

1-1966

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Recommended Citation

Jack M. Howard, *Preemption Aspects of the Freeway Problems*, 17 HASTINGS L.J. 571 (1966).

Available at: https://repository.uchastings.edu/hastings_law_journal/vol17/iss3/8

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Preemption Aspects of the Freeway Problems

By JACK M. HOWARD*

Development of the State Highway System Under Law

IN construing the road statute in 1867 the California supreme court commented that, "to lay-out and establish roads and highways is exclusively within the power and control of the Government. To do so is one of its most important and onerous duties."¹ The observation remains appropriate today

The beginning of the period of transition from railroads to highways as the main mode of surface transportation is graphically described in the 1895 report of the commissioners of the Bureau of Highways.² "For generations," the commissioners reported,

the building of roads was forgotten and the building of railroads stimulated and fostered. During this period of railroad growth, roads have been neglected to such an extent that generations have grown up that have never seen a road. They have learned to speak of streaks of dust or mud, as the case may be, as roads—have actually learned to regard them as such, and solemnly dedicate the same to public use, as if they were well-located, graded, drained and thoroughly metaled highways.

The engineers of the country have so seldom, until lately, been employed on road work that they, too, have looked upon road building as a lost art which at one time was practiced by the ancients.

Noting that during the ten years from 1885 through 1895, county records showed that highway expenditures, exclusive of private subscriptions of money, labor and materials, had reached "the enormous sum of \$18,000,000," the Commissioners stated, "the work on our highways has been carried on without method or system; the money has been wastefully and injudiciously expended."

They concluded that, "until an economic and definite system of highway construction through the entire State be inaugurated, Cali-

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¹ *Sherman v. Buck*, 32 Cal. 241, 252-53 (1867).

² The Bureau of Highways was created by the legislature in 1895 to make exhaustive studies and recommendations concerning California highway conditions.

forma can hope for no improvement over her present highway condition."

It is visible to all that the State highway system has progressed a long way since that report and the 1902 constitutional amendment authorizing the system,³ followed by the State Highway Act of 1909.⁴ This statute included authorization of a bond issue not to exceed eighteen million dollars, which was approved by the voters in 1911. At the end of 1965 there were 14,200 completed miles in the State highway system. Of this total, 1,825 miles were full freeway, 704 miles multilane divided expressway, and 823 miles two-lane expressway.⁵

With the continually exploding population growth, and resulting land development, the millennium in the satisfaction of highway needs is not in sight. The proper satisfaction of these needs, however, in metropolitan, park and scenic areas, has become the subject of bitter controversy and acrimonious debate.

From the beginning of the State highway system the preemptive requirements and powers of the State in this field have been legislatively and judicially recognized. It is indispensable in such a system that highway alignments must not fail to meet at county and municipal boundaries. They must also pass through metropolitan areas. Anything less than statewide control would stultify such a highway program.

Factors affecting the greatest public good and least private injury in establishing the highway system have varied through the years. While alignment controversies are inherent, most of the earlier disputes were between factions seeking the highway, rather than with those rejecting it. A notable exception is evidenced by the *Rindge* litigation.⁶ There, in a vain attempt to stop a highway from encroaching upon the family land, property owners traveled all the way to the Supreme Court of the United States. These cases are instructive upon the legal philosophy, judicially recognized without deviation, that highway route selection is a legislative and strictly political question.

Always present has been the problem of dislocating people. This has been aggravated by population growth and density of land improvements. In the earlier years, however, the principal problem was

³ CAL. CONST. art. IV, § 36.

⁴ Cal. Stat. 1909, ch. 383, at 647.

⁵ California Highways & Public Works, Nov.-Dec. 1965, p. 8. An interesting history of California roads and highways, starting with the days of the Spanish explorers and the Padres, is contained in the Centennial Edition of this publication, Sept.-Oct. 1950.

⁶ County of Los Angeles v. Rindge Co., 53 Cal. App. 166, 200 Pac. 27 (1921), *aff'd*, 262 U.S. 700 (1923).

getting and spending the money to lay down the maximum amount of pavement to alleviate the acute traffic needs. Highway engineers had to scrounge for financing to make ends meet.

New dimensions to the basic problems have been added with advent of the gasoline tax in 1923;⁷ the constitutional amendment of 1938,⁸ preventing the diversion from highway purposes of taxes imposed upon motor vehicle fuel; the freeway act of 1939,⁹ and various federal-aid highway acts covering a federal-aid primary and secondary system, culminating in the 1956 National System of Interstate and Defense Highways.¹⁰

Now, in a period of more adequate financing, and with the growing experience in freeway architecture, aesthetic, scenic and historical values have become more significant in highway planning. Indicative of the change are recent statutory enactments, both federal and State. Perhaps most significant is the 1965 amendment to section 90 of the Streets and Highways Code, which eliminates the legal requirement that all State highways be established, between the termini designated by law, on the "most direct and practicable" locations as determined by the highway commission. The quoted words were deleted from the section.

California in 1965 has introduced a State Parkway Program¹¹ and made revisions to promote its Scenic Highway Law.¹² On the national level is the Highway Beautification Act of 1965.¹³

Inevitably remaining is the primary and basic objective to expedite the movement of traffic to where it wants to go. This paramount consideration is often incompatible with satisfaction of the variant esthetic senses. Blending of culture and freeways is proving a difficult task. Cultural aspects notwithstanding, the earliest possible completion of a statewide and national freeway system is the existing governmental transportation design. Under State law, it is "declared to be essential to the future development of the State of California to establish and construct a statewide system of freeways and expressways"¹⁴ And under federal law,

It is hereby declared to be in the national interest to accelerate the

⁷ Cal. Stat. 1923, ch. 267, at 571.

⁸ CAL. CONST. art. XXVI.

⁹ CAL. STREETS & H'WAYS CODE §§ 23.5, 100.1, 100.2, 100.3.

¹⁰ Federal-Aid Highway Act of 1956, ch. 462, 70 Stat. 374 (1956).

¹¹ CAL. STREETS & H'WAYS CODE §§ 885-89.

¹² CAL. STREETS & H'WAYS CODE §§ 260-63.5.

¹³ 79 Stat. 1028, 1030, 1032 (1965), 23 U.S.C.A. §§ 131, 136, 319 (1966).

¹⁴ CAL. STREETS & H'WAYS CODE § 250.

construction of the Federal-aid highway systems, including the National System of Interstate and Defense Highways, since many of such highways, or portions thereof, are in fact inadequate to meet the needs of local and interstate commerce, for the national and civil defense.

It is hereby declared that the prompt and early completion of the National System of Interstate and Defense Highways, so named because of its primary importance to the national defense and hereafter referred to as the "Interstate System," is essential to the national interest and is one of the most important objectives of this Act. It is the intent of Congress that the Interstate System be completed as nearly as practicable over the period of availability of the fifteen years' appropriations authorized for the purpose of expediting its construction, reconstruction, or improvement, inclusive of necessary tunnels and bridges, through the fiscal year ending June 30, 1971 under Section 108(b) of the Federal-Aid Highway Act of 1956 and that the entire System in all States be brought to simultaneous completion.¹⁵

Robert B. Bradford, Administrator of Transportation, outlined the freeway facts in a speech to The League of California Cities.¹⁶ He pointed out the basic problem that while California had 11 per cent of the nation's traffic, it had only 4 per cent of the road surface in the United States.

He described the three most important objectives in the highway program. The first is complete integrity in planning and construction. The second is highway safety—compared to a death rate of 5.2 per 100 million vehicle miles on the general system of public highways, on full freeways the death rate was only 2.9. Statistics indicated elimination of over 42,000 accidents per year through the existing freeway safety factors. The third objective is adequate and efficient mobility in the metropolitan areas, which is vital to the local economy of each municipality.

It is planned that by 1980 the freeway and expressway system will represent 10 per cent of California's total road mileage, but the system is expected to handle 60 per cent of the total traffic. Mr. Bradford paid tribute to the excellence of the legislation under which the highway system has developed.

With these words of background we turn to a résumé of some of the basic laws under which the State highway program is being administered. The beginning was the constitutional provision, article IV, section 36, which empowered the legislature to establish a system

¹⁵ 23 U.S.C. § 101(b) (1964).

¹⁶ Address by Robert B. Bradford, then California Director of Public Works, to the Annual Conference, League of California Cities (Oct. 22, 1962).

of State highways, declare any road a State highway, and pass all laws necessary or proper to construct, and maintain the same. Embodiment of such section into the organic law is the highest form of recognition that State highways are matters of statewide concern.

Summary of Some of the Controlling Statutes

Pursuant to this practically unlimited constitutional grant of powers to pass *all laws* necessary or proper to establish a system of State highways, the legislature has enacted comprehensive statutes, most of which are codified in the Streets and Highways Code. Section references will be to this Code unless otherwise noted. Since current public interest is focused primarily upon controversies between State and local officials incident to freeway locations and designs, the following discourse is oriented to the preemptive rights of the State in that phase of the freeway problems.

The Department of Public Works, now existing as part of the Transportation Agency under Government Code, section 14000, is vested by law with full possession and control of all State highways and State highway property. The department is authorized and directed to lay out and construct all State highways between the termini designated by law on locations as determined by the highway commission. The department also has sole power and responsibility to design.¹⁷

The California Highway Commission consists of seven members and is in the Department of Public Works. The Administrator of Transportation is *ex officio* member and chairman. The Governor, with the advice and consent of the senate, appoints the other six members. The Director of Public Works acts as administrative officer, but is not a member of the commission.¹⁸

While it is perhaps traditional for the Governor to appoint members from the various regions of the State, it is the declared policy of the law that each member shall represent the State at large and not any particular district or section.¹⁹ Again appears express recognition of the statewide concern.

All general highway routes and termini are established by direct acts of the legislature, and the routes in the statewide system of Freeways and Expressways and Scenic Highways are also legislatively

¹⁷ CAL. STREETS & H'WAYS CODE §§ 90-92.

¹⁸ CAL. STREETS & H'WAYS CODE § 70.

¹⁹ CAL. STREETS & H'WAYS CODE § 70.2.

designated.²⁰ It is the function of the highway commission to determine the location alignments upon the general routes so authorized by law²¹ (The delegation of such legislative power is valid.²²) Traversable city streets and county highways within the determined State highway locations may be absorbed into the State system without compensation.²³

It also devolves upon the highway commission to determine the "freeway" and "expressway" status within the segments of State highways.²⁴ "Freeway" means a divided arterial highway for through traffic with full control of access and grade separations at intersections. "Expressway" means an arterial highway for through traffic, with limited access control, which may or may not be divided or have grade separations at intersections.²⁵

Public hearings are had on alignment selection. Driver benefits and community values are relevant factors in considering alternate locations.²⁶

Highway construction is essentially an engineering business, and the work of assembling and presenting pertinent facts and figures rests upon the engineering personnel of the Division of Highways, which exists within the Department of Public Works.²⁷

In the course of the planning process for freeway locations there is coordination with county and city agencies, including publicized meetings and exchange of information, views and plans. At the public hearings interested persons, organizations and officials have full opportunity to present facts and views.²⁸ Sole power of determination of the right of way alignment and freeway status, however, is vested in the highway commission, except as reserved to the legislature while in session.²⁹

The State and local twain must finally meet under the provisions of section 100.2 which reads:

The department [Public Works] is authorized to enter into an agreement with the city council or board of supervisors having jurisdiction over the street or highway and, as may be provided in such

²⁰ CAL. STREETS & H'WAYS CODE §§ 230, 253, 263, 300.

²¹ CAL. STREETS & H'WAYS CODE § 75.

²² *Holloway v. Purcell*, 35 Cal. 2d 220, 217 P.2d 665 (1950).

²³ CAL. STREETS & H'WAYS CODE § 83.

²⁴ CAL. STREETS & H'WAYS CODE § 254.

²⁵ CAL. STREETS & H'WAYS CODE § 257.

²⁶ CAL. STREETS & H'WAYS CODE §§ 75.5, 75.7.

²⁷ CAL. STREETS & H'WAYS CODE § 50.

²⁸ CAL. STREETS & H'WAYS CODE §§ 210-13.

²⁹ CAL. STREETS & H'WAYS CODE § 79.

agreement, to close any city street or county highway at or near the point of its interception with any freeway or to make provision for carrying such city street or county highway over or under or to a connection with the freeway and may do any and all work on such city street or county highway as is necessary therefor. No city street or county highway shall be closed, either directly or indirectly, by the construction of a freeway except pursuant to such an agreement or while temporarily necessary during construction operations. No city street, county road or other public highway of any kind shall be opened into or connected with any freeway unless and until the California Highway Commission adopts a resolution consenting to the same and fixing the terms and conditions on which such connection shall be made and the said commission may give or withhold its consent or fix such terms and conditions as in its opinion will best subserve the public interest.

The statutory pattern is clear. It is the delegated duty of the highway commission to determine the location of freeways, and their status, whether limited access or full freeway. In the determinative process it is the privilege of city and county officials to advocate local views and the preservation of community values. It is not their function or right to determine where or how State highways are to be built. After the location and status of the freeway is determined by the Highway Commission, then the area of negotiation and agreement between the Department of Public Works and city councils or boards of supervisors concerns only what streets or county highways are to remain open or be closed. At this point the true prerogatives of local officials relate to the proper integration of streets and county highways into the freeway system.

The pocket veto implications, however, are apparent in the language of section 100.2 that "no city street or county highway shall be closed except pursuant to such an agreement." It also appears to be the present administrative policy of the State not to act finally in freeway planning and construction without approval of affected cities or counties, although freeways could be carried over or under local thoroughfares without local consent.³⁰ To the great credit of sincere and dedicated public officials acting in a highly controversial field, reasonable compromises and adjustments have been reached and final impasse so far avoided.

Case Law

From the inherent nature of the subject matter and text of the foregoing statutes it appears indubitably that the State has preempted the

³⁰ OPS. CAL. ATT'Y GEN. 173 (1956).

field of law relating to State highways. Nevertheless, the courts have from time to time had to reaffirm the fact.

A fundamental concept has existed in California that all public thoroughfares are owned by the people of the State. It is only the control that varies between cities (streets), counties (county highways), and State (State highways).³¹

The rule as to such control has been stated as follows:

It is universally recognized that the state in its sovereign capacity has the original right to control all public streets and highways, and that except in so far as that control is relinquished to municipalities by the state, either by provision of the state constitution or by legislative act not inconsistent with the constitution, it remains with the state legislature to be exercised in any manner not prohibited by the state constitution.³²

The control of a city over its own streets is an exercise of the political power of the State committed to the city.³³ Even as to traffic control upon a public street, where it is undeniable that a municipality has a special interest, it is nevertheless held that a speed limit ordinance in conflict with State law is void.³⁴

In the planning and construction of State highways the question is not really present whether the State has occupied the field. We are dealing with the State's own governmental business. It has been uniformly recognized that the laws of the State do preempt this field.³⁵

An informative opinion dealing with section 100.2 of the Streets and Highways Code was written by the Honorable James L. Atteridge in deciding the case of *City of San Jose v. Purcell*.³⁶ An initiative ordinance enacted by the city electors sought to nullify a contract made between city council and State for street closures pursuant to section 100.2. In holding the ordinance invalid as an attempt to legislate in an area of State rather than municipal concern, the decision points out the true legal status of a city council acting under section 100.2. Liberty is taken for the following quotations from this trial court opinion, since it is not reported:

³¹ *People v. County of Marin*, 103 Cal. 223, 37 Pac. 203 (1894); *County of Marin v. Superior Court*, 53 Cal. 2d 633, 349 P.2d 526 (1960).

³² *Western Union Tel. Co. v. Hopkins*, 160 Cal. 106, 116 Pac. 557 (1911).

³³ *People v. Holladay*, 93 Cal. 241, 29 Pac. 54 (1892).

³⁴ *Ex parte Daniels*, 183 Cal. 636, 192 Pac. 442 (1920).

³⁵ *San Mateo v. R.R. Comm'n*, 9 Cal. 2d 1, 68 P.2d 713 (1937); *Southern Cal. Roads Co. v. McGure*, 2 Cal. 2d 115, 39 P.2d 412 (1934); *Young v. Superior Court*, 216 Cal. 512, 15 P.2d 163 (1932); *Allied Amusement Co. v. Bryam*, 201 Cal. 316, 256 Pac. 1097 (1927); *County of Los Angeles v. Hunt*, 198 Cal. 753, 247 Pac. 897 (1926); *People v. City of Los Angeles*, 179 Cal. App. 2d 558, 4 Cal. Rptr. 531 (1960); *Gadd v. McGure*, 69 Cal. App. 347, 231 Pac. 754 (1924).

³⁶ Civil No. 70666, Super. Ct. Santa Clara County, Cal., Dec. 10, 1948.

The term "City Council" as used in the statute under review is a distinct entity from the city viewed as a municipal corporation. In the case of *In re Pfahler*, 150 Cal. at p. 81, this distinction is pointed out: "The common council or other legislative body and other charter officers do *not* constitute 'the city' but are merely agents or officers of the city" In the present matter, however, the "City Council" are not agents of the city, but are instead a state agency since they derive their authorization to contract solely from the state, and in so contracting (assuming rectitude on their part) are wholly independent of the city As thus constituted and as so authorized the "City Council" is a state mandatory or agency

Because of an obvious curtailment of some of the ordinary and important incidents of the ownership of land that is resultant in the construction of a "freeway," and because it appeared also that not only the interests of property owners but also those of a municipality itself (where a portion of a "freeway" traverses city streets) would almost always be necessarily involved, the Legislature deemed it expedient and fair (in relation to "freeways") to set up as an empowered contracting entity to act in conjunction with the Department of Public Works the "City Council" of an involved municipality—thereby affording to the city and to the property owners a procedure that may well be compared to the granting of a form of "due process of law"—in that it thus supplied to the municipality and to the property owners a not unsympathetic or antagonistic contracting agency which is close to the picture, and before which the claims and interests of both the city and the property owners may be urged with reasonable assurance that the same will receive fair consideration at its hands. The Legislature, however, was not required to thus provide, because, as previously pointed out, its powers with respect to "highway" legislation under the Constitution are plenary . Nor was the Legislature required to constitute the "City Council" and no other body or person as a contracting agency It could have, had it seen fit to do so, with entire propriety selected the County Engineer or Surveyor or the City Engineer for that purpose and its action in so doing would be equally valid and immune from attack.

The Law and the San Francisco Impasse

Relating the law to the San Francisco controversy, it appears questionable whether local and State officials have approached the problem with a proper exercise of their delegated duties. This is perhaps understandable in view of the tremendous community values involved. Under law the highway commission has the duty to select a freeway route, after full and objective consideration of civic views. When such location is determined, it is the function of the Department of Public Works and the Board of Supervisors to negotiate in good faith and agree upon what city streets are to be closed or carried over or under the freeway.

At present certain local factions seem intent upon being the highway planners and going underground like the mole. Many city planners seem to belong to this school of thought. On the other hand the State could elect to go completely overhead. Sensible compromise seems imperative.

It is not enough to criticize freeways and say we must find a better way. The undeniable reality of everyday living is that we are a nation on wheels. Freeways are already an integral part of our way of life. It is hardly feasible to consider return to the picturesque ferry boats or the scrambling traffic of the old Embarcadero. Perhaps solace is to be found in the adage that beauty lies in the eyes of the beholder. The Embarcadero Freeway can appear a thing of beauty to the harried motorist. There must be an effort by all to adjust to the change. Certainly the bridges have been taken wholeheartedly into the San Francisco scene, where once opposed upon aesthetic grounds.

Possible alleviation of traffic problems in the bay area lies in rapid transit systems. Rejected so far on the peninsula and in Marin, the east bay system under construction will afford an important test. The history of local transit failures in recent decades is not encouraging. Perhaps a large part of the problem is the degree to which the motorist can be influenced to give up the independence afforded by control of his own transportation. Short line railroads have also succumbed to the trucks. Regardless of cause, highway deficiencies create clear and present dangers leading to area strangulation. Freeways are the only solution presently at hand, and are in fact the nation's plan for the foreseeable future. Obviously freeways cannot be the complete solution, however, since a city can absorb only so many motor vehicles.

If the present impasse in San Francisco should unduly continue, it is conceivable that an irate motorist might seek mandate to require State and city officials to perform their respective legal functions of determining the freeway plan, and then negotiating for agreement as to street closures.

Speculation could also arise as to the continued role of the federal government. So far Uncle Sam has been content to threaten his squabbling progeny, in the form of State and city, with loss of the highway funds. The implications of such threat are serious and far-reaching, since federal financing would pick up 92 per cent of the construction tab. It would also result in spending in other climes highway-user taxes locally collected, and leaving unsolved our local highway needs.

From a national standpoint, there arises the consideration of how important to the national defense is continuation of the interstate freeway through San Francisco. Should it be inclined to invoke it, the federal government has preemptive power in establishing the federal interstate system, to which both cities and states are subordinate, the State by express attornment.³⁷ In California we have an example of the exercise of the federal power in taking cemetery land, which under State law was not subject to highway use.³⁸

A fully integrated state and interstate freeway system is a principal part of the transportation plan under law, and no substitute for vehicular traffic movement is presently available. Under these conditions, the need is absolute that there be no relinquishment of the preemptive powers and ultimate control of state and federal governments in establishing such a freeway system. Anything less is conducive to the tail wagging the dog, and could leave the interstate freeway system floundering at county and city lines. These are the harsh facts until a new method of transportation is developed. Then, undoubtedly, there will be those expressing a nostalgic desire to return to the good old days of the freeways.

³⁷ CAL. STREETS & H'WAYS CODE § 820.

³⁸ Eden Memorial Park Ass'n v. Department of Pub. Works, 59 Cal. 2d 412, 29 Cal. Rptr. 790, 380 P.2d 390 (1963).

