

# HIGHWAY RESEARCH CIRCULAR

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LAND ACQUISITION  
MEMORANDUM # 177

177-1 NEW JERSEY COURT RULES BOARD OF EDUCATION ENTITLED TO COMPENSATION  
IF USE OF A SCHOOL WOULD BE DESTROYED BY CONSTRUCTION OF A HIGHWAY  
EVEN THOUGH THERE WAS NO PHYSICAL INVASION

The dispute in this case involved the construction of part of Interstate Highway 287 and an interchange or ramp system connecting with it, in the vicinity of the George Washington Elementary School, Morristown, New Jersey. The school site would be completely encircled by the highway and its interchanges so that it would become a virtual island. The board of education brought suit to compel the highway commissioner to condemn the school. It alleged that the proposed construction would result in (1) extreme danger to pupils between their homes and the school, whether on foot or on bicycles; (2) noxious fumes and serious problems of air pollution; (3) extreme noise from surrounding traffic, which would so interfere with the teaching process and oral control of pupils within the school building as to nullify any effective educational program; (4) a serious safety problem to pupils using the outdoor play area, the edge of which would be close to an embankment leading down to the highway level; and (5) traffic noises that would render ineffective the school's outdoor physical education program because the instructors' verbal instructions would be limited to three to five feet when trucks would use the highway. The board claimed that because of the cumulative effect of these limitations, hazards and interferences, the beneficial use of the school land and building would be destroyed, and this, in effect, amounted to a taking of the property itself.

The highway department, on the other hand, argued that when a highway was constructed on land adjacent to that of an individual owner, but none of his land was actually taken, he had no constitutional right to compensation although he might suffer from noise, fumes, dust and other incidental inconveniences.

The trial court disposed of the case in summary fashion, apparently in light of the highway department's oral representation that there would, in fact, be no physical taking. The school board thereupon appealed to the appellate division of the superior court. That court noted that the New Jersey and Federal Constitutions both provided only for payment of compensation when property was taken for a public use, but not when property was damaged. It pointed out, however, that the United States Supreme Court in United States v. General Motors Corporation 323 U.S. 373 (1945) had defined "property" as the group of rights inhering in a citizen's relation to the physical thing, as the right to possess, use and dispose of it. As for "taking" the court in that case stated:

. . . courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign

constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking.

The appellate court further pointed out that the cases relied on by the highway department where courts in a "taking" State had denied compensation for incidental inconveniences or annoyances affected not only the complaining party but others in the general area. However, such was not the case projected by the board of education since it made the flat claim that the engulfing superhighway and ramps would destroy the beneficial use of the elementary school for education purposes.

The appellate court went on to state that the United States Supreme Court had on several occasions held that private property was taken within the meaning of the Fifth Amendment when its beneficial use was destroyed or substantially diminished, although the owner thereof remained in undisputed possession of the entire tract. The court in this case did not believe that there had to be a physical invasion, such as the invasion of the owner's air space in *United States v. Causby*, 328 U. S. 256 (1946). Rather, it relied on the decision in *Thornburg v. Port of Portland*, 367 P. 2d 100 (1962) where the Supreme Court of Oregon ruled, under a "taking" clause, that property owners were entitled to compensation for jet aircraft flights passing about 1,000 feet to one side of their property, resulting in noise and tremors. It held there was a taking in the constitutional sense, and this without the element of trespass of air space or any physical contact whatever.

The appellate court in the instant case stated that the damage to the school property to the point of total or substantial destruction of its beneficial use as a school facility (assuming that the board of education could prove the allegations made in its complaint) would be different in kind from the damage suffered by other property owners in the area. If the board was correct in its assertions, it would be faced with the dilemma of remaining where it was and carrying on as best it could, at the risk of children's lives and the certainty of substandard education, or moving the entire school operation to another location. If the beneficial use had indeed been destroyed, there would be no other choice but to move, at an alleged cost of between 2 and 2½ million dollars. In such a case justice demanded that the right of compensation as well as the amount thereof be determined by the effect of the proposed highway construction upon the school facilities, without regard to whether such construction involved a physical invasion of the property. The case was therefore remanded to the trial court for a determination of these issues. (*Board of Education of Town of Morristown v. Palmer*, 212 A2d 564, July 1965)

177-2 RHODE ISLAND SUPREME COURT RULES STATE MUST COMPLY WITH CONSTITUTIONAL AMENDMENT PROVIDING FORMER OWNER MUST BE OFFERED FIRST OPPORTUNITY TO OBTAIN LAND TAKEN FROM IT WHICH IS NOT NEEDED BY STATE

Four lots were taken through eminent domain in 1960 from M. S. Alper & Son, Inc., for the construction of a portion of interstate Highway 95 through the City of Providence. Thereafter, the State negotiated other arrangements with Laredef Realty Operators, Inc. (some of whose adjacent real estate had also been condemned for the same purpose) and decided not to utilize the land acquired from Alper. As part of