purposes has been estimated to represent 61 per cent of all travel on rural trunk lines and 53 per cent of all travel on county and local roads. *The Utility and Recreational Use of Highways*, by D. Grant Mickle (*Proceedings of the Twenty-fourth Annual (Michigan) Highway Conference* (1938) 36-45).

\(^4\) See *Divided Highways and Freeways*, by Arnold H. Vey (*Proceedings of the Twenty-fourth Annual (Michigan) Highway Conference* (1938) 140-151); *The Problem of the Roadside* (New England Regional Planning Commission, 1939); *Unfit for Modern Motor Traffic*, Fortune, V. XIV, No. 2 (August 1936) 85; *Bulletin No. 23* (American Road Builders Association, 1931) pp. 3 and 33. Unpublished studies by the Chicago Park District Commission and the Long Island State Park Commission of limited access highways and parkways under their control have clearly shown the increased safety and capacity of such roads.

I.

Basically the problem is to prevent the use of abutting land to exploit the highway traffic for commercial purposes. This can be done either (1) by directly controlling the use of the abutting land, or (2) since such exploitation requires access to and from the highway (except for billboards), by restricting the right of access from such land, or (3) by a combination of both use and access control. Various measures based on one or the other of these methods have been tried or suggested. Although this article is concerned only with the legal questions raised by restrictions on the access from abutting land, a very brief reference to the different types of measures may give perspective in considering that problem.6

Dating back forty years or more, the earliest is the parkway, in which the roadway is flanked on either side by wide strips in public ownership. Most widely developed in Westchester County and on Long Island, in New York State, and to a lesser extent in Chicago and Metropolitan Boston,7 the parkway is expensive and feasible only for scenic routes along new rights of way.8 Because the wide borders of abutting land are publicly owned, commercialization along or near the road can not occur.9

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6 Detailed consideration of the various measures and their respective uses and advantages is impractical and unnecessary for present purposes. Moreover, the subsequent legal discussion is confined to the constitutional problems inherent in restricting highway access and does not attempt to consider whether the State Roads Commission now has the statutory authority (1) to lay out limited access ways or parkways (see Md. Code Supp. (1935) Art. 89 B, Sec. 3, and Bouis v. Baltimore, 138 Md. 284, 113 A. 852 (1921)) or (2) to restrict access from abutting land to existing highways under its power to make “such regulations . . . as it may deem necessary for the preservation of State Roads” (Md. Code Supp. (1935) Art. 89 B, Sec. 27) and its control over openings in the highway (Md. Code Supp. (1935) Art. 89 B, Sec. 8) or other powers.


8 For a new route between Baltimore and Washington, a parkway located largely within existing governmental reservations has been suggested. See Baltimore-Washington-Annapolis Area, op. cit. supra, n. 5, and the Baltimore Sun, February 15, 1940, pp. 24 and 11.

9 Whether land adjacent to the parkway still has a right of access across the publicly owned borders to the roadway depends on the statutory authority under which the parkway is constructed. See Anzalone v. Metropolitan District Commission, 257 Mass. 32, 153 N. E. 325, 47 A. L. R. 897 (1926); Metropolitan District Commission v. Cataldo, 257 Mass. 38,
The second general method, known as "highway zoning," relies on public regulation of the use of abutting land in private hands, in place of public ownership. Although successfully used in certain California counties, and other scattered districts in the United States, the most important application of this type of control at present is the English Restriction of Ribbon Development Act, 1935. Under this Act, the use of land within two hundred and twenty feet of the center of the main highways is restricted, subject to broad administrative discretion to permit non-injurious uses. Statutes proposed in this country for this purpose generally conform more closely to the zoning statute pattern and provide for districting and use regulations instead of broad administrative discretion. Such highway zoning raises various legal questions common to all zoning regulation and also some questions of delegation of power to administrative agencies but both are outside of the scope of this article.


Laws regulating the locations of billboards or particular businesses such as gasoline stations or motor junk yards along the highways are special forms of restriction on abutting land use. Billboard statutes are collected in Roadside Improvement (American Civic and Planning Association, 1938) 18-23. For forms of junk yard and gasoline station statutes, see Conn. Gen. Stat. (Supp. 1935) Secs. 1238c-1248c, and Conn. Gen. Stat., Secs. 1659-1667, amended by (Supp. 1935) Secs. 644c-648c and (Supp. 1937) Sec. 359d.

Quarterly Bulletin (American Nature Association), V. 1, No. 2 (July 1938).

Such as Spokane County, Washington, and Glynn County, Georgia. The Roadside Bulletin (National Roadside Council), V. 6, No. 1 (October 1939), 26-7. Connecticut has adopted a general enabling act permitting towns and boroughs to establish non-commercial zones for the purpose, inter alia, of regulating "distracting hazards to safe motor vehicle operation and general traffic upon the highway" (Acts of 1931, Ch. 267; Conn. Gen. Stat. (Supp. 1935), Secs. 89c-92c). Apparently, however, only one town has used this power to prevent highway ribbon development. Roadside Bulletin, V. 5, No. 1 (June 1937), pp. 28-29.

Sections 2 and 7. Section 9 provides for compensation under certain narrowly restricted circumstances.

Model acts for state highway zoning have been drafted and proposed by the American Civic and Planning Association (see Roadside Improvement, op. cit. supra, n. 10, pp. 11 to 13); the American Society of Planning Officials (mimeo.); and the American Automobile Association (Suggested Uniform Act for Roadside Development and Control, 1938, amended in 1939 and, at the AAA annual meeting in November 1939, referred back to the Committee for further consideration and public hearings).
In addition to the regulation of the use of the land, both the English Act and two of the proposed acts impose restrictions on the right of access from abutting property. In the English Act, access, like land use, is subject to administrative control, while the proposed American acts contemplate general regulations of the number, location, design and construction of means of access. The extent to which such restrictions may limit or abolish the access from abutting land to the highway without compensation depends, of course, on the nature and extent of the abutting owner's rights.

The third and newest type of control, the "limited access" highway, relies exclusively on restriction of access, and for practical purposes abolishes all rights of access from abutting land. In this way the highway is insulated from the abutting land, and exploitive uses, except billboards, can not arise along the margin. Within the last three years, statutes authorizing limited access highways have been passed in California, Connecticut, New York, Rhode Island, and West Virginia. While the New York and Connecticut laws appear to authorize establishment only on new rights of way, the California, Rhode Island and West Virginia statutes expressly permit the designation of existing roads as limited access roads, and authorize the extinguishment of existing rights of access by purchase or condemnation.

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16 Sections 2 and 7. See supra n. 14.
17 American Society of Planning Officials, Draft Act, Sections 5 and 13; American Planning and Civic Association, Proposed Act, Section 3. While in many states a permit from the highway commission is now required for opening new means of access to the highways, such control is generally applied only to the design and not the number of such approaches.
18 Streets and Highways Code (California), Secs. 23.5, 100.1, 100.2, and 100.3 (Statutes of 1939, Ch. 687); see also Cal. Gen. Laws, Act 8202 (Statutes of 1939, Ch. 359).
19 Laws of 1939 (Conn.), Ch. 307.
20 N. Y. Highway Law, Secs. 3 and 30 (as amended by Laws of 1937, Ch. 248).
21 General Laws of Rhode Island (1938), Ch. 75 (Public Laws of 1937, Ch. 2537).
23 A Model Act proposed by the American Planning and Civic Association also applies to existing roads. The Constitution of California and West Virginia, it should be noted, require compensation for damage to private property as well as for a taking. Const. of California, Art. I, Sec. 14; Const. of West Virginia, Art. III, Sec. 9.
Establishment of such roads on new rights of way would not involve legal problems since the right of access of abutters, if any, can be acquired along with the necessary land and the question of the extent of such rights will not arise.\textsuperscript{23a} When an existing road is so designated, however, the abutting owner will be prevented from making a new means of access and his existing access may be closed.

To what extent then may the access of the abutting owner on an existing highway be cut off or restricted either under a limited access highway statute or pursuant to a highway zoning or permit statute, without paying to the owner compensation under Section 40, of Article III, of the Maryland Constitution?

II.

Before taking up the cases on this question, attention may be called to several general considerations. In the first place, it is important to bear constantly in mind the fact that the Maryland Constitution requires compensation only for a “taking” of private property for a public purpose and not for mere “damaging” or “injuring”.\textsuperscript{24} Many of the other states, beginning as far back as 1870 have amended the eminent domain provisions of their constitutions to include “damaging” as well as “taking” but, as the Court of Appeals has several times pointed out, Maryland has not done so.\textsuperscript{25} Consequently, in Maryland, pri-

\begin{footnotesize}
\begin{enumerate}
\item When, in widening and regrading an existing street, a part of an abutting lot is actually taken and the remainder left much above the former street level, compensation may be recovered for the resulting injury to the beneficial use of the remainder, measured by restoring it to its former relative condition, as well as for the property actually taken, \textit{Baltimore v. Garrett}, 120 Md. 608, 87 A. 1057 (1913). This rule, it should be noticed, does not deal with the question of what constitutes a taking, which is the subject of this article, but merely fixes the measure of damages when a taking has admittedly occurred.
\item Art. III, Sec. 40 of the Maryland Constitution provides: “Sec. 40. The General Assembly shall enact no Law authorizing private property to be taken for public use, without just compensation as agreed upon between the parties, or awarded by a jury, being first paid or tendered to the party entitled to such compensation.”
\item Krebs v. State Roads Comm., 160 Md. 584, 588, 594, 154 A. 131, 133, 135 (1931); \textit{Brehm v. State Roads Commission}, 176 Md. 411, 414, 5 A. (2d) 820, 821 (1939). Such amendments have been adopted in approximately one-half of the States.
\end{enumerate}
\end{footnotesize}
private individuals may suffer substantial loss or injury as a result of lawful public action without being thereby entitled to compensation.

In the second place, any restriction upon access imposed under statutes of the sort here under consideration is clearly done for the public purpose of protecting the safety and traffic capacity of the highway as a highway. Consequently cases in which an abutter’s access to the highway from his property is obstructed by a private individual for his own purposes, either on his own responsibility, or under permission from a public authority, have no present bearing. Equally inapplicable are cases dealing with the right of the abutting owner to damages when his access is blocked or impaired through wrongful failure of the public authority to keep the streets or roads in repair. In neither class of cases is the restriction of access imposed for a public purpose. A final group of cases to be distinguished includes those involving the use of the highway for a public but non-highway purpose which affects the abutter’s access, such as railroad tracks or telephone or telegraph poles.

The restrictions on access here involved are not imposed either for a private or non-highway purpose. On the contrary, they are required to prevent the abutting

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26 See, e.g., Houck v. Wachter, 34 Md. 265 (1871) (Even then the abutting owner must show special damage different from the public’s, such as that the road is only means of access); Crook v. Pitcher, 61 Md. 510 (1884).


28 See, e.g., Bembe v. Anne Arundel County, 94 Md. 321, 51 A. 179 (1902) (damages allowed where sole means of access blocked by non-repair); Johnson v. Oakland, 148 Md. 432, 129 A. 648 (1925) (non-repair creating cul-de-sac destroyed abutter’s business).

owner from exploiting the highway for his private gain as a market place. In other words, they seek to preserve the highway as such and to prevent its use for other purposes essentially private which interfere with the safety and the travel of the general public on the highway.

Consequently none of the foregoing cases is relevant to the solution of the present problem. General expressions in such cases as to the rights of an abutter must be interpreted in the light of the facts dealt with. An abutter's right to have his access protected against interference arising from a private purpose, or from unlawful neglect of public duty, or from non-highway uses, does not necessarily give him the right to interfere for his private purposes with the proper use of the highway by the public.

III.

Consideration must therefore be restricted to cases in which the abutting owner's access has been interfered with by lawful actions done to promote the use and maintenance of the highway as a highway. To simplify discussion these cases may be divided into four groups (1) cases involving safety measures on the highway; (2) cases involving changes in the grade of the highway; (3) cases involving viaducts or similar structures in the highway; and (4) cases involving closing or relocation of the highway. These may be taken up in turn.

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In Krebs v. State Roads Commn., 160 Md. 584, 593, 154 A. 131, 135 (1931), however, the Court, in expressly repudiating such dicta to the effect that an abutter had an independent private interest in the highway, said: "Expressions used in the course of argument in some of the opinions may, perhaps, be difficult to reconcile with each other; but, if we take the decisions and essential reasons, which alone should control, we find the argument for a separate private easement here inconsistent."
Protection of the Highway.

In general, the public authority charged with care of streets or highways is not liable to abutting owners for damage caused by improvements to protect the highway if they are made with due care. Thus, if the public authority, in order to prevent the flooding of a highway adjacent to a stream builds a dike or wall along the bank, and a mill on the stream is injured by the additional water so backed up, the owner has no claim for damages.\(^1\) On the other hand, if the improvement concentrates water from elsewhere and drains it over the abutting owner's land in such large quantities that he is deprived of its use, that amounts to a taking for which compensation is payable.\(^2\)

Two cases illustrate the application of these principles to protective structures, which interfere with an abutter's access. In *Textor v. The Baltimore and Ohio Railroad Company*,\(^3\) plaintiff owned a corner property abutting on two streets, on one of which railroad tracks had been laid. To protect traffic at the grade crossing, the defendant railroad, with the approval of the city, proposed to erect safety gates. Plaintiff sought to enjoin, claiming that when up, the gates extended three feet in front of his door, and that when down, they projected five feet and also prevented access to the entrance to his lumber yard on the street containing the railroad tracks. Assuming that the location was reasonably selected, the Court refused relief on the ground that the city had full power to provide for safety devices on the highway, observing:

"The streets are under the exclusive control of the city as avenues of travel; and whatever precaution may be reasonably taken to secure the safety of those who use them is but effectuating the object of such highways and discharging a corporate responsibility."\(^4\)

\(^1\) Tyson v. Commissioners of Baltimore County, 28 Md. 510 (1868); Walter v. Wicomico Co., 35 Md. 385 (1872).
\(^2\) Guest v. Church Hill, 90 Md. 689, 45 A. 882 (1900).
\(^3\) 59 Md. 63, 43 A. R. 540 (1882).
\(^4\) 59 Md. 63, 64, 43 A. R. 540, 541 (1882).
This decision clearly establishes the fundamental public right to restrict an abutter's access for the protection of the highway users.

The second case dealing with highway safety devices, DeLauder v. The County Commissioners of Baltimore County,\(^8\) reveals the basic limitation on this power. In that case, the plaintiff owned a farm which was separated into two parcels. Between the parcels ran the Little Gunpowder Falls, a narrow strip of land owned by another, parallel to the Falls, and a public road. One-half of the farm abutted on the road but the only access to the other half was by a right of way twenty feet wide over the Falls and across the intervening strip to the road. In repairing a drain in the road, the County Commissioners built a culvert, raising the level of the road about four feet opposite plaintiff's right of way, and erected a railing along this raised portion directly blocking the entire right of way. Plaintiff sued for the destruction of this right of way. The Court of Appeals allowed recovery on the ground that the total destruction of the private right of way amounted to a "taking". In its opinion, the Court emphasized the fact that the right of way over another's land was itself property which was destroyed by the highway barrier, and indicated that the location of the railing was unnecessarily injurious to the plaintiff's rights. The case is unusual since the land deprived of access did not abut the highway but was connected with it by the private right of way destroyed. Subsequent cases, in discussing this case, have stressed the facts involved and the total destruction of all possible use of the right of way.\(^3\)

Change of the Highway Grade.

Cases involving a change in the grade of the highway affecting the access of abutting owners provide close analogies to the problem under discussion. Since such changes are an assertion of the superior rights of the travelling

public in the highway over the interests of abutting owners, the decisions in this field should provide a fair index of the probable attitude of the Court to restrictions on access for the protection of the highway and its users.

Although two earlier cases denied the abutting owner damages for interference with his access resulting from lawful reductions in highway grades, the first case fully discussing the question of injuries due to grading was *Mayor and C. C. of Cumberland v. Willison*, which is considered a leading case on the topic although the particular injury involved was not interference with access. After stating the general principle that consequential damages do not require compensation, the Court then said:

"Upon this principle it has been decided by a great preponderance of authority that municipal corporations acting under authority conferred by the Legislature to make and repair, or to grade, level, and improve streets, if they exercise reasonable care and skill in the performance of the work resolved upon, are not answerable to the adjoining owner whose lands are not actually taken, for consequential damages to his premises, even though in grading and leveling the street a portion of the adjoining lot in consequence of the removal of its natural support falls into the highway, and the same immunity exists if the street be embanked or raised so as to cut off, or render difficult the access to the adjacent property, and this, too, although the grade of the street had been before established and the adjoining property owner had erected buildings or made improvements with reference to such grade. Property thus injured is not in the constitutional sense taken for public use.... So far, therefore, as injury to the private owner consists in leaving his property above or below the grade of a street, so as to cut off or render difficult the access thereto, and so far as its value or its convenient and comfortable enjoyment may be impaired in consequence of such grading or change thereof from time to time, the law seems to be well settled, and if the

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88 50 Md. 138, 33 A. R. 304 (1878).
injury complained of in this case 'were of that character we should have no difficulty whatever in holding that the city was not responsible therefor.'

Applying this principle to the facts before it, the Court held that interference with the flow of a mill-race resulting from regrading of streets did not entitle the owner to damages. The same principle was applied in O'Brien v. Baltimore Belt Railroad Company, where a deep railway cut in the street opposite plaintiff's property, which narrowed the street to one-half its former width, was held not to be a taking.

In the next two cases, the abutting owner alleged that the highway involved provided the only means of access to his property and that the regrading deprived him of free access and beneficial enjoyment of the property. In the Green case, a fill of six feet was made, and in the Offutt case, a cut of seven feet. Nevertheless, in both cases the Court held that the damages were merely consequential and did not amount to a "taking" within Article III, Section 40.

The extent and limits of this doctrine are clearly shown by the cases of Sanderson v. Baltimore and Baltimore v. Dobler which were decided within two years of each other. In the Sanderson case, the plaintiff built a home on a corner lot which fronted on two streets and an alley. Years later, the City graded the streets by excavating from fourteen to seventeen feet from one street, and from sixteen to thirty feet on the other, and cutting off both ends of the alley, thereby depriving the owner of all vehicular access to the property and all individual access except

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30 50 Md. 138, 148-149, 33 A. R. 304, 307-308 (italicizing of "cut off" added). 40 74 Md. 363, 22 A. 141, 13 L. R. A. 126 (1891). Likewise, in Poole v. Falls Road Ry. Co., 88 Md. 533, 41 A. 1069 (1898), the placing of street car tracks on a narrow street leaving insufficient space between the tracks and curb to permit passing or parking of vehicles was held not a taking.


42 135 Md. 509, 109 A. 425 (1920).

43 140 Md. 634, 118 A. 168 (1922).
by a steep ladder. After reviewing the cases denying liability for inconvenience or expense resulting from grading, the Court allowed recovery, stating in its opinion that the extreme excavation on all sides

"has resulted in the practical destruction of access to her property, and we are of opinion that, under the principles declared in DeLauder's case, supra, and in Walters v. B. & O. R. R., 120 Md. 644, the injury amounts to or is equivalent to the taking of private property without making just compensation therefor to the owner."

Decided two years later, Baltimore v. Dobler complements the Sanderson case. The lot there involved was unimproved and ran the full depth of the block (466 feet) between two parallel streets, fronting three hundred and fifteen feet on each street. In connection with an extension of the belt line railroad, the City lowered the grade on one of these streets to twenty feet below the level of the plaintiff's lot, resulting, according to the plaintiff, in damage of $50,000. In holding that there was no "taking" requiring compensation the Court stated:

"The controlling facts in the case are as follows:

"1. There is no physical taking of any part of the lot.

"2. There is no destruction of plaintiff's easement in the use of the street.

"3. There are no improvements erected on the lot on Clement Street, the reasonable use and enjoyment of which would be destroyed by the proposed regrading.

"4. There is a wide front of the lot on another street, so that ingress to and egress from the lot does not depend upon convenient access to Clement Street."

The Court distinguished the DeLauder, and the Walters cases on the ground that in each, access had been com-

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44 135 Md. 509, 523, 109 A. 425, 430 (1920).
45 Supra, n. 43.
46 140 Md. 634, 643, 118 A. 168, 171 (1922) (italics added).
barred, and the Sanderson case on the ground that the destruction of all access

"practically destroyed plaintiff's home and amounted to a taking."\(^{47}\)

Expressly stating that the facts presented by this case fell within the principles announced in the case of Cumberland v. Willison,\(^ {48}\) the Court denied the owner relief.

Of the four factors enumerated by the Court as controlling, the fourth was apparently the crucial one on which the case turned. In the subsequent case of Dobler v. Baltimore,\(^ {49}\) seeking recovery for the same damage on a different theory, the Court summarized its prior decision as holding

"that a change in the grade of a street made by a municipal corporation under statutory authority, where abutting property is rendered more difficult of access, without, however, destruction of all means of ingress and egress, does not involve a taking of property within the meaning of the constitutional prohibition of the taking of private property for public use without compensation."\(^ {50}\)

This line of distinction has been adhered to in later cases. Thus in Baltimore v. Marine Works,\(^ {51}\) the plaintiff leased a lot and building abutting on three streets on each of which it had entrances used for its heavy trucks. When grading lowered the street level on two of the streets varying amounts from three to five feet, truck entrances from these streets became impractical and plaintiff claimed a taking. Pointing out that even though his truck entrances were closed, plaintiff was still not completely deprived of the use of any of the streets, the Court held that there was no taking and that the hardship was not as great as in other cases where recovery had also been denied. It specifically stated that the DeLauder, Walters, and Sanderson cases

\(^{47}\) 140 Md. 634, 646, 118 A. 168, 173 (1922).
\(^{48}\) Supra, n. 38.
\(^{49}\) 151 Md. 154, 134 A. 201 (1926).
\(^{50}\) 151 Md. 154, 159-160, 134 A. 201, 203 (1926) (italics added).
\(^{51}\) 152 Md. 367, 136 A. 829 (1927).
did not vary the rules of law laid down in the other cases but that the differences were "in the findings on the facts". 52

In the most recent case on change of grade, Smith v. Balto. & Ohio R. Co., 53 the road in front of a filling station had been raised about a foot in providing an approach for a grade crossing elimination, thereby causing the station owner a loss of business. Following its earlier decisions in denying recovery, the Court, in an opinion by Judge Parke commented on the general rule as follows:

"The theory adopted by the court is that, when a highway is acquired by gift, purchase, or the exercise of the power of eminent domain, it was an implication of the acquisition, in whatever form, by the public agency, that the land acquired for the highway would and could be used not only for passage by the public, but also for its repair and alteration of surface, from time to time, as the public needs might require. The owners of land along streets and highways are charged with a knowledge of this right of the public to repair and change the surface of the highway, and, so, this principle applies to such proprietors, who must be held to have contemplated, at the time when title was acquired, and so to have assumed the lawful contingencies implicit in the location of their properties. Moreover, since consequential damages resulting to land from a mere change of grade, without any physical injury to the property itself, is not a taking within the meaning of the Constitution (Article 3, Sec. 40), the abutting landowner has no right of action, if the work is authorized by law, and is skillfully and not negligently done." 54

Since the superior public right is "an implication of the acquisition" which the owner "is held to have contemplated", it is apparent that actual intention or expectation is immaterial. Indeed, while an abutting owner may contemplate minor changes, it is hardly likely that as a matter of actual fact, he expects changes like those in the Dobler case. In effect, therefore, this explanation

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53 168 Md. 89, 176 A. 642 (1935).
recognizes that the public rights in the highway are paramount to those of the abutting owner.\textsuperscript{55} Consequently any changes in its use or structure to improve or protect it as a highway, whether originally contemplated or not, must be suffered by the abutting owner without compensation, unless their effect is to deprive him of the entire use and enjoyment of his property. In the case of injury to access this can only occur where the owner is cut off from all access to the general network of public roads.

**Highway Viaducts**

Closely akin to the change of grade cases are those involving viaducts in the highway. In the first Maryland case of this character, *Garrett v. Lake Roland Elevated Railway Co.*\textsuperscript{56} the plaintiff sought to enjoin the construction in front of his lot of a stone approach to the elevated street car viaduct on Guilford Avenue. The approach was eighty-three feet long and sixteen feet wide, in the middle of the street, leaving only ten feet of the street for access to plaintiff's property. Applying the principles of *Cumberland v. Willison*\textsuperscript{7} and *O'Brien v. The Baltimore Belt R. R. Co.*,\textsuperscript{58} the Court held this injury to plaintiff's access was consequential damage only and not a "taking" within Article III, Section 40 and denied the injunction. It may be noted, however, that since the statute authorizing the construction expressly required the railway company to pay damages for injuries to property, plaintiff had an action at law under the statute.

More significant for present purposes, however, is the case of *Walters v. B. & O. R. R.*\textsuperscript{59} There, to eliminate railroad grade crossings in Baltimore a highway viaduct was being erected along Hamburg Street with an approach between Sharp and Howard passing in front of plaintiff's lot and building. At that point, the approach, five feet

\textsuperscript{56} 79 Md. 277, 29 A. 830, 24 L. R. A. 396 (1894).
\textsuperscript{57} Supra, n. 38.
\textsuperscript{58} Supra, n. 40.
\textsuperscript{59} 120 Md. 644, 88 A. 47 (1913).
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in height with an additional guard-rail above, and supported on a concrete pillar directly before plaintiff's entrance, ran within a few inches of his property. As the Court said:

"The effect of this structure was to effectually bar all ingress to and egress from the premises, unless by means of a ladder from the second floor window to the newly constructed foot-way."

In addition, the loss of light and air made the first floor damp and uninhabitable. Plaintiff claimed damages on the ground that the deprivation of the use of his property amounted to a taking.

After recognizing the general principle that the City would not be liable for a change in grade of the street, the Court continued:

"... But the owners of lots abutting upon public streets have easements or rights in the street which are valuable and are in addition to those which they have with the general public. This is recognized in our statute law which confers upon the City of Baltimore the power for laying out and closing up streets by providing for compensation to such owners upon the closing of an adjacent street. So in Van Witzen v. Gutman, 79 Md. 405, where an alley was attempted to be closed, thus taking from other abutting owners their means of ingress to and egress from their property through the alley to the public street, it was held, that the right was a valuable one and could not be taken for public use without compensation, and a fortiori not for private use. And in Townsend, Grace & Co. v. Epstein, 93 Md. 537, the same rule was followed where the interference was with regard to light and air."

Both of the cases cited, it should be noticed, involved structures in or over the street by private individuals for

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60 120 Md. 644, 652, 88 A. 47, 50 (1913).
61 120 Md. 644, 655, 88 A. 47, 51 (1913). The view that as against the public abutters have "easements or rights in the street ... in addition to those which they have with the general public" was expressly rejected, and earlier dicta to that effect disapproved, in Krebs v. State Roads Commn., 160 Md. 584, 592-3, 154 A. 131, 134-5 (1931). See supra, n. 30, and infra, n. 76).
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their own benefit. Against such use of the street for a private, non-highway purpose, the abutting owner has, of course, a right to be protected. But this right to prevent an individual from diverting the highway from public highway purposes does not mean that the abutting owner has a property right in the highway as against the public. And no such special easement was necessary to decide the case, since all access had been blocked.

This distinction the Court appears to recognize later in its opinion, where, in referring to a New York case, it states as the rule

"that an abutting owner cannot be deprived of the street affording him access to his premises, unless there is left for his use and enjoyment other suitable means of access, or just compensation is paid him for the deprivation of the same."6

In other words, as against the public, he is protected from complete destruction of all means of access to his property, but not the obstruction of access from a particular highway. Having found in this case that the structure cut off all access, the Court held, in accordance with this rule, that so complete a destruction of use and enjoyment amounted to a "taking" under the Constitution.

In M. & C. C. of Balto. v. Bregenzer,63 the Court reached the opposite conclusion on somewhat different facts. There the plaintiff's properties were nearer to the base of the viaduct which merely blocked the light and air from the cellar windows, and required changes in the front entrances. In denying recovery the Court took occasion to state

"that the Court does not understand that it announced a new legal principle in the Walters case, or that it impaired in the slightest degree the settled principles of law upon the subject it was dealing with. It merely applied these principles to the facts of that case."64

62 120 Md. 644, 656, 88 A. 47, 52 (1913) (italics added).
63 125 Md. 78, 83, 93 A. 425, 426 (1915).
64 125 Md. 78, 83, 93 A. 425, 426 (1915).
LIMITING HIGHWAY ACCESS

And after reviewing the prior cases, it concluded:

"In none of the cases is it held that mere inconvenience of access resulting from acts done, or mere diminution of light and air constitute a taking of private property. The injury complained of must amount to a substantial destruction of these rights before the provisions of the Constitution can be invoked."^65

And in the latest viaduct case, Baltimore v. Himmelfarb,^66 seeking damages for interference with light and air by the Orleans Street viaduct, the Court again emphasized this principle:

"The difficulty is the one long experienced from the extension of meaning of 'taken', in decisions which have allowed compensation when property has not been actually appropriated for the public use, but its use and enjoyment by the owners have been interfered with in great degree. As distinctions between possible interferences must be largely distinctions in degree, complete uniformity in the precedents is not to be found, and 'expressions used in the course of argument in some of the opinions may, perhaps, be difficult to reconcile with each other.' Krebs v. State Roads Commission, 160 Md. 584, 593, 154 A. 131, 135. But it results from the adjudications that compensation may be exacted only for severe interferences which are tantamount to deprivations of use or enjoyment of property... The use has then, in effect, been taken from the private owners, although the property has not been taken over into the possession and use of the public. Injury short of such incidental destruction or deprivation is not compensable."^67

Consequently in that case, no "taking" resulted from the interference.

Highway Closings or Relocations

In the final category are cases where the closing or relocation of a street or highway has adversely affected the access to property along the highway.

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^65 125 Md. 78, 87, 93 A. 425, 427 (1915).
^66 172 Md. 628, 192 A. 595 (1937).
^67 172 Md. 628, 630-1, 192 A. 595, 597 (1937).
Passing over the case of M. & C. C. of Balto. v. Brennan, which turned on whether the closing of a diagonal street was for a public or private purpose rather than on the right to compensation, the first case in this group is Germ. Luth. Church v. Baltimore. There the church, school and parsonage were located at the corner of Eutaw and Henrietta Streets and to eliminate the grade crossing over the B. & O. tracks to the east, the City closed Henrietta Street east of Eutaw, leaving Eutaw entirely open and Henrietta open in front of the church property. The church sued, claiming that the more circuitous route toward the city caused the loss of membership and property value. Citing the earlier grading cases, the Court drew the familiar distinction between consequential damage and a "taking", and pointed out that even in cases of private obstruction, damages are recoverable only where the sole means of access is closed.

Huffman v. State Roads Commn., and Ragan v. Susquehanna Power Co., apply the same principle to essentially similar facts. In the first, the landowner was denied damages for the relocation of a bridge and its approaches to a site less convenient for his use. In the Ragan case, a tow road along the edge of the Susquehanna River which provided plaintiff with convenient access to various points was flooded by the defendant's dam and plaintiff was forced to use the much more circuitous upland route. He claimed damages "because the comparative inconvenience in being forced to take the longer road has deprived him of some part of the value of his land", but the Court rejected the claim, saying:

"But it is settled that subjection to such inconvenience does not amount to a taking, and so deprive the owner of legal rights."

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88 116 Md. 342, 81 A. 677 (1911). At the end of its opinion, however, the Court remarked that "of course, a street cannot be closed even for a public purpose without just compensation to those entitled to it". On this point, see infra, n. 78.
89 123 Md. 142, 90 A. 983 (1914).
70 152 Md. 566, 137 A. 358 (1927).
71 157 Md. 521, 146 A. 758 (1929).
72 157 Md. 521, 527, 146 A. 758, 760 (1929).
Because of its rigorous application of this rule and its extensive discussion of the abutting owner's rights, the case of *Krebs v. State Roads Commn.*,\(^7\) deserves the closest attention. There the plaintiff's store was located on the York Road just west of the railway grade crossing over which the road passed in entering the town of Parkton. Eighty per cent of plaintiff's trade came from customers living on the opposite side of the tracks in Parkton and much of the remainder from persons on their way into Parkton. To eliminate the grade crossing, the State Roads Commission relocated the road to the south and built an overpass and then closed the grade crossing. Consequently, plaintiff's store was left on a cul-de-sac instead of a through road, and the distance from the store to the town was increased from several hundred feet to three-quarters of a mile. Plaintiff sought to enjoin this as a "taking".

Despite the severe damage, the Court denied recovery. In reaching this decision, the Court, in an opinion by Chief Judge Bond, passed on several important points:

(1) After pointing out that the change had been made under statutory authority, the opinion distinguished cases based on nuisances caused by a public body, or neglect of public duties to repair, or obstructions by non-highway uses.

(2) The Court then distinguished the *Walters* and *Sanderson* cases on the ground that they decided that to deprive an abutting owner "of access to and from the street *in front"\(^7\) amounted to a "taking", and that this was not done here. More precisely, it is believed, those cases turned on a deprivation of all access rather than merely that in *front*; this is also implicit in the holding in the *Dobler* case that cutting off access to one of two front streets was not a taking.

(3) The Court rejected the theory of some jurisdictions that leaving the property on a cul-de-sac was a taking, observing that it was difficult to distinguish such a situation "from the cutting off of access on one of two

\(^7\) 160 Md. 584, 589, 154 A. 131, 134 (1931) (italics added).
fronds, or from the reduction of wide adjacent streets to narrow passages, none of which latter disadvantages have been found to constitute takings of the properties for public use in the constitutional sense.\textsuperscript{75} It is rather a matter of greater inconvenience of access, as in the \textit{German Lutheran Church} case or the \textit{Ragan} case, although in a more severe form and with more serious financial losses.

(4) Expressly repudiating contrary dicta in several earlier cases, the Court specifically held that an abutting owner had no special private easement or property in the road against the public. Observing that the change had been made for the benefit of the general public, the Court stated:

"It could not be said that the property of any of these users—at least property not actually deprived of all access—is to be taken, unless it can be said that the location of the public easement at that site gave them superimposed property rights against the public as a whole. And this, we think, it did not do."\textsuperscript{76}

(5) Finally, referring to the dictum in \textit{Baltimore v. Brengle}\textsuperscript{77} that "a street cannot be closed even for a public purpose without just compensation to those entitled to it", the Court said:

"But, assuming full authorization by statute for the closing without allowance of compensation, the claim could rest on no basis other than that of the constitutional prohibition against a taking without compensation; and such a taking, we find, is not involved in the surrender or transfer of the public easement in this case."\textsuperscript{78}

The very recent case of \textit{Brehm v. State Roads Comm.}\textsuperscript{79} reaffirms and applies these principles. There the plaintiff's farm was located on a private side road which crossed the adjacent railroad tracks of the Pennsylvania and ran a short distance to the new Philadelphia Road. The Coun-

\textsuperscript{75}160 Md. 584, 590, 154 A. 131, 134 (1931).
\textsuperscript{76}160 Md. 584, 593, 154 A. 131, 135 (1931).
\textsuperscript{77}\textit{Supra}, n. 68.
\textsuperscript{78}160 Md. 584, 595, 154 A. 131, 136 (1931).
\textsuperscript{79}176 Md. 411, 5 A. (2d) 820, 6 A. (2d) 378 (1939).
ty Commissioners acquired the road, covenanting to keep it open. The State Roads Commission, after various proceedings then took over the road, closed the crossing and substituted a viaduct almost a mile to the south, increasing plaintiff's route to the Philadelphia road by about a mile. Aside from objections to the proceedings, plaintiff sought to enjoin the closing on the ground that (1) this added distance and inconvenience amounted to a taking; (2) the fact that the new viaduct was so distant and restricted to eight ton shipments was unreasonable; and (3) the closing was fraudulent in view of the covenant to keep the road open. In rejecting all three grounds the Court made several significant statements. Following the prior cases in holding the inconvenience and added distance were not a taking, the Court passed to the validity of locating the new viaduct "so far to the south", saying

"the majority consider it impossible for a court to hold on the evidence that the commission's determination, in the exercise of the State's police power, is unreasonable and extravagant, and that the convenience and rights of the landowners are arbitrarily disregarded."\(^{80}\)

Where there is no taking, it would appear that the landowner's "convenience and rights are arbitrarily disregarded" only if the public action is not reasonably related to promotion of a public purpose. But as applied to highways, this is unlikely to occur in practice except where the sole motive is private benefit;\(^{81}\) otherwise a wide latitude is permitted.\(^{82}\) In disposing of the third claim on the ground that any fraud in acquiring the road would not affect the closing of the crossing, the Court said:

\(^{80}\)176 Md. 411, 419, 5 A. (2d) 820, 823 (1939). Presumably, Judges Offutt and Delaplaine, who dissented without opinion, disagreed with the majority on this point.

\(^{81}\)Such action for private benefit would, of course, violate the principle established by the cases cited supra, n. 27.

"He appears to have had at most an easement over the tracks and beyond, and even if the road over his land had continued in private ownership, the State, by its authorized agency, could have acquired the road over the tracks and beyond, and once owning it could have removed the crossing in the exercise of its police power."

Thus the destruction of his private easement in one direction would not be a taking where use in the other direction remains.

Finally, the supremacy of the public rights in the highway was strongly stated by Judge Parke in his concurring opinion, in which, after referring to the conversion of the private way into a public road, he wrote:

"... The rights and obligations of the plaintiff must be determined with reference to the rights and obligations of the public in the way thus created. ... The grantor must be held to have known that the county commissioners could not covenant against the exercise of the police power or of its discretionary power to change, alter or close, whenever the proper occasion arose, the highway in accordance with the public welfare, safety or convenience."

The fact that the landowner had donated the right of way and obtained the covenant in order to forestall the closing forcefully emphasizes the strength of the principle.

IV.

From a consideration and comparison of these various cases, several conclusions as to the rights of the abutting owner appear justified.

(1) If the abutting owner is totally deprived of all access to his property by changes in the highway or other measures, he is entitled to compensation for a taking. The cases of DeLauder v. Baltimore County, Walters v. Balti-

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85 Supra, n. 35.
more & Ohio R. R. Co., and Sanderson v. Baltimore City, establish this rule. This is based on the fact that a total destruction of access so completely destroys the use and enjoyment of the property by the owner that, as by a flooding, he is practically deprived of the property itself. It is the total loss of practical use and not the depreciation in value which is determinative.

(2) Short of total loss of access, however, the abutting owner has only a qualified privilege of access to any highway, subordinate to the paramount right of the public to its use and protection; he does not have a special easement or other private property right in the highway different from that of any other member of the public. This is the express holding of Krebs v. State Roads Commission and is implicit in the cases referred to there.

(3) Consequently, so long as some reasonable means of access is preserved, the public may restrict or destroy the access of an abutting owner to a particular road by any measures designed to maintain, improve or preserve the highway or to protect its users, without paying him compensation or damages. Since the abutting owner has no private property or easement in the highway as against the public, the restriction of his access can amount to a taking only when its effect is to deprive him of the use and enjoyment of the property itself. From the cases discussed, it is apparent that greater inconvenience of access, or reduction in accessibility, or relegation to a single route or much longer route do not amount to a "taking", even though the value of the property is seriously impaired. Both the Krebs case and the Dobler case rigorously apply this doctrine despite its obvious hardship. In the light of the cases and as a practical matter, the property of the abutter is not "taken" so long as any reasonable means of access to the network of public roads remains.

57 Supra, n. 59.
58 Supra, n. 42.
59 Supra, n. 73. Even where compensation is payable, however, the amount should be limited to the cost of providing an alternate means of access. See Webb v. Baltimore & Ohio R. R. Co., 114 Md. 216, 232, 79 A. 193, 197 (1910).
If these conclusions are sound, it seems apparent that, in order to protect the users of the highway from accident hazards and congestion, the State could either severely restrict or abolish the privilege of access by the abutting owner along heavily travelled main highways without payment of compensation except where all access to the property was thereby prevented. That the promotion of highway safety and convenience is a proper purpose is too obvious to require citation or argument. That restriction of access will tend to promote these objectives conforms to common experience and can be clearly demonstrated. The conclusion therefore follows that limitation of the abutter’s access for these purposes would give no right to damages unless all access was cut off.

V.

If such restriction of access is not a “taking” within the Maryland Constitution, it would not constitute a deprivation of property without due process under the Fourteenth Amendment of the Federal Constitution. This was decided by the Supreme Court in *Sauer v. New York.* There, the decision of the Court of Appeals of New York, that a highway viaduct fifty feet in height interfering with access to the abutter’s property did not constitute a taking, was claimed to violate the Fourteenth Amendment, but the Supreme Court rejected this contention on the ground that the New York Court’s determination of the nature of the abutter’s rights was conclusive and binding for the purposes of the Federal Constitution.

90 206 U. S. 536, 51 L. Ed. 1176, 27 S. Ct. 686 (1907). In Krebs v. State Roads Commission the Court said (160 Md. 584, 588, 154 A. 131, 133 (1931)): “Narrowing the controversy still further, the court does not see in the prohibitions of the United States Constitution and that of the State, against deprivation of property without due process of law, any ground for relief not included in the requirement of article 3, section 40A, of the State Constitution, that private property shall not be taken for public use without just compensation to the property owner. . . . In many decisions it has been held that, given an authorization by statute, the only limitation upon the power of the public body to proceed is that found in this prohibition against legislation for taking private property without compensation. The prohibitions against deprivation of property without due process of law have, indeed, been regarded as having the same effect in such case.”
To attempt to review the decisions in other jurisdictions as to interference with access would serve no useful purpose. The diversity and confusion existing on this topic were well described by the Supreme Court in the Sauer case, where it said:

"The right of an owner of land abutting on public highways has been a fruitful source of litigation in the courts of all the States, and the decisions have been conflicting, and often in the same State irreconcilable in principle. The courts have modified or overruled their own decisions, and each State has in the end fixed and limited, by legislation or judicial decision, the rights of abutting owners in accordance with its own view of the law and public policy."91

Because of the comparative recency of the acute accident and traffic problem, relatively few cases dealing with direct restrictions on the abutter's access have arisen as yet, but the decisions on this question in each jurisdiction will naturally follow whatever doctrines that jurisdiction has adopted in the grading, viaduct, change of location, and related cases. Thus, in the many states where the Constitution provides for compensation for "damage" to private property for a public purpose, the decision will presumably be controlled by that provision.92

Attention may, however, be called to the fact that several jurisdictions have upheld such direct restriction of vehicular access to abutting property under the conditions discussed above. In Missouri,93 Pennsylvania94 and Virginia95 such restriction has been sanctioned for the promotion of convenience and safety. In each case the City

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92 Under such constitutional provisions, added inconvenience of access resulting from public structures narrowing but not blocking the street has been held "damage" requiring compensation. See e. g., McCandless v. City of Los Angeles, 47 P. (2d) 1103 (Cal. App. 1935); Cummings v. City of Minot, 67 N. D. 214, 271 N. W. 421 (1937). 1 ELLIOTT, ROADS AND STREETS (4th ed. 1926) Sec. 237.
had refused or revoked a permit for a means of access to a busy street from abutting property for the use of a garage, filling station or parking space, but in each case other means of access to the property were available from another street. The Court in each case sustained the refusal or revocation on the ground that the abutter's right of access could be regulated and restricted in the interest of public safety and convenience so long as all means of access were not cut off.96

In conclusion it may be well to emphasize that this article has dealt only with the constitutional power of the state to limit the abutting owner's access in the public interest without compensation for resulting damage. How far and in what cases that power should be exercised is of course a matter of legislative policy beyond the scope of this article. Undoubtedly, such restriction along heavily travelled ways will cause serious depreciation of some of the abutting land, but there are several balancing factors. In the first place such restrictions could in practice be applied only to relatively new or undeveloped roads. On older main routes, where substantial commercial development has already occurred with the resulting subdivision into small parcels, the main road is frequently the sole means of access, so that the cost of providing alter-

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96 See also, Alger v. City of Lowell, 85 Mass. 402 (1862); Thompson v. City of Boston, 212 Mass. 211, 98 N. E. 700 (1912); and consider cases denying a right of access across park property to recreational drives, Burke v. Metropolitan District Commission, 262 Mass. 70, 159 N. E. 739 (1928). But, under the circumstances described in the text, such restriction of access was held invalid in Brownlow v. O'Donoghe Bros., 276 Fed. 636, 22 A. L. R. 939 (D. C. App. 1921), relying on Donovan v. Pennsylvania Co., 199 U. S. 279, 302, 50 L. Ed. 192, 202, 26 S. Ct. 91, 97 (1905) as "binding". But the cited case dealt with private interference with access and is therefore inapplicable to public regulation for the reasons already discussed.

In many cases, the restrictions on access were imposed by administrative action and were held to exceed the statutory authority conferred. Anzalone v. Metropolitan District Commission, 257 Mass. 32, 153 N. E. 325, 47 A. L. R. 897 (1926); Metropolitan District Commission v. Cataldo, 257 Mass. 38, 153 N. E. 328 (1926); Gleason v. Metropolitan District Commission, 270 Mass. 377, 170 N. E. 395 (1930); Goodfellow Tire Co. v. Commissioner of Parks, etc., 163 Mich. 249, 128 N. W. 410 (1910); Greeley Sightseeing Co. v. Riegelmann, 119 Misc. Rep. 84, 195 N. Y. S. 845 (1922); In re Singer-Kaufman Realty Co., 196 N. Y. S. 480 (1922); Marshall v. Blackpool Corp. [1933], 1 K. B. 688; [1933] 2 K. B. 339; [1935] A. C. 16. Turning on the lack of statutory power, these cases are inapplicable on the question of constitutional power.
nate access or compensation would be prohibitive. If newer and uncommercialized roads are so restricted, however, other means of access would probably be available or easily provided, and the owner will largely suffer only the loss of an unearned increment in land value; the restriction merely takes away the value which the construction of the road created. Moreover, this is particularly true today when the cost of roads is borne by the automobile user through the gasoline and motor taxes and not by the landowner. The loss of such an unearned speculative profit, which impairs the public usefulness of the highway does not present a particularly appealing claim for compensation. Nevertheless, if the legislature feels differently, it could of course still provide for such compensation as it deemed fair, although not constitutionally required to do so.