

HIGHWAY RESEARCH CIRCULAR

Number 1

Subject Area: Land Acquisition

March 1965

Two years ago the Board discontinued its series of Research Correlation Service Circulars. In the interim committee reports and similar material were published in the Highway Research News. This change, however, proved to be somewhat unpopular. As a result, the Executive Committee has authorized the reinstatement of a circular series.

This is the first issue of the new series. As in the past, it will provide an outlet for committee reports, special material prepared by committees, and other material that does not normally appear in the other publications of the Board. The Circulars will be issued at irregular intervals during the year.

Distribution of the Circulars will be selective in that each issue will be sent only to those who have indicated an interest in its subject area.

COMMITTEE ACTIVITY

Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Department of Economics, Finance and Administration, Highway Research Board.

LAND ACQUISITION
MEMORANDUM #169
February, 1965

169-1 ARKANSAS SUPREME COURT RULES OWNERS IN SUBDIVISION RESTRICTED TO RESIDENTIAL USE NOT ENTITLED TO DAMAGES WHEN RESTRICTION IS VIOLATED

Mr. and Mrs. McNeill lived in Crestview Estates, a subdivision which was an addition to Fort Smith, Arkansas. The deeds to their property and to all other property in the subdivision restricted the use of the land to residential purposes. The State Highway Commission acquired a tract within the subdivision that comprised 11 lots that abutted the McNeill's property, but none of their land was taken. The McNeills brought an action to enjoin the State Highway Commission from constructing a cloverleaf interchange upon a highway near their home unless the Commission first filed a bond to secure any damages that they might suffer as a result of the construction. Witnesses for the McNeills testified that when the interchange would be completed, changing the area behind their home from a quiet residential district to a busy highway, their property would be reduced in value by \$10,000 or more.

The State Highway Commission contended that the presence of the completed interchange would not cause any legally compensable damage to the owners. The chancellor rejected this defense and granted the injunction, but withheld any determination of the McNeill's damages, until the principal question had been decided by the supreme court. That court agreed with the Highway Commission. It noted that the owners had claimed damages on two separate grounds: (1) the value of their

property would be reduced by the presence of the highway, with its attendant noise, dust, fumes, glaring lights, and vibration; and (2) the value of their property would be reduced by the Highway Commission's violation of the residential restriction contained in the deeds.

Although the trial court denied compensation on the first ground, the owners did not appeal from this decision. In fact, in oral argument their counsel conceded that there was no cause of action for such damages. The supreme court stated that although the merits of this count were not now in issue, its decision upon the main question was really based upon the lack of such merit. It was well settled in Arkansas that a landowner whose land was not being taken was not entitled to compensation for damage of the same kind as that suffered by the public in general, even though the inconvenience and injury to the particular landowner might be greater in degree than that to others. The court continued by stating that there could be no doubt that the first count did not state a cause of action. The owners merely asserted that after the project had been completed their back property line would border a public highway rather than a privately-owned residential lot. Such an inconvenience was of the same nature as that suffered by the public in general whenever a highway was built in a residential district.

The appellate court ruled that the fact that the proposed interchange would violate the restrictive covenant did not entitle the owners to any compensation because the reduction in the value of their property was attributable not to the breach of the restriction, but rather to the fact that a highway was about to pass through a residential district. It noted that if the subdivision had been developed in exactly the same way that it was actually developed -- as a residential district -- but without any restriction as to the use of the land, the construction of an interchange on land in the subdivision would not have entitled the McNeills to any compensation. Thus, the court thought that it was illogical to permit a recovery upon the theory that the breach of covenant was the proximate cause of the injury. It pointed out that if damages were allowed for the violation of a covenant, landowners in an unrestricted neighborhood, upon learning that a highway was coming in their direction, would find it advantageous to enter into an agreement imposing restrictions.

The appellate court stated it did not deny the existence of a property right in the owners because the restrictive covenant probably gave added value to their land when they bought it. However, it was not the breach of the covenant alone that was causing their damage. The same 11 lots which were acquired by the Highway Commission, instead of being used for a highway, might have been used by the city as a site for a public park. That too would have involved a breach of covenant, but the value of the owners' property might actually have been enhanced. Therefore, the owners' present damage could not be attributed to the naked breach of covenant. Even without the restriction their injury would still have occurred.

A vigorous dissent stressed the fact that the restrictive covenant was a property right and that the State had no right to overlook it since the constitution provided that "The right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged without just compensation." In this judge's opinion, the restriction was owned only by lot owners in the subdivision and that distinguished them from the general public. (Arkansas State Highway Commission vs McNeill, 381 S.W.2d 425, June 1964)