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 $2\frac{1}{2}$ 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

such negotiation the State executed and delivered to Laredef a certain instrument dated May 22, 1962, purporting to be a grant of an easement or right-of-way to the lots acquired from Alper for five years from February 1, 1962 to January 31, 1967. The instrument also provided that for the consideration of $1, Laredef had the option to purchase the four lots at the expiration of the option and that the option would be deemed to have been exercised if Laredef did not give notice of its intention not to buy at least 60 days prior to the termination of the easement. In the agreement the State promised to execute all deeds necessary to convey the land to Laredef or its successors and assigns.

Alper brought a suit in equity to declare null and void the conveyance to Laredef and to order State officials to convey the lots back to Alper on the same terms and conditions they purported to convey the land to Laredef. The suit was based on a constitutional provision requiring the condemner to give the former owner the first opportunity to obtain property taken from him which was not needed by the condemner. The trial court ordered the State to offer the four lots to Alper "upon the same terms and conditions as the said land was offered to Laredef Realty Operators, Inc. on May 22, 1962." The State appealed from that order and Alper appealed from the part of the order shown in quotes.

The evidence showed that Alper was not informed of the negotiations for the arrangement entered into by the State and Laredef, and that Alper knew nothing of the instrument consummating it until it was recorded in the land records. After obtaining knowledge thereof, Alper informed State officials of its willingness to take back its real estate on the same terms as those set out in the conveyance to Laredef. The State's director of public works thereupon delivered a letter to Alper wherein it was stated that the company would be deeded back the real estate upon payment of $15,000 which represented the reasonable value added to the land by the work and improvements thereon since the date of condemnation. In the letter it was stated that ". . .although the said land has not yet been sold or leased for value, the basis on which this land is offered to you is the same basis upon which it will be offered to another, in the event that you do not accept this offer." It was further stated that refusal to accept the offer within 30 days would be deemed a waiver of any possible right Alper might conceivably have had to reacquire the land under the constitution or laws of the State, including any legal proceedings brought in furtherance of any such claim.

A copy of this letter was admitted conditionally. Considerable testimony was introduced in support of the State's position that Alper had been given an opportunity to obtain a conveyance on the same terms and conditions as were actually given to Laredef and that it had waived whatever rights it had by refusing to reply to that letter. Alper contended that it was not bound to reply since the offer in the letter was made after the State's conveyance to Laredef and therefore it was not made in compliance with the constitutional provision that an offer to repurchase should be first made to the former owner.

At the conclusion of the evidence Alper moved that the letter be stricken from the record and this motion was granted. The State did not appeal from this ruling. The supreme court, therefore, stated that since the letter had to be disregarded, it was left only with the State's contention that the conveyance to Laredef was neither a lease nor a sale of the real estate but merely an easement and therefore not within the constitutional amendment mentioned above. The appellate court agreed with the

trial court that under that amendment the former owner had to be offered the land before any negotiation was begun with Laredef. The court disagreed with the State that the instrument of May 22, 1962, was the grant of a mere easement and therefore was not within the purview of the constitutional amendment. The court thought that it was a "self-executing option" to purchase the land in consideration of $1. It was an option based upon an irrevocable offer on the part of the State to sell for the self-same consideration. In other words, without further action on Laredef's part the so-called easement at the expiration of five years would become a sale and the instrument by its terms would become effective to secure the vesting of title in Laredef. The court stated that it was apparent from such provisions that the instrument was designed to circumvent the constitutional preemptive right of Alper to purchase before an offer was made to any other person.

As to Alper's contention that it should be offered the land in consideration of $1 since that was the amount Laredef was to pay for it and since the State was unable to show that Laredef was to pay a more substantial amount without relying on the letter which was stricken from the record, the supreme court held that since Alper came into equity asking for relief it should be willing to do equity. The court pointed out that after the State had acquired the land in question it was warranted in improving it in any way which was designed to promote the purpose for which it had been taken. In the opinion of the court, any expenditure made for such purpose which enhanced the value of the land would be a proper matter for consideration if it was found later that the land was not needed for the purpose for which it was taken and was offered to the condemnee in accordance with the constitutional amendment. However, this would not be so if it appeared that the expenditure was made necessary by reason of some arrangement which was made with a third party with whom the State was mistakenly negotiating to convey the land. In the first instance it would be unjust enrichment to the former owner to force the State to reconvey without allowing for such expenditure, but in the second instance it would not. In other words, whatever the State spent solely to adapt the land to the uses of Laredef and whatever Laredef itself might have spent on the land after the conveyance of May 22, 1962, could not properly be chargeable to Alper on the ground of unjust enrichment.

Because there was some evidence in the record of State expenditure which qualified as a ground for requiring the complainant to pay more than $1 in order to avoid unjust enrichment, the case was remanded to the trial court to determine the amount which should be paid. (M. S. Alper & Son, Inc. v Capaldi, 206 A2d 859, Feb. 1965)

177-3 SUPREME COURT OF IDAHO HOLDS STATE HAS POWER TO REQUIRE FEE OWNER OF RIGHT-OF-WAY OF FEDERAL-AID HIGHWAY TO REMOVE SIGN THEREFROM

In 1933 the State of Idaho was granted a right-of-way easement in unappropriated Federal land for use as a Federal-aid highway. The United States later granted a private person the fee interest in a tract of land which included, but was subject to, the easement. The owner erected a sign on land that was within the right-of-way but that was not used for actual highway purposes. The State, through its board of directors, asked the owner to remove the sign, asserting that it was an encroachment and a nuisance upon a State right-of-way. Following the owner's noncompliance, the State was granted injunctive relief compelling him to remove the sign.