

Technical Report #1

Indiana Statewide Access Management Study

Access Management Authority in Indiana

DRAFT

Prepared for:

Indiana Department of Transportation
Long-Range Transportation Planning Division

Prepared by:

Urbitran Associates, Inc.

January 12, 2006



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1.0 EXECUTIVE SUMMARY

Access is the right to cross public roads or highways, as well as the right to enter upon or lease land abutting such roads and highways. The authority of a governmental unit to implement an access management system involves a determination of the power of a governmental unit to regulate an abutter's right of access to a public way without compensation.

In an overwhelming majority of cases across the country, including Indiana, regulating vehicle access has taken the form of regulating or prohibiting construction of curb cuts. INDOT has statutory authority to promulgate administrative rules and regulations for curb cuts. Indiana regulates curb cuts by requiring a permit from INDOT and requiring compliance with INDOT's rules and requirements. Indiana courts have consistently held that access points can be regulated since a property owner is not entitled to unlimited access at all points along a highway. In addition, ingress and egress can generally be made more circuitous and difficult for an abutting property holder without constituting a taking of private property. There is no property right of an abutting property holder in the free flow of traffic past his property, and thus, no compensation may be required if traffic is diverted from an abutter's premises or made to travel a more circuitous route. However, it is important to note, that courts across the country have not given broad general police powers to highway authorities to exert police power to eliminate or reduce access rights without paying compensation to abutting property owners. Instead, courts have made determinations on police power and eminent domain based on the specific facts of the particular case. This makes it difficult to draw broad conclusions as to the ability of a highway authority to implement new methods of access regulation.

Police power confers authority on a governmental unit to control access for public health, welfare and safety. Police power is a construct of statute, rules and regulations. When access rights are controlled under police power, the impact of the regulation on the property holder is not compensable. When access regulations are characterized as a taking of property for a public purpose, the authority to make the regulations arises from the power of eminent domain, and payment of just compensation is necessary.

Types of traffic regulations that have tended to be upheld by courts under police power include one-way streets, stop lights, stop lines, and prohibitions against certain turns. Divided highways where U-turns and left turns are permitted only at designated points by either physical dividers, including median strips, or regulations have also been consistently upheld as reasonable based on the principle that an abutter has no property right in the continuance or maintenance of traffic flow past his property. Indiana has codified the installation, maintenance, and removal of traffic control devices and has codified the authority of INDOT to create the *Indiana Manual on Uniform Traffic Control Devices for Streets and Highways*.

Eminent domain is the right of a state or nation to take private property for a public or semipublic use. Under a recognized rule in the law of eminent domain, the right of street or highway access belonging to an abutting property holder may not generally be taken by governmental authorities without payment of just compensation.

The Indiana rule for acquisition and compensation under eminent domain was established by the 1968 case *State v. Stefaniak*, that is, taking in eminent domain includes the substantial interference with private property which destroys or impairs free use and enjoyment or rights and interests in the property. Indiana eminent domain is defined by a "substantial interference" in property rights. Substantial interference is achieved when there is either a taking of some physical part of the real estate, or a taking of some substantial right attached to the use of the real

estate. When a property holder experiences damages from either of these events, the damage must be special and peculiar to the real estate and not some general inconvenience suffered alike by the public for it to be compensable.

The nature of the right to access varies among the states. Whether the right of access has been merely regulated for the public safety or welfare by the exercise of the police power, or whether the regulation amounts to a compensable taking under eminent domain is a question courts have had great difficulty in resolving. It appears that no strict, generally accepted definition of what constitutes “deprival” of a right of access to and from a public highway has been developed. When a court seeks to determine whether a property holder has been deprived of a right of access, the court balances the abutter’s rights against public health, welfare and safety. Resolving issues of the power of a governmental unit to regulate access involves recognizing the right of access and balancing that right against particular public and private rights. Statutory authorization for action by a governmental unit regulating access is essential; but that statutory authorization does not always have to specifically address access rights. Courts have found justification for reasonable regulation of access among general charter or enabling provisions.

Indiana establishes access rights by the state constitution. Statutory provisions and case law augment the constitutional provisions. Indiana follows a majority rule among the states that abutting property holders have no inviolable right of access, only a right of reasonable access. As a general principle, a properly authorized governmental unit has the power to regulate, at least reasonably, in the public interest, and without illegal discrimination, the extent of an abutter’s private right of access from his property to the street or highway.

Governmental units have general responsibility for maintenance and/or regulation of streets and highways in their jurisdictions. They are ordinarily authorized by general or specific statutory or charter provisions to regulate access, assuming no violation of constitutional limitations upon any governmental regulation of an abutter’s access,. INDOT is established by statute and is responsible for a set of statutorily iterated activities including: (1) the identification, development, coordination, and implementation of the state’s transportation policies; (2) the approval of applications for federal transportation grants from funds allocated to the state; (3) the review, revision, adoption, and submission of budget proposals; (4) the construction, reconstruction, improvement, maintenance, and repair of state highways and toll road projects or toll bridges; and (5) the administration of programs as required by law, including railroads, rail preservation, aeronautics, airports, and aviation development programs. INDOT also has a codified set of tasks that must be accomplished in its role as the state’s transportation agency including developing, updating and implementing long range comprehensive transportation plans and carrying out transportation responsibilities including public transportation policies, plans and work programs. Similar authority and responsibilities are extended by statute to departments and highway authorities of Indiana’s counties and municipalities.

As a general rule, governmental units have the power to promulgate or enforce traffic regulations in the general public interest, even if they interfere to some extent with the convenience of an abutter’s access, or compel some circuitry of route. Traffic regulations include all rules having the direct function of regulating the direction, flow, speed, etc., of vehicular traffic on public streets or highways, or private roads treated as public because of permitted use. In reaching their decisions, courts balance public interest and private rights, with the issue usually becoming one of reasonableness in the circumstances. Regulations of the general direction, flow, or diversion of all traffic on a given street or highway will not be held unreasonable. Careful consideration should be given to regulations which prohibit the use of certain streets by particular kinds of

traffic, which shuts off all or convenient access to the abutter's property, or which completely close a street to traffic.

Establishing divided highways where U-turns and left turns are permitted only at designated points by either physical dividers or regulations have been consistently upheld as reasonable based on the principle that an abutter has no property right in the continuance or maintenance of traffic flow past his property. Traffic regulations which provide access only at designated points are almost universally regarded as reasonable. Indiana courts have consistently agreed and have stated that when INDOT establishes designated access points for the valid public purpose of public safety and without fraud, bad faith, or arbitrary and capricious behavior, then INDOT does so within the authority of its police power and within its responsibilities.

Courts have generally found that it is beyond the power of a governmental unit to eliminate abutter's access by prohibiting use of connecting streets by the class of vehicles used in the abutter's business. It is also beyond the power of a governmental unit to deny an abutter all access from the street system by regulations limiting the weight of vehicles that may be used on certain streets. However, as long as there is not a complete loss of practicable access, the exercise of the power of limiting the weight of vehicles is not invalidated because the abutter is forced to use circuitous routes, or is caused some inconvenience. Indiana has codified the ability of state and local authorities to impose restrictions on the operation of vehicles on highways or the weight, size, or use of vehicles on highways.

Regulations closing streets to all vehicular traffic are weighted against the alternative access available and the necessity for taking the particular measure in the public interest. Generally, complete denial of access to an existing road is compensable. However, it is generally recognized that governmental units may indirectly affect the abutting property by utilizing police power to eliminate crossovers, establish one-way streets, construct median strips, and implement weight and speed restrictions or restrictions on U-turns and left and right turns.

Limited-access or controlled-access highways are established in Indiana by statute. The limited-access statute is the codification of a number of court cases which established a "reasonableness test" for determining when an abutting property holder is entitled to compensation for a limitation of access resulting from a limited-access highway. Under the reasonableness test, an abutting property holder is entitled to compensation if the access previously enjoyed has been unreasonably, substantially, or materially impaired by a change in the abutting street or highway. The reasonableness test rejects all liability if a frontage or service road is provided for the use of the abutting property holders. Impairment or loss of access resulting from the conversion of a conventional road into a limited-access highway is non-compensable if, after such conversion, the owner of abutting land retains a reasonable means of ingress and egress to and from his property.

Based on this assessment of access management authority, the following are the findings to consider in the development of recommended actions:

- INDOT could use its current statutory authority to implement an access classification system. A classification system could be incorporated into the Driveway Permit Manual and/or the Highway Design Manual. INDOT could also incorporate an access classification system into the statewide mobility corridor program.
- INDOT could use its current authority to designate additional limited-access facilities. This could be applied in a manner consistent with the access classification system. Each time a major improvement is implemented on a state highway, part of the project

approval process could be a request for limited-access designation within the project limits. This would allow the design of the project and the right-of-way acquisition to determine the location of allowable access points, both public and private.

- Access management techniques could be applied and incorporated into the access classification system so they will be applied in a manner commensurate with a state highway's functions. The following are examples of the access management techniques whose use could be applied or expanded:
 - Purchase of access rights
 - Introduction of a median
 - Closing a median opening
 - Eliminating left-turn access
 - Limiting or reducing the number of driveways (i.e. applying driveway spacing)
 - Replacing direct access with service road access
- Compensation may be due for the following access management actions:
 - Changes that would result in the creation of zoning violations
 - Alternative access that would substantially or materially interfere with ingress and egress

2.0 INTRODUCTION

2.1 *Study Description*

The overall objective of this study is to assist INDOT in the development and implementation of an access control strategy that will support the refinement of the INDOT Long-Range Transportation Plan in terms of implementing the Statewide Mobility Corridor Concept. The work activities involve a review of the Indiana access management process to identify its limitations as well as opportunities for its refinement. The following highlights some of the key project issues that are addressed in the scope of work:

- Crafting a pragmatic approach that fits Indiana's conditions.
- Reflecting the diversity of transportation conditions in Indiana.
- Addressing Indiana's institutional and policy environment.
- Explaining the benefits of access management enhancements.
- Drawing creatively from lessons learned in other states.
- Assessing what can be accomplished within the existing framework.
- Establishing agreement on recommendations and implementation approach.
- Improving stakeholder understanding about access management.

2.2 *Scope of this Report*

This report presents the results of a review of the legal framework that currently governs rights of access in Indiana and a comparison of other state jurisdictions where relevant. The consultant team has investigated the relevant statutes and case law. This report represents the understanding of the reviewers concerning those materials but does not represent a legal opinion. The report provides an overview of the following topics:

- The legal basis for access management in Indiana, including:
 - Rights of property and access, and
 - Acquisition and control of property rights.
- Current legal policies and authorities in Indiana, including
 - Laws that pertain to the authority to manage access,
 - Judicial opinions pertaining to access management authority, and
 - Judicial opinions pertaining to taking under Eminent Domain.

3.0 LEGAL BASIS FOR ACCESS MANAGEMENT

The law defining the nature and extent of a landowner's rights with respect to an abutting street or highway has a few well-settled rules:

- An owner of abutting land has a right of access (however, right of access may be defined) to and from a public street or highway.
- An owner of land abutting a street or highway cannot constitutionally be deprived of all access to his premises without compensation.

Access is the right to cross public roads or highways, as well as the right to enter upon or lease land abutting such roads and highways. The authority of a governmental unit to implement an access management system involves a determination of the power of a governmental unit to regulate an abutter's right of access to a public way without compensation. An access classification system is a hierarchy of access categories that can be established to form the basis for the application of access management. Each access category sets forth criteria governing the access-related standards and characteristics for corresponding roadways. These access categories can define where access can be allowed between private developments and the roadway system, and where it should be denied or discouraged. They can define spacing standards for signalized intersections, and also whether left-turn ingress/egress should be allowed or whether a driveway should be restricted to right-in/right-out operation.

3.1 *Rights of Property and Access*

Most of the modern highways in the nation have been created by legislative acts.ⁱ This results in the title being held by the state or municipality. Where the required right of way could not be obtained by voluntary conveyances from the private property owners, the state exercised its power of eminent domain to acquire the land.

When the state or municipality holds title to the highway right of way, abutting property owners (and any other member of the public) have no rights to the surface of the land, the soil beneath, or the air space above. However, the owner of land abutting the public way has abutter's rights, rights over and above any other member of the public. These rights are in the nature of easements in the part of the highway adjoining his land. The most commonly recognized right is the property owner's right of access onto the highway from his land, a right which, generally, public authorities can regulate but not deny without the payment of compensation.

3.2 *Acquisition and Control of Property Rights*

3.2.1 *Eminent Domain*

Eminent domain is the right of a state or nation to take private property for a public or semipublic use. The right of eminent domain is considered either an inherent right of sovereignty or an implied condition resulting from the public grants which created private title in property. Under a recognized rule in the law of eminent domain, the right of street or highway access belonging to an abutting property holder may not generally be taken by governmental authorities without payment of just compensation. An "abutter" is the owner or occupant of the property, the boundary of which is formed by any land constituting a public right of way.

3.2.2 Police Power

Police power is the ability of the state to control activities and property for the public health, welfare and safety. The state acts to prevent activities that are determined to be detrimental to the general public. Police power is a construct of statute, rules and regulations. An abutter's right of access may be regulated under the police power for public safety or welfare. If right of access is controlled under the police power of a governmental unit, then the impact of the regulation on the property holder is not compensable.

When rights of access are regulated without compensation to the property holder under police power, there are often conflicting interests between the public and abutting property holders. When access is regulated and controlled (1) as an exercise of police power, (2) under the authority over a public way, and (3) in furtherance of the public good, a governmental unit does not incur liability to the abutting property holder for a resulting injury and is not required to pay compensation. However, if access regulations by the governmental unit are characterized as a taking of property for a public purpose, the authority to make the regulations arises from the power of eminent domain, and payment of just compensation is necessary.

3.2.3 Regulating Rights of Access

Whether the right of access has been merely regulated for the public safety or welfare by the exercise of the police power, or whether the regulation amounts to a compensable taking under eminent domain is a question courts have had great difficulty in resolving. It has been argued that the police power-eminent domain dichotomy be dispensed with and replaced with the rule that there is no compensable taking unless property is substantially diminished. Professor Stoebuck in *The Property Right of Access Versus the Power of Eminent Domain*ⁱⁱ criticizes the doctrine that access may be impaired without compensation if it is classified as a police power regulatory measure. He argues, in effect, that the power of eminent domain and the police power are not mutually exclusive. When an abutting owner's right of access (a property right) is impaired to the extent that it amounts to a taking under the power of eminent domain, compensation must be paid. Professor Stoebuck believes this is true whether or not such an impairment could also be classified as a valid exercise of the police power to regulate the use of highways. Professor Stoebuck's minority view position is supported by the Minnesota case, *Hendrickson v State*ⁱⁱⁱ where the court said that prohibiting or limiting access to a highway may well be an exercise of police power in the sense that it is designated to promote traffic safety, but at the same time it may cause compensable injury to an abutting owner.

The conventional view as to the difference between the police power and eminent domain is illustrated by *Ray v State Highway Com.*,^{iv} a 1966 Kansas case in which the court said it must be recognized that these two types of power exercised by the highway commission are mutually exclusive "polestars" with different legal consequences. The use of one, eminent domain, incurs liability for compensation; the use of the other, police power, does not. The court determined that an act by the highway commission must be classified as an exercise of one type of power or the other – it cannot be both.

The right of access to and from a public highway is recognized as one of the incidents of land ownership or occupancy. It is a right for which the property holder cannot be deprived without compensation. This rule has been applied to invalidate governmental regulation of an abutter's access. However, it appears that no strict, generally accepted definition of what constitutes "deprival" has been developed. When a court seeks to determine whether a property holder has been deprived of a right of access, the court balances the abutter's rights against public health,

welfare and safety. Principles of public convenience and regulation have been applied in upholding many governmental regulations of access.

Resolving the issue of the power of a governmental unit to regulate access involves recognizing the right of access and balancing that right against particular public and private rights. Statutory authorization for action by a governmental unit regulating access is essential; but that statutory authorization does not always have to specifically address access rights. Courts have found justification for reasonable regulation of access among general charter or enabling provisions.

4.0 CURRENT LEGAL POLICIES AND AUTHORITIES

4.1 *Rights of Property and Access*

4.1.1 *Constitution*

The right to access property you own is generally recognized as a property right of ownership and a right protected by both federal and state constitutions. The Constitution of the State of Indiana, Article 1, §21, establishes property rights:

No person's particular services shall be demanded, without just compensation.
No person's property shall be taken by law, without just compensation; nor,
except in case of the state, without such compensation first assessed and
tendered.

4.1.2 *Statutory Authority*

Augmenting the Indiana Constitutional provision are statutory provisions which provide that “[i]f a highway is constructed . . . the right-of-way, or any required drainage courses, approaches, or any land necessary for the construction of a highway”^v or bridge, may be acquired by eminent domain. A taking in eminent domain includes substantial interference with private property which destroys or impairs the free use and enjoyment of property^{vi} or one’s rights and interests in the property.^{vii}

The nature of the right to access varies among the states. Some states, North Carolina for example, follow a minority view by adopting laws that hold that the property owner has the statutory right of access to each and every abutting public way. Most states, including Indiana, follow the majority view that abutting owners have no inviolable right of access, only a right of reasonable access. As a general principle, a properly authorized governmental unit has the power to regulate, at least reasonably, in the public interest, and without illegal discrimination, the extent of an abutter’s private right of access from his property to the street or highway.

A case representing these principles is *Miami v. Gitman*^{viii}. In this Florida case, the property owners challenged the ordinance under which the city engineer was authorized to approve ingress/egress applications and challenged the city’s denial of their requested access to, and use of, a second entrance for their parking lot business as unreasonable and a denial of access to which they were entitled under law as a property right.

The court stated that a city, as the arm of the state, has in the exercise of the police power, a wide discretion in determining what precautions in the public interest are necessary and appropriate under the circumstances. Questions of public safety are proper fields for the exercise of police power and extend to all matters wherein the morals, health, comfort, safety and welfare of the public are involved.

The charter of the City of Miami included the following provision:

The City of Miami shall have power to pave, grade, curb, repave, macadamize, re-macadamize, lay out, open, close, vacate, dis-continue, widen and otherwise improve streets, alleys, avenues, boulevards, lanes, sidewalks, parks, promenades and other public highways or any part thereof, and to hold liens therefore as

hereinafter provided; to construct and maintain bridges, viaducts, subways, tunnels, sewers and drains, and to regulate the use of all such highways, parks, and public grounds and works; to prevent the obstruction of such sidewalks, streets and highways; abolish and prevent grade crossings over the same by railroads; regulate the operation and speed of all cars and vehicles using the same, as well as the operation and speed of all engines, cars and trains of railroads within the City; to regulate the service to be rendered and rates to be charged by buses, motor cars, cabs and other vehicles for the carrying of passengers and by vehicles for the transfer of baggage.^{ix}

The court determined that the provision of the charter conferred broad powers on the City for the regulation and control of the streets. The court stated that although there is no mention of regulating driveways onto streets,

their relation to the streets, and to traffic on the streets and sidewalks is of such obvious character and importance that they are recognized as an incident to street use, and municipal corporations have implied power to regulate them, as being a power necessarily incident to those expressly granted regarding the streets [citations omitted].^x

The court concluded that the owner's convenience or inconvenience, and whether restrictions may hinder or prevent profitable operation of the owner's business on the property, are material factors weighed against public necessity. Reasonableness, as applied to the proposed use by the property holder, is determined by an inquiry into whether such a use "would be fraught with such unusual hazard that the danger to the traveling public would be out of proportion to the detriment to the owner of being deprived of it."^{xi}

The Indiana rule for acquisition and compensation under eminent domain was established by the 1968 case *State v. Stefaniak*.^{xii} The case was brought in Circuit Court by the Stefaniaks against the State of Indiana to recover damages for an alleged taking and deprivation of property rights under the inverse condemnation statute^{xiii} and eminent domain. The State of Indiana, in constructing Highway 20 Bypass, dead-ended Sundown Road, the Stefaniak's property frontage road. The state constructed Huron Street to provide residents of Sundown Road access to Western and Grant, placing the Stefaniak's property in a cul-de-sac. As a result of the state's construction of Huron Street, the Stefaniak's property became a corner lot. After the construction, the location of the Stefaniak dwelling violated zoning ordinances. Six zoning restrictions on the property use exist after the highway construction. These additional restrictions are not waivable by the Board of Zoning Appeals and do not apply to other property which conforms to the zoning laws. The Stefaniaks argue that the construction caused additional damages, including snow drifts blocking their driveway from a new limited access fence, vehicle damage from a new drainage ditch, and loss of privacy in their back yard.

The case was tried by a jury and the jury found for the Stefaniaks, awarding them damages of \$4,000. The State appealed on reversible error due to the lower court not sustaining the State's motion to dismiss, motion for a directed verdict, and for erring in the jury instructions. The State argues that the Stefaniaks were and are merely inconvenienced, and that the damages are too remote and inconsequential for the granting of compensation.

Although much of the basis of the appeal is procedural, the court states that it cannot, as a matter of law, considering the evidence of the case, find that the Stefaniak's damages are merely incidental and constitute only inconveniences. The court finds that the damage suffered was peculiar to the Stefaniak's property and was not suffered in common with the general public. The court states that due to the fact that the Stefaniak's dwelling is now in violation of the zoning ordinance, located on a cul-de-sac, and has suffered a substantial loss in value because of the construction, it was proper for the lower court to leave the question of a compensable taking for a jury's determination. As such, the court finds that the State's motions were properly denied and that there was no error in the trial court's jury instructions. By the court affirming the judgment of the trial court in awarding damages to the Stefaniaks, the court established the rule that damages resulting from a zoning violation caused by an eminent domain appropriation are compensable.

The same year as the *Stefaniak* case, the holding was applied to *Schuh v. State of Indiana*.^{xiv} In this inverse condemnation action, the State of Indiana, in order to widen a highway, appropriated a strip of land five feet in depth on the southernmost edge of Harry Schuh's property. The widening of the highway causes a zoning violation of one of Schuh's buildings. An appraiser for the state assured Mr. Schuh that the building would not have to be razed and in reliance on these assurances, Mr. Schuh conveyed the right-of-way to the state for \$16,598. Subsequently, the Marion County Zoning Board required the razing of Mr. Schuh's building. Citing *Stefaniak*, the court stated as the rule:

[t]aking in eminent domain, by the modern and prevailing view, includes the substantial interference with private property which destroys or impairs one's free use and enjoyment of the property . . . or one's rights and interests in the property.^{xv}

Applying the rule in the *Stefaniak* case to the facts of the *Schuh* case, the court found that causing the violation of a zoning ordinance was a "taking" and should have been considered as a compensable injury to Mr. Schuh's property.

The 1974 case *Indiana & Michigan Electric Company v. Whitley County Rural Electric*^{xvi} cites both the *Stefaniak* and the *Schuh* cases in establishing that "substantial" interference in property rights sufficient to amount to a taking is a question properly for a jury's determination. The *Indiana* case is a "utility" case, arising under §18A of the Rural Electric Membership Corporation Act (REMC) providing for the purchase or condemnation of electric utility property upon annexation of additional territory to a city or town. Based on the *Stefaniak* case, which was subsequently approved in *Schuh*, the court finds that "if the REMC has property outside of the annexed area the value and usefulness of which is substantially interfered with or damaged by the loss of the territory annexed, it is entitled to compensation for such damages."^{xvii}

The 1976 case *City of Gary v. Ruberto*^{xviii} specifically states the rule as established by *Stefaniak* and *Schuh* for taking property under eminent domain:

It therefore follows that either some physical part of the real estate must be taken from the owner or lessor, or some substantial right attached to the use of the real estate taken before any basis for compensable damage may be obtained by an owner of real estate in an eminent domain proceeding. It must be special and peculiar to the real estate and not some general inconvenience suffered alike by the public. (citations omitted)^{xix}

In the *Ruberto* case, the court finds that the evidence presented at the lower court's evidentiary hearing was insufficient to establish a taking under the test.

4.1.3 Administrative Authority

Although regulating vehicle access may take the form of prohibiting use of an existing driveway, in the overwhelming majority of cases, it has taken the form of regulating or prohibiting construction of means of access, i.e., curb cutting. The right of access is inseparably related to the right to provide access. The Maryland court in *Hillyard v. Chevy Chase*^{xx} specifically recognized that an abutter's right of access may include the right to cut a curb. This recognition is implicit in the discussion and holdings of many cases addressing the right to regulate access. The Oklahoma court found in *Norman v. Safeway Stores*^{xxi} that the owner of a lot abutting a city street has a right of access to his property from the street, and the city is bound to permit such owner to construct and maintain a driveway from his property to the street under reasonable regulations when it appears that the construction and maintenance of the driveway will not materially interfere with the full and free use of the street and sidewalk by the public.

Under Ind. Code §9-21-19-1 a written permit from INDOT is required for the construction of a “private entrance, driveway, or approach connecting with a highway in the state highway system or the state maintained route through a city or town” or a curb cut or cut removal along a highway.^{xxii} In addition, “[t]he action must be in accordance with the rules and requirements of the department.”^{xxiii} Indiana has codified the rules and requirements for highway permits, and the authorization for determining and establishing requirements and restrictions for driveway approaches under Indiana Administrative Code Article 7.

Conceding a power of reasonable regulation, courts in many states have held or recognized that the power does not extend to completely depriving an abutter of all access to the street or highway without compensation. However, the rule respecting complete deprival of access, or deprival of “all” access has in fact, been applied in situations which did not literally involve a complete deprival of access. This application almost always has reference to vehicular access, drawing a distinction to pedestrian access. For example, the Pennsylvania court in *Breinig v. Allegheny County*^{xxiv} said that a municipality cannot, without compensation, completely shut off an abutter's access to his land, particularly pedestrian access, and that the right of vehicular access cannot be denied when there is no substantial interference with public travel. The right to use the sidewalk and cut the curb for driveway purposes must be exercised subject to the protection of the public, and may be regulated under the police power in the interest of safety. The court said that in highly congested areas, the right of vehicular access may be reduced to a minimum, and be so limited as to exclude the right to maintain driveways immediately fronting the property where it is possible to locate them elsewhere. If relocating driveways to an alternate location is not possible, access may, in proper cases, be restricted in its hours of operation.

In the 1998 inverse condemnation proceeding *Jenkins v. Board of County Commissioners*^{xxv} Madison County relocated a portion of Raible Avenue to form an S-curve west of the Jenkins' land. The S-curve was constructed to eliminate a double T-intersection. Following the construction approximately 675-feet of Raible Avenue was no longer adjacent to Jenkins' property. In response, Jenkins filed a complaint for inverse condemnation claiming loss of ingress and egress, road frontage, and corner influence. The Jenkins claimed that the change resulted in a diminution of value of the property.

The court in making a determination on the Jenkins' case, states that the right of ingress and egress is a property right which cannot be taken without compensation.^{xxvi} Compensation is due under eminent domain when the taking of property substantially interferes with private property destroying or impairing one's free use and enjoyment of the property or one's interest in the property.^{xxvii} Finding for the Board of County Commissioners by applying the rule in *Ensley*, the court reaffirms that a property owner is not entitled to unlimited access to abutting property at all points along the highway. Further, the fact that ingress and egress is made more circuitous and difficult does not itself constitute a taking of private property. The court concludes that Jenkins' property had not been taken in the context of eminent domain and that there was no diminution of value.

The 2002 Indiana case *Bussing v. INDOT*^{xxviii} re-affirms the law established by *Ensley*, *Young* and *Diamond Lanes*. *Bussing* claimed that INDOT's plan to eliminate the left-hand turn at the intersection of Brentwood and S.R. 66 was a compensable taking of his property and access rights under Indiana's eminent domain statutes. Citing *Young v. State*,^{xxix} the court stated that the general rule in Indiana is that,

. . . before any basis for compensable damage may be obtained by an owner of real estate in an eminent domain proceeding, either some physical part of the real estate must be taken from the owner or lessor, or some substantial right attached to the use of the real estate taken; it must be special and peculiar to the real estate and not some general inconvenience suffered alike by the public.^{xxx}

In the *Bussing* case, Brentwood is a public thoroughfare used by other landowners south of the intersection. This circumstance supports the finding that the access from S.R. 66 via Brentwood is not special and peculiar to *Bussing*'s property, but is a general convenience enjoyed alike by the public. As support for this conclusion, the court cites the *Ensley* case. The *Bussing* court restates the rule of *Ensley*: there is no property right of an abutting property owner in the free flow of traffic past his property, and thus, no compensation may be required if traffic is diverted from an abutter's premises or made to travel a more circuitous route. The *Bussing* court holds that the elimination of the left-turn from the median on S.R. 66 did not completely deprive drivers access to *Bussing*'s property. The elimination of the turning lane simply requires drivers to travel a more circuitous route. This is not compensable under Indiana's eminent domain statutes.

In general, a highway authority's claimed right to exert police power to eliminate or reduce access rights without paying compensation to abutting property owners has not been given much weight by the courts. Instead, courts find on the facts of the particular case, rather than on the merit of the legal theory.

4.2 Acquisition and Control of Property Rights

4.2.1 Statutory Authority for Eminent Domain

The State of Indiana has the power of eminent domain under the Constitution. All other agencies must receive a delegation of this power by statute. Municipalities and other government bodies having general responsibility for the maintenance or regulation of streets or highways within their jurisdiction are ordinarily authorized by statutory provisions to regulate access. Counties have the power of eminent domain under Ind. Code §8-17-1-3:

If a highway is constructed under this chapter, the right-of-way, or any required drainage courses, approaches, or any land necessary for the construction of a

highway, or land necessary to build a bridge or a culvert shall be acquired by the county, either by donation by the owners of the land through which the highway passes or by agreement between the owner and the county executive, through eminent domain, or the public may acquire the property as is necessary in the same manner as provided for the construction of public highways. The entire cost of the right-of-way shall be paid by the county.^{xxxii}

The power of condemnation is codified under Ind. Code §32-24-1-3.^{xxxiii} This statute is cross-referenced to the Indiana Constitution, Article 1, §21 and to taking property for highways legislation, Ind. Code §8-17-1-3 and Ind. Code §8-23-7. Under *Vandalia Coal Co. v. Indianapolis & L. Ry., et seq.*,^{xxxiv} the act does not violate any provisions of the federal or state constitutions.

An interpretation of the statute is available in *State v. Ensley*,^{xxxv} where the court found that where a property owner suffered inconvenience and annoyance when a divider strip was placed in the newly constructed highway, it did not amount to a compensable appropriation of the right of access, even though ingress and egress was made more circuitous and difficult.

The INDOT or a highway authority may acquire property or property rights for a limited access facility under Ind. Code §8-23-8-3:

- (a) The department or a highway authority may acquire private or public property and property rights for limited access facilities and service roads, including rights of access, air, view, and light, by gift, devise, purchase, or condemnation for the laying out, widening, or improvement of highways and streets within their respective jurisdictions.
- (b) In the acquisition of property or property rights for a limited access facility or a service road connected with a facility, the state, county, or municipality may acquire an entire lot, block, or tract of land, if the interests of the public will be best served, even though the entire lot, block, or tract is not immediately needed for the right-of-way.^{xxxvi}

This limited access statute is interpreted and applied by the courts in the cases discussed below. In summary, the court has determined: (1) sovereign immunity cannot prevail in the face of statutes giving property owners remedy when right of access to property is taken for public use;^{xxxvii} (2) damages may be awarded when an abutting property owner's access is substantially and materially impaired;^{xxxviii} and (3) property owners are not entitled to compensation when the state improves an existing access highway by constructing a limited access highway and the abutting property owners have reasonable means of continued ingress and egress.^{xxxix}

The court states in dicta for *Bussing v. INDOT*^{xxxix} that Ind. Code §8-23-8-3 does not clearly provide for compensation when traffic flow adjacent to the landowner's property is somewhat restricted. Instead, the statute merely provides authority in broad terms, for the acquisition of property rights, including rights of access. The statute's purpose, according to the court, is to promote the relatively unimpeded flow of traffic upon such highway facilities. The statute does not assure compensation to landowners for every deviation from the status quo.

4.2.2 Statutory Authority for Police Power

Assuming no violation of constitutional limitations upon any governmental regulation of an abutter's access, governmental units having general responsibility for maintenance and/or regulation of streets and highways in their jurisdictions are ordinarily authorized by general or specific statutory or charter provisions to regulate access.

INDOT is established by Ind. Code §8-23-2-1 (2004).^{xli} Under Ind. Code §8-23-2-4-1 (2004)^{xlii} INDOT is responsible for the following activities:

- (1) The identification, development, coordination, and implementation of the state's transportation policies.
- (2) The approval of applications for federal transportation grants from funds allocated to the state.
- (3) The review, revision, adoption, and submission of budget proposals.
- (4) The construction, reconstruction, improvement, maintenance, and repair of: state highways and toll road projects or toll bridges.
- (5) The administration of programs as required by law, including railroads, rail preservation, aeronautics, airports, and aviation development programs.

INDOT holds statutory authority (1) to encumber property to carry out its responsibilities; (2) to compromise any claims "with the approval of the attorney general; and (3) to execute all documents and instruments necessary to carry out its responsibilities."^{xlii}

Under Ind. Code §8-23-2-5 (as amended, effective July 1, 2005), INDOT shall:

- (1) Develop, continuously update, and implement: long range comprehensive transportation plans; work programs; and budgets to assure the orderly development and maintenance of an efficient statewide system of transportation.
- (2) Implement the policies, plans and work programs adopted by the department;
- (3) Organize by creating, merging or abolishing divisions.
- (4) Evaluate and utilize whenever possible improved transportation facility maintenance and construction techniques.
- (5) Carry out public transportation responsibilities, including: developing and recommending public transportation policies, plans and work programs.

Under Ind. Code §8-23-4-8 (2004)^{xliii} INDOT may change the location of a state highway for the following reasons:

- (1) To reduce the length of the highway.
- (2) To eliminate steep grades or sharp turns.
- (3) To widen narrow parts.
- (4) To promote public convenience and safety.

Similar authority is extended to departments and highway authorities of counties and municipalities under Ind. Code §8-23-8-1^{xliv} which provides:

The department and the highway authorities of the counties and municipalities, acting alone or in cooperation with each other or any federal agency, or state or local agency of another state having authority to participate in the construction and maintenance of highways, may plan, designate, establish, regulate, vacate, alter, improve, maintain, and provide limited access facilities for public use on all or any part of a highway whenever the department or authority that has

jurisdiction over the highway determines that traffic conditions, present or future, will justify the facilities. The department or a highway authority that has jurisdiction over a highway may regulate, restrict, or prohibit the use of limited access facilities on that highway by various classes of vehicles or traffic.

The 1975 Indiana case, *Richmond v. S.M.O.*,^{xlv} defined the authority of a municipality to regulate access to a state highway, and the proper exercise thereof. In this case, the Indiana State Highway Commission granted Burger Chef's application for a curb cut and driveway along a state highway. When Burger Chef petitioned the City's Board of Public Works and Safety for the same permission, it was denied and Burger Chef was ordered to remove the curb cut. The City placed a metal post barricade across the driveway, cutting off access to the state highway, and leaving access only via an adjacent street.

Indiana has previously established, through a series of earlier cases, that the state and a municipality "may share in the regulation of a given activity provided that regulation is not exclusively reserved to the state and the municipal regulation does not impose a less stringent requirement than specified by the state."^{xlvii} The statute in effect at the time of the case which gave the state the authority to regulate curb cuts was Ind. Code §9-4-1-119. The statute established the authority for the state to promulgate a series of administrative rules and regulations "setting forth those things deemed pertinent by the State Highway Commission for a curb cut."^{xlviii} The court determined that the statute did not reserve authority for curb cuts exclusively to the state and that some degree of municipal participation in regulating same could be inferred from the statute. However, a municipality "must accompany any attempt to regulate curb cuts with reasonable rules and regulations dealing with that subject."^{xlix} The municipality cannot rely on general ordinances that regulate obstructions or injury to streets, or ordinances requiring excavation permits for work on public streets. A municipality must "inform a property owner of the standards considered by the City in allowing or denying a curb cut."^{xlxi}

The 2004 Indiana case *Fulton County Advisory Plan Com. v. Groninger*^l involved a dispute between an abutting property holder and the Fulton County Advisory Plan Commission over a zoning ordinance which allowed the Commission to approve or reject subdivision plans. The ultimate question was the scope of the statutory authority of the Commission to regulate access.

The Groningers submitted a primary plat application to the Commission seeking approval for the Rolling Acres Estates subdivision. The proposed subdivision included a roadway entrance onto a highway. The hilly terrain and the roadway entrance implicated Article 5.13 of the Zoning Ordinance:

The intent of Vision Clearance Standards are [sic] to provide for a safe vehicular and pedestrian transportation system. The visibility at intersections, driveways, curb cuts, and entrances are particularly important for the safe movement of vehicles and pedestrians.

The following Vision Clearance Standards apply to all intersections, drives, curb cuts, and entrances.

A. No curb cut or drive shall be permitted when:

(a) A minimum of 225 feet from the crest of a hill where the slope on either side of the crest is 6% or greater, and the speed limit is 45 MPH or greater.

(b) A minimum of 175 feet from the crest of a hill where the slope on either side of the crest is 6% or greater, or the visibility is determined to be impaired by the Zoning Administrator, and the speed limit is 45 MPH or less.

(c) The visibility to or from the desired location is determined to be impaired by the Zoning Administrator.^{li}

The Commission’s authority for subdivision control ordinances is statutorily granted and controlled by Ind. Code §36-7-702(b) (2002) which provides that a subdivision control ordinance “must specify the standards by which the commission determines whether a plat qualifies for primary approval.” Further, the language and requirements of the ordinance must be understandable with “reasonable certainty”, and a valid ordinance must be “concrete” and “precise, definite, and certain in expression.” The Commission’s authority to regulate access must be exercised in a manner that is “standardized” and “clearly defined” so as “to enable both the plat applicant and the municipality to act with assurance and authority regarding the development of the area in question” (citations omitted).^{lii}

The court provides an analysis of the Commission’s ordinance. The court states that subsections (a) and (b) “set forth minimum standards – the Plan Commission will not approve an application that does not meet these minimums.”^{liii} The use of the minimums in the ordinance puts the reader on notice “that more may very well be required in order to receive approval for an entrance.”^{liv} In this case, the Groningers were required to construct an entrance that complied with AASHTO Design Standards. The court cited a previous case where it upheld an ordinance listing several factors that a planning commission would consider when deciding whether to approve or deny a plat application, namely, whether streets were of sufficient width and proper grade; whether streets were located to accommodate traffic volumes; whether streets provided access for fire fighting equipment; and whether the streets conformed to the County Transportation Plan.

When seeking to interpret statute and there is not a case completely on point, an examination is done of how courts in other states have sought resolution as persuasive authority. For example: The Colorado court in *Heckendorf v. Littleton*^{lv} recognized the power of the municipality to regulate access under statutes authorizing municipalities to regulate the use of sidewalks, provide for and regulate curbs and gutters, and to regulate traffic on streets, sidewalks and public places. The court said that such statutes gave the municipality the right, under its police power, to regulate curb cuts. The court in *Newman v. Newport*^{lvii} recognized the power of a city to reasonably regulate driveways and curb cuts by abutting owners under the authority found in a statute granting a municipality the power to “order sidewalks,” including curbing, and to make ordinances and regulations relative to alterations or repairs. In *Wood v. Richmond*^{lviii} a city was held to be authorized to regulate driveways and sidewalks by charter provisions allowing the city to enact ordinances to secure the general welfare and authorizing the council to control the use of, and prevent or remove any structure or obstruction in, any street or sidewalk.

4.3 Power to Restrict or Interfere with Access Through Traffic Regulations

“Traffic regulations” include all rules having the direct function of regulating the direction, flow, speed, etc., of vehicular traffic on public streets or highways, or private roads treated as public because of permitted use.

As a general rule, governmental units have the power to promulgate or enforce traffic regulations in the general public interest, even if they interfere to some extent with the convenience of an abutter’s access, or compel some circuitry of route. Courts have held or recognized to be

unreasonable regulations which entirely cut off practicable access to the system of streets or highways. In reaching their decisions, courts balance public interest and private rights, with the issue usually becoming one of reasonableness in the circumstances. Courts do not hold unreasonable a regulation of the general direction, flow, or diversion of all traffic on a given street or highway. However, courts will carefully consider regulations which prohibit the use of certain streets by particular kinds of traffic which shut off all or convenient access to the abutter's property or regulations which completely close a street to traffic.

4.3.1 Traffic Control Devices - Direction, Flow, Turns, Stop Lights

Traffic regulations and regulatory devices, such as one-way streets, stop lights, stop lines, and prohibitions against certain turns, which merely impose some circuitry of route upon the abutter, tend to be upheld against contentions that access was impaired. For example, the court in *Brown v. City of Twin Falls*^{viii} found that the city and state had the right to erect median barriers without compensation when the barriers had the effect of blocking left turns into an abutting property holder's shopping center. The court stated that an abutter's right of access does not encompass a right to any particular pattern of traffic flow. The Kansas court found in *Pringle v. City of Wichita*^{ix} that although owners of land adjoining roads or highways enjoy a right of access without unreasonable interference, an abutting owner has no right to a continuation of flow of traffic in front of the property. The court stated that regulation of traffic under police power without liability for compensation includes prohibiting left turns, prescribing one-way traffic, prohibiting one-way traffic, prohibiting access on crossovers between separated traffic lanes, prohibiting or regulating parking, and restricting speed, weight, size and character of vehicles allowed on certain highways.

Indiana has codified the installation, maintenance, and removal of traffic control devices under Ind. Code §9-21-4-2:

- (a) The Indiana department of transportation shall place and, except as otherwise provided in this section, maintain traffic control devices conforming to the state manual and specifications upon all state highways, including the state maintained routes through a city or town, as necessary to indicate and to carry out this article or to regulate, warn, or guide traffic.
- (b) A local authority may not place or maintain a traffic control device upon a highway in the state highway system or the state maintained routes through a city or town until the authority has received written permission from the Indiana department of transportation.
- (c) If the department determines, upon the basis of an engineering and traffic investigation, that any traffic control signal is not necessary for the safe, convenient, economical, and orderly movement of traffic, the signal shall be removed by the Indiana department of transportation and be returned to the authority responsible for the signal's erection. If the Indiana department of transportation determines, based on an engineering and traffic investigation, that a traffic control signal now in place is necessary for the safe, convenient, economical, and orderly movement of traffic, the signal must remain in place, and the Indiana department of transportation shall affix a tag or seal to the signal showing that the signal has been approved by the Indiana department of transportation.^{lx}

A 1961 opinion of the Attorney General stated that the determination of when and under what circumstances traffic control devices, including “stop” signs, may be used is within the discretion of the highway department.

Indiana has further codified the authority of INDOT to create the *Indiana Manual on Uniform Traffic Control Devices for Streets and Highways* under Ind. Code §9-21-2-1, “The Indiana department of transportation shall adopt rules under IC 4-22-2 to create the Indiana Manual on Uniform Traffic Control Devices for Streets and Highways.”^{lxii}

4.3.2 *Divided Highways*

Establishing divided highways where U-turns and left turns are permitted only at designated points by either physical dividers or regulations have been consistently upheld as reasonable based on the principle that an abutter has no property right in the continuance or maintenance of traffic flow past his property. The Indiana court in *State v. Ensley*^{lxiii} applied the conventional principle that there is no property right in the free flow of traffic past the property of an abutter to address the impairment of access caused by the creation of a divided highway. The court quoted, with approval, language of *Iowa State Com. V. Smith, infra.*, respecting the reasonableness of regulating traffic in the manner at issue.

Iowa State Highway Com. v. Smith^{lxiv} held that the abutting holder’s property had not been taken under eminent domain when traffic regulations prohibited crossing the highway, making left turns, and U-turns except at designated points. The court stated that such regulations were almost universally regarded as reasonable, that such regulations facilitated travel, and virtually eliminated collisions between vehicles going in opposite directions. The court also stated that the abutting property holder has no vested right to the continuance of existing traffic past his property and that the requirement to cross the highway only at designated places was imposed alike on all members of the public.

At issue in the Indiana case *State v. Cheris*^{lxv} was whether the construction of a median strip resulted in an impairment in the unrestricted flow of traffic past the abutting property or whether it resulted in a material and substantial interference of the abutting property holder’s right of access. Quoting *State v. Ensley*,^{lxvi} the court finds the case directly applicable to *Cheris* and, under *Ensley*, the court holds:

[s]ince appellees have no property right in the free flow of traffic past their premises, the construction of the divider strip does not deprive them of any property right, and, hence, any damage sustained thereby, by loss of business or depreciation in the value of their property, would not, for this further reason, be compensable.^{lxvi}

Indiana Dept. of Transportation v. Southern Bells, Inc.^{lxvii} was an appeal resulting from the grant of a preliminary injunction to Southern Bells, Inc. INDOT proposed a median that would prevent southbound traffic from turning onto the access road to reach Southern Bells’ business. The business obtained a temporary injunction, enjoining the INDOT road improvements. The court found that INDOT established a valid public purpose for the median construction, namely, public safety. Increased traffic created by a development project made the median necessary to protect public safety. INDOT “had a legitimate public purpose in constructing the median.”^{lxviii} Given the legitimate public purpose, if and to the extent INDOT’s actions constituted any taking of Southern Bells’ property interests, remedy was available through a suit for inverse condemnation

under Ind. Code §32-1-1-12¹. The court found that absent fraud, bad faith, or arbitrary and capricious behavior on the part of the INDOT, the court may not interfere with INDOT's decision to construct the median.^{lxix} The court refers to Ind. Code §8-23-2-4-1 in holding that INDOT's median is an action for which there is express legislative power and responsibility to perform. (See section 4.2.2. regarding police power.)

4.3.3 Closing Streets to Particular Classes of Traffic

Courts have generally found that it is beyond the power of a governmental unit to eliminate abutter's access by prohibiting use of connecting streets by the class of vehicles used in the abutter's business. It is also beyond the power of a municipality to deny an abutter all access from the street system by regulations limiting the weight of vehicles that may be used on certain streets. However, as long as there is not a complete loss of practicable access, the exercise of the power of limiting the weight of vehicles is not invalidated because the abutter is forced to use circuitous routes, or is caused some inconvenience. In upholding the validity of an ordinance prohibiting the use of certain streets by vehicles over three tons capacity, the court in *Ferguson Coal Co. v. Thompson* stated that the street on which the compliant abutting property owner, a coal company, was located was not designed or capable of withstanding use by heavy traffic and that it was necessary to segregate heavy traffic to relieve congestion and facilitate traffic. The court conceded that the abutting property owner may suffer some inconvenience by not being permitted to take the most direct route and may suffer some increase costs. However, those facts did not make the ordinance unreasonable. The court recognized that ingress and egress could not be prohibited in its entirety, but that here, the abutting property holder's access had not been totally cut off.

Plaintiffs in Indiana case *State v. Tolliver*^{lxx} operated an ornamental iron prefabrication business on property located several hundred feet south of highway construction. Trucks transporting raw materials to and from the business traveled over Foster Road to get to U.S. Highway 136. In 1959 the State and County closed Foster Road and eliminated this access between the Tolliver's business and Highway 136. The sole remaining access required crossing a bridge with a weight capacity far below the loads required for the business. The Tolliver court adopted the following legal principles:

A property owner suffers a compensable damage on account of the construction or vacation of a public road when egress and ingress to his property are cut off or interfered with and he has no other reasonable means of access. The right of access under such circumstances is property which cannot be taken from him without compensation.^{lxxi}

The Tolliver court held that the alternative route, via the bridge, was insufficient to support plaintiff's business operations and was therefore not a reasonable outlet. The injury suffered in Tolliver "was far greater and of a kind and nature different from the injury suffered by the general public."^{lxxii}

Indiana has codified the ability of state and local authorities to impose restrictions on the operation of vehicles on highways or the weight, size, or use of vehicles on highways under Ind. Code §9-20-1-3, which states that local authorities, with respect to highways under their

¹ Ind. Code §32-11-1-12 provides that a person having an interest in land which has been taken for public use without having been appropriated under the procedures set forth in Ind. Code §32-11-1-1, *et seq.*, may proceed to have his damages assessed in accordance with that chapter.

jurisdiction, may by ordinance: prohibit the operation of vehicles upon any highway; impose restrictions as to the weight of vehicles to be operated upon any highway; and prohibit the operation of trucks or other commercial vehicles; impose limitations as to the weight, size, or use of those vehicles on designated highways. INDOT has the same authority granted to local authorities to determine by executive order and to impose restrictions as to weight, size, and use of vehicles operated upon a highway in the state highway system, including state maintained routes through cities and towns.^{lxxiii}

4.3.4 Closing Street to All Vehicular Traffic

Regulations closing streets to all vehicular traffic are weighted against the alternative access available and the necessity for taking the particular measure in the public interest. The North Carolina court found in *Snow v. North Carolina State Highway Commission*^{lxxiv} that the erection of a barrier on a road that cut off access to a nearby controlled-access highway for an abutting property holder was an exercise of police power. Although the abutting property was left in a cul-de-sac with less convenient ingress/egress in another direction, the court found that the abutting property holder had no right to have traffic pass by his property.

The 1963 Wisconsin court stated in *Stefan Auto Body v State Highway Commission*^{lxxv} that all decisions recognize that a complete denial of access to an existing road is compensable and it is generally recognized that the state under its police power may indirectly affect the abutting property by such controls as the elimination of crossovers and the establishment of one-way streets or lanes of traffic, median strips, weight and speed restrictions, and restrictions on U-turns and left and right turns. However, the court observed, the line between police power and condemnation has not been sharply drawn. If the damage is such as to be suffered by many similarly situated, it is the nature of a restriction of the use to which land may be put, and ought to be borne by the individual as a member of society for the good of the public safety, health, or general welfare, then it is a reasonable exercise of the police power. If the damage to the individual is so great that he ought not to bear it under contemporary standards, then the court should be inclined to consider it a “taking” of the property or an unreasonable exercise of the police power.

4.4 Limited-Access Highways

A “limited-access” or “controlled-access” highway may be defined as a highway especially designed to expedite and control through traffic, primarily by means of median dividers or strips, elimination of grade level intersections, and limitation of access to specific interchanges or access ramps at designated intervals. As part of a limited-access highway, a frontage or service road may be constructed to provide abutting landowners with a means of local transportation, and to grant them access to the public road system and, at certain locations, to the express lanes of the limited-access highway.^{lxxvi} Indiana defines a limited access facility as:

[A] highway or street designed for through traffic, over, from, or to which owners or occupiers of abutting land or other persons have either no right or easement or a limited right or easement of direct access, light, air, or view because their property abuts upon the limited access facility or for any other reason. The highways or streets may be parkways from which trucks, buses, and other commercial vehicles are excluded or freeways open to use by all customary forms of highway and street traffic.^{lxxvii}

Highway authorities have argued that the right to convert an existing conventional highway into a limited-access facility is within the exercise of the police power of the state, and that the owner of abutting property is not entitled to damages for loss or limitation of access. The South Dakota court found that while an abutting landowner's right of access is not absolute in that it is subject to reasonable regulation and restriction, regulations must be reasonable, and the legislature cannot, under the guise of the police power, impose unreasonable or arbitrary regulations which go beyond that power and which deprive a person of property within the purview of eminent domain. The court in *Hurley v. State*^{lxxviii} said that the relative rights of the public and private interests must be considered, and the reasonableness of the regulation and the degree of its interference with private property determined.

State ex rel. State Highway Com. v. Lavasek^{lxxix} takes a more expansive view of police power by stating that if a new controlled-access highway is located on the right-of-way of the old conventional highway, the state may restrict the entrances and exits if such restriction appears reasonable as an exercise of its police power to regulate traffic. The court pointed out that the state highway commission has the right, in the interest of public safety, to regulate the means of entry to and exit from a heavily traveled highway and to regulate the means and places of access of abutting property owners. The state in the exercise of its power to construct highways and control traffic is not liable for loss of trade to abutting landholders as a result of the exercise of its police power. Restrictions of the rights of entrance and exit from a public street or highway is as much a regulation of traffic as are median dividers, one-way streets, no left turns, no U-turns, and other widely recognized traffic controls.

Governmental power to restrict or interfere with access of an abutter for limited-access highways is established by statute in Indiana. Under Ind. Code §8-23-8-3, the limited-access statute, access rights may be acquired “if the interest of the public will be best served, even though an entire lot, block, or tract is not immediately needed for the right-of-way.”^{lxxx}

In the absence of a specified statute providing for the acquisition of access rights, the majority rule of the courts is that an abutting property holder is entitled to compensation if the access he previously enjoyed has been unreasonably, substantially, or materially impaired by a change in the abutting street or highway. This is the reasonableness test. The test rejects all liability if a frontage or service road is provided for the use of the abutting property holder. Under the reasonableness test, the impairment or loss of access resulting from the conversion of a conventional road into a limited-access highway is non-compensable if, after such conversion, the owner of abutting land retains a reasonable means of ingress and egress to and from his property. This is the rule in Indiana.

A number of courts have, in effect, inserted a reasonableness test into statutes authorizing the acquisition of access rights, or statutes simply providing for payment of compensation to abutting landowners for loss or impairment of access rights occurring when an existing street or highway is designated as a limited-access highway. Despite the unqualified language of such statutes, these courts have allowed recovery only when the abutting owner's means of ingress and egress have been unreasonably, or substantially impaired by the change in the highway.

The 1960 Indiana case, *State v Ensley*,^{lxxxi} concerned a condemnation action by the state for the purposes of widening Keystone Avenue and constructing improvements as part of the Indiana State Highway System. Ensley owned and operated a recreation center known as Little America on an abutting property. Prior to the widening of Keystone Avenue, the commercially zoned lot had an entrance on both Keystone Avenue and 62nd Street (located on the north side of the property, about one-half block west of the intersection of Keystone and 62nd Street). The

Highway Commission, in reconstructing Keystone Avenue, both the Keystone and 62nd Street driveways for Little America. However, the construction of a divider strip on Keystone Avenue permitted access only from the southbound side. Northbound traffic, instead of turning directly into the Keystone Avenue entrance, had to continue to the intersection of 62nd and Keystone, make a left turn and drive west one-half block to access Little America at the 62nd Street entrance.

Citing the Constitution of Indiana Article 1, §21, the court stated that it is well-settled that acts done in the proper exercise of governmental powers and not directly encroaching on private property, although their consequences may impair the property's use or value, do not constitute a “taking” within the meaning of the Constitution. The court stated that any injury so caused is deemed to be remote and inconsequential and not compensable in the absence of an express statute to the contrary.

Ensley argued that “The Eminent Domain Act of 1905, as amended” was just such a statute. Under the Act every element of damage which will ordinarily and naturally result from the taking of property may be considered in determining damages in a condemnation proceeding. Ensley argued a property right in the free and unrestricted flow of traffic passing the premises and any impairment of, or interference with, this alleged right must be compensated.

Citing the 1936 case *State v. Patten*,^{lxxxi} the court stated that where an abutting property owner suffers damages as a result of the change or alteration in the grade of a highway, such inquiry is too remote and inconsequential to be compensable. Likewise, the mere change in grade of a highway alone, without the appropriation of any additional real property for the right of way does not come within the eminent domain statute. In order to recover for the alleged impairment of their right of access, Ensley must suffer a particular private injury, and not merely an inconvenience or annoyance, even though it may be greater in degree than such as is suffered by the public generally. That ingress and egress are made more circuitous and difficult does not of itself constitute a taking of private property. In addition, the court narrowed the interpretation of the eminent domain statute, stating that compensation under the statute must result directly from the taking of some property right.

The eminent domain rule in Indiana as applied to limited-access highways was further clarified with the following cases.

Indiana case *State v Hastings*,^{lxxxiii} where there is no actual taking of property under the eminent domain act or the limited-access act, the property holder is merely deprived of convenient access and required to use a more circuitous route, compensation is not due to the owner. The court determined that compensation is only allowable in the event of a deprivation of access that leaves the property without reasonable means of ingress and egress.

Bech v State,^{lxxxiv} a 1971 Indiana case found that the Indiana statute under which the state acquires its right to condemn access for the construction of limited-access highways provides for payment of damages to property owners when their rights of ingress and egress are taken or substantially impaired.

State v Diamond Lanes, Inc.^{lxxxv} was a 1968 Indiana case brought specifically pursuant to the Eminent Domain Act of 1905 and the Limited Access Statute of 1945 to recover damages for impairment of access resulting from the construction of the Diamond Avenue Limited Access Highway in Evansville. The evidence presented to the court showed that Diamond Lanes' access had been both materially and substantially obstructed, and reduced, and that the substituted access

could not be equated with the former access. Citing *State v. Geiger & Peters, Inc.*,^{lxxxvi} a case the court found similar in facts, the court stated,

Appellant cannot equate appellee's previous right of access to old Madison Avenue which led to the north and south through the entire City of Indianapolis, with access solely to the narrow dead-end service road which leads nowhere to the north and nowhere to the south except Calvin Street. Whether appellant calls the dead-end service road old Madison Avenue or not, in reality it is not the highway to which appellees previously had access. The injury to appellees is special and peculiar and is different in this case from that sustained by the public at large. The construction work done on old Madison Avenue and the land immediately west thereof to make a new super highway out of old Madison Avenue and the creating of obstructions and embankments cutting off appellee's right of ingress to and from the highway was a taking of appellee's property rights for which they were entitled to compensation in eminent domain.^{lxxxvii}

The court found that Diamond Lanes' access was substantially and materially impaired and that same was compensable.

The 1969 Indiana case *Young v State*^{lxxxviii} concerned a State Highway Department construction project that lowered the grade of a new highway approximately 12-feet, leaving on the old grade, one-half of the old two-way highway which ran along the frontage of the Young's property. The Young's property was left 12-feet above the new highway, but between the new highway and the property remained, in original condition, the old two-way highway. Relying on two previously established rules, namely: (1) in order to receive compensation in a condemnation action the landowner must show that the injury is special and peculiar to his real estate and not some inconvenience suffered by the public generally; and (2) unless the lowering of the grade of the highway cuts off access to the abutting property, there can be no compensable damages to the property owner;^{lxxxix} the court finds no compensable taking in the case of the Youngs.

The court in the 1964 Indiana case, *State v Geiger & Peters, Inc.*^{xc} citing a provision of the Indiana Limited Access Statute to the effect that property and rights for limited-access facilities and service roads, including rights of access, may be acquired by gift, devise, purchase or condemnation as may be provided by law, conceded that an abutting owner may not be entitled to damages for a mere partial limitation or obstruction to his right of access, but that this could not be extended to include substantial or material interference or cutting off of the right of ingress and egress. The court noted that an earlier case, *State v Marion Circuit Court*,^{xi} not involving a limited-access highway, specifically recognized the rule that an abutting property owner has an easement of ingress and egress to and from a public highway constituting a property right which cannot be substantially or materially interfered with or taken away without due compensation.

State v Marion Circuit Court quoted the same Indiana statutory provision. The court pointed out that the limited-access statute provided that rights of access are property or property rights which the state might acquire by condemnation. The court indicated that the impairment of access must be unreasonable, substantial or material in order to entitle the abutting owner to damage. This rule is consistent with the rule in the majority of states.

The court in the 1966 South Dakota case *Hurley v State*^{xcii} found that regulations under the police power must be reasonable and the legislature cannot, under the guise of such police power, impose unreasonable or arbitrary regulations which go beyond that power, and which in effect deprive a person of his property within the purview of the law of eminent domain. In each case,

the relative rights of the public and private interests must be considered and the reasonableness of the regulation and the degree of its interference with private property must be determined.

In the Indiana case, *Beck v. Indiana*^{xciii} the Becks were property owners of a vacant tract of land bordering U.S. Highway No. 460. The State of Indiana filed an action in condemnation for the acquisition of land to improve the existing highway and establish a limited access highway where a full access highway has previously existed. The Becks claimed an error in jury Instructions 3 which read, as follows:

Loss of access is only compensable and may be considered by you in determining the damages to be awarded the defendants only when such loss of access is special and peculiar to this property, and only when no other reasonable means of access is available to the property.^{xciv}

In support of these contentions the Becks cite Ind. Code §36-3101, *et seq.* (see, Burns Ind. Code Ann. §8-23-8-3 (2004)), the statutory authority for Indiana DOT or a highway authority to acquire property and property rights for limited access facilities and service roads. This statute empowers the highway departments to construct limited access facilities by acquiring property by “gift, devise, purchase, or condemnation.”^{xcv} In interpreting this statute, the court had previously held in *State v. Geiger & Peters, Inc.*^{xcvi} where the property owner had an existing drive to a business, the impairment of such entrance to the point where it could no longer be used in support of the business was compensable damage. In *State v. Tolliver*^{xcvii}, closing the country road with a limited access fence changed the truck traffic to and from the business to a circuitous route over a bridge with a weight capacity far below the loads required for conducting the business. The court held that the property owner had suffered compensable damage by the county road closure between the business and the main highway.

The court distinguishes *Beck* from the two previous cases:

the property owners had existing businesses which for some time prior had made specific use of their existing access to the highway. In each instance they suffered particular and measurable damages by reason of impairment of the use of the existing ingress and egress easement.^{xcviii}

The Beck's have unimproved property with no existing driveway on Highway 460. Under the rule established in Indiana under *State v. Ensley*^{xcix} abutters are not entitled to free access at every foot along their road frontage. The court concludes by holding that jury Instruction No. 3 was permissible:

The instruction permitted the jury to determine from the evidence whether the access remaining from Highway 460 to the property in question was a reasonable means of access under the circumstances and whether or not the property owners had suffered a compensable damage as a result of the cutting off of a portion of the road frontage by the construction of a limited access fence.^c

5.0 RECOMMENDATIONS FOR ACCESS MANAGEMENT

Based on this assessment of access management authority, the following are the findings to consider in the development of recommended actions:

- INDOT could use its current statutory authority to implement an access classification system. A classification system could be incorporated into the Driveway Permit Manual and/or the Highway Design Manual. INDOT could also incorporate an access classification system into the statewide mobility corridor program.
- INDOT could use its current authority to designate additional limited-access facilities. This could be applied in a manner consistent with the access classification system. Each time a major improvement is implemented on a state highway, part of the project approval process could be a request for limited-access designation within the project limits. This would allow the design of the project and the right-of-way acquisition to determine the location of allowable access points, both public and private.
- Access management techniques could be applied and incorporated into the access classification system so they will be applied in a manner commensurate with a state highway's functions. The following are examples of the access management techniques whose use could be applied or expanded:
 - Purchase of access rights
 - Introduction of a median
 - Closing a median opening
 - Eliminating left-turn access
 - Limiting or reducing the number of driveways (i.e. applying driveway spacing)
 - Replacing direct access with service road access
- Compensation may be due for the following access management actions:
 - Changes that would result in the creation of zoning violations
 - Alternative access that would substantially or materially interfere with ingress and egress

Endnotes

- i Where a public way has been created, the question arises as to whether there is vested in the public merely an easement of way, or whether the state or municipality has acquired title to the land over which the highway runs. In the absence of an express statutory provision providing for passing of title to the state or municipality, there is merely the creation of an easement, a right of passage, with title to the property remaining with the abutting property owners. In some states there are statutes which expressly provide that where a public highway is created by dedication or condemnation, title to the land covered by the highway vests in the municipality or state. These statutes may be limited to streets within incorporated municipalities, and not include rural highways.
- ii 47 Tex. L. Rev. 733 at 740 (1969)
- iii 127 N.W.2d 165 (1964)
- iv 410 P.2d 278, *cert. den.* 385 U.S. 820
- v Burns Ind. Code Ann. §8-17-1-3 (2004)
- vi *State v. Stefaniak*, 238 N.E.2d 451; citing *Brown v. State*, 211 Ind. 61, 5 N.E.2d 527
- vii *Id.* citing *State v. Jordan*, 215 N.E.2d 32
- viii 104 So.2d 62 (1958)
- ix *Id* at 67
- x *Id*
- xi *Id*
- xii 238 N.E.2d 451
- xiii Indiana case *Old Romney Development Co. v. Tippecanoe County*, 817 N.E.2d 1282 (2004), defines inverse condemnation as “a process provided by statute that allows individuals to be compensated for the loss of property interests taken for public purpose without use of the eminent domain process (citations omitted).” Inverse condemnation provides a remedy for property takings that would otherwise violate Article I, §21 of the Indiana Constitution. The statutory remedy for inverse condemnation is provided under Ind. Code §32-24-1-16.
- xiv 241 N.E.2d 362 (1968)
- xv *Id. at* 407
- xvi 312 N.E.2d 503 (1974)
- xvii *Id. at* 508
- xviii 354 N.E.2d 786 (1976)
- xix *Id. at* 789
- xx 137 A.2d. 555 (1958)
- xxi 145 P.2d. 765 (1944)
- xxii Burns Ind. Code Ann. §9-21-19-1 (2004)
- xxiii *Id*
- xxiv 2 A.2d. 842 (1938)
- xxv 698 N.E.2d 1268 (Ind. Ct. App. 1998)
- xxvi *Yater v. Hancock County Planning Comm'n*, 614 N.E.2d 568, 577 (Ind. Ct. App. 1993), *cert denied*, 511 U.S. 1019; *State v. Lovett*, 257 N.E.2d 298, 304 (1970)
- xxvii *Board of Comm'r's of Vanderburgh Cty. v. Joeckel*, 407 N.E.2d 274, 278 (Ind. Ct. App. 1980), *trans. denied*.
- xxviii 779 N.E.2d 98 (1965)
- xxix 246 N.E.2d 377 (1969)
- xxx 779 N.E.2d 104
- xxxi Burns Ind. Code Ann. §8-17-1-3 (2004)
- xxxii §32-24-1-3 (2004): “(a) Any person that may exercise power of eminent domain for any public use under any statute may exercise the power only in the manner provided in this article, except as otherwise provided by law.”
- xxxiii 168 Ind. 144, 79 N.E. 1082 (1907); *Smith v. Cleveland, C.C. & St. L. Ry.*, 170 Ind. 382, 81 N.E. 501 (1907); *Schnull v. Indianapolis Union Ry.*, 190 Ind. 572, 131 N.E. 51 (1921); *Sisters of Providence v. Lower Vein Coal Co.*, 198 Ind. 645, 154 N.E. 659 (1926),

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- overruled on other grounds, *Joint County Park Bd. v. Stegemoller*, 228 Ind. 118, 89 N.E.2d 720 (1950)
- xxxiv 240 Ind. 472, 164 N.E.2d 342 (1960)
- xxxv Burns Ind. Code Ann. §8-23-8-3 (2004)
- xxxvi *State v. Marion Circuit Court*, 238 Ind. 637, 153 N.E.2d 327 (1958)
- xxxvii *State v. Geiger & Peters, Inc.*, 245 Ind. 143, 3 Ind. Dec. 133, 196 N.E.2d 740 (1964);
State v. Diamond Lanes, Inc., 251 Ind. 520, 16 Ind. Dec. 279, 242 N.E.2d 632 (1968).
- xxxviii *Beck v. State*, 256 Ind. 318, 25 Ind. Dec. 335, 268 N.E.2d 746 (1971)
- xxxix 779 N.E.2d 98; 2002 Ind. App. LEXIS 1965
- xl Burns Ind. Code Ann. §8-23-2-1 (2004)
- xli §8-23-2-4.1 (2004)
- xlii Burns Ind. Code Ann. §8-23-2-4-1 (2004)
- xliii §8-23-4-8 (2004)
- xliv §8-23-8-1 (2004)
- xlv 333 N.E.2d 797 (1975)
- xlii *Id* at 643
- xlvii *Id* at 644
- xlviii *Id*
- xlix *Id* at 645
- I 810 N.E.2d 704 (2004)
- ii *Id* at 705
- iii *Id* at 708
- lii *Id*
- liv *Id*
- lv 286 P.2d. 615 (1955)
- lvii 57 A.2d. 173 (1948)
- lviii 138 S.E. 560 (1927)
- lviii 855 P.2d 876 (1993)
- lix 917 P.2d 1351 (1996), *review denied* May 3, 1996
- lx Burns Ind. Code Ann. §9-21-4-2 (2004)
- lxi §9-21-2-1 (2004)
- lxii 164 N.E.2d. 342 (1960)
- lxiii 82 N.W.2d. 755, 73 A.L.R.2d. 680 (1957)
- lxiv 287 N.E.2d. 777 (1972)
- lxv 164 N.E.2d. 342 (1960)
- lxvi 153 Ind. App. 454
- lxvii 723 N.E.2d. 432 (1999)
- lxviii *Id* at 434
- lxix See, *State v. Roberts*, 226 Ind. 106, 76 N.E.2d. 832, 835 (1948). See also, Ind. Const. art. IV, §1, separation of powers doctrine, under which courts are prohibited from substituting their judgment for that of the legislature where the legislature has not acted arbitrarily.
- lxx 205 N.E.2d 672 (1965)
- lxxi *Old Romney Development Co. v. Tippecanoe County*, 817 N.E.2d 1287
- lxxii *Id*
- lxxiii Burns Ind. Code Ann. §9-20-1-3 (2004)
- lxxiv 136 S.E.2d. 678 (1964)
- lxxv 124 N.W.2d 319
- lxxvi 42 A.L.R.3d 19
- lxxvii Burns Ind. Code Ann. §8-23-1-28 (2004)
- lxxviii 143 N.W.2d. 722 (1966)
- lxxix 385 P.2d. 361
- lxxx Burns Ind. Code Ann. §8-23-8-3 (2004)
- lxxxi 164 N.E.2d 342 (1960)
- lxxxii 209 Ind. 482, 490; 199 N.E. 577

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- lxxxiii 246 Ind 475, 206 N.E.2d 874 (1965)
 - lxxxiv 268 N.E.2d 746
 - lxxxv 251 Ind. 520; 242 N.E.2d 632, 1968 Ind. LEXIS 601
 - lxxxvi 245 Ind. 143, 196 N.E.2d 740
 - lxxxvii *Id. at 524*
 - lxxxviii 246 N.E.2d 377, *cert. den.* 396 U.S. 1038
 - lxxxix *State v. Ensley*, 164 N.E.2d 342 (1960); *State v. Patten*, 199 N.E. 577 (1936)
 - xc 196 N.E.2d 740
 - xci 153 N.E.2d 327 (1958)
 - xcii 143 N.W.2d 722
 - xciii 268 N.E.2d 746 (1971)
 - xciv *Id. at 321*, 748
 - xcv Burns Ind. Code Ann. §8-23-8-3 (2004)
 - xcvi 196 N.E.2d. 740 (1964)
 - xcvii 205 N.E.2d. 672 (1965)
 - xcviii 256 Ind. 322
 - xcix 164 N.E.2d. 342 (1960)
 - c 256 Ind. 323