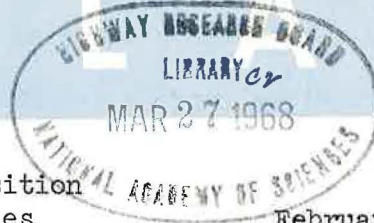


# HIGHWAY RESEARCH CIRCULAR



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## COMMITTEE ACTIVITY

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LAND ACQUISITION  
MEMORANDUM #191

191-1 ANALYSIS OF RECENT CASE LAW AND TRENDS REGARDING COMPENSABILITY OF  
HIGHWAY ACCESS IMPAIRMENT IN EMINENT DOMAIN

This paper does not necessarily represent the official position of the Federal Highway Administration and the Bureau of Public Roads. It can shed considerable light on what is considered to be "generally compensable in eminent domain." It represents one effort at a general analysis of the recent cases relating to control of highway access.

## SURVEY OF RECENT CASE LAW REGARDING THE COMPENSABILITY OF ACCESS IMPAIRMENT IN EMINENT DOMAIN

by

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A review of recent case law concerning interference with or restrictions imposed upon an abutting owner's access to the through portion of an existing highway made necessary by reason of a highway construction project, indicates that the problem areas may be classified into nine categories:

1. Traffic regulation under the Police Power
2. Frontage road situations
3. Highways built on new location
4. Bisection of a land unit with resulting inaccessibility between the severed portions
5. Cul-de-sacs
6. Frontage on two or more roadways

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7. Other takings of access rights
8. Change of grade within existing right-of-way
9. Miscellaneous interference with or reduction of access to the through highway

Many cases considered in the study involved situations which overlap two or more areas, and others could not be classified at all within the selected categories.

1. Traffic regulation under the Police Power

During the evolution of the law of highway access the terms "Police Power," "compensable taking," "easement of access," and certain other legal terms, have been rather loosely used by the courts with the result that it is not always possible to take them at face value when they appear in an opinion. An attempt will be made in this study to restrict the use of the term "Police Power" to situations where the governmental agency exercises its inherent power to regulate movements on the highway proper rather than an exercise of the power in directly affecting rights appurtenant to abutting property, although the same are incidentally affected by the action taken.

The courts are in general agreement that the governmental agencies have power to control traffic movement upon the public highways as a means of alleviating dangerous or potentially dangerous conditions. Insofar as such regulation interferes with abutting owner's access rights, the overall public benefit is considered to be of primary importance to which conflicting private interests must yield. On the other hand, when private property and/or property rights are taken for a public purpose, the owners deprived of such interests are entitled to just compensation. The line between "consequential takings" under the Police Power, which do not give rise to compensation, and "takings for a public purpose" under the power of Eminent Domain, which require payment of compensation, is incapable of definition. As in all highway access problems, the fact situation is determinative of whether the owner is to receive payment for his damages or "yield to the paramount public purpose."

The courts are virtually unanimous in stating that abutting landowners have no interest in the traffic flowing past their premises. It follows that governmental regulations of the traffic flow upon the highway itself is a governmental function directly related to public safety. So long as such regulation does not destroy or substantially impair the owner's access to this property, regulation of access is non-compensable. On the other hand, when access rights are destroyed or substantially impaired through exercise of the governmental function of traffic regulation, the owner is entitled to compensation for the property right taken. Here again, there is no discernable line of demarcation and a determination as to whether the impairment of access was "substantial" controls compensability of the taking.

Generally speaking, circuitry of travel, diversion of traffic and loss of business caused by traffic regulation and convenience in entering or leaving the property are not considered to be items of damage which are compensable since they are of a general nature shared with the public and not special or peculiar to the property affected.

The following are examples of situations which are generally considered to be valid exercises of the police power by a governmental authority and which do not entitle the abutting landowner to compensation for damages:

- (a) median dividers separating lanes of travel,
- (b) one-way streets,
- (c) parking regulation or restriction,
- (d) limitations, size, weight and class of vehicles authorized to use the roadway,
- (e) "curb cut" restrictions,
- (f) speed and movement limitations or restrictions, and
- (g) decrease in the volume or change in the nature of traffic on the subject highway.

This listing is not exhaustive but merely illustrative of the many types of actions falling within the category of police power regulation which may inflict consequential damages upon an abutting landowner without giving rise to the right of compensation therefor.

## 2. Frontage Roads

Probably the greatest volume of litigation in the area of highway access control has involved situations where following a taking of land and/or access rights the abutting property is left on a so-called frontage road. (Such roads are also referred to as "service roads," "outer roadways," and other similarly descriptive terms.) Included within the discussion of this category of cases are instances where the existing road on which the subject property abuts is left intact and utilized as a frontage road.

The courts have developed at least three theories not necessarily reconcilable with each other regarding compensation to a landowner whose property is left with access to a frontage road in place of his former direct access to the through portion of the highway. The first two are commonly encountered, the third less often. First, the owner is entitled to no damages for interference with his direct access if he is provided or retains reasonable access to the through portion of the highway via a frontage road, with no consideration given to convenience, circuitry of travel or diversion of traffic. Second, if the impairment of direct access is accompanied by a taking of property the owner is entitled to damages with the frontage road to be considered in mitigation thereof. Third, impairment of direct access to the through portion of the highway entitles the owner to compensation regardless of whether or not there has been a taking of property. In the latter two categories, no consideration should be given to the factors of convenience, circuitry of travel or diversion of traffic, and the courts holding to these views uniformly state that such factors are not to be considered by the jury in arriving at an award.

In order to qualify as a "frontage road," the courts are in general agreement that such roadway must connect in a reasonable manner with the through portion of the highway upon which the property formerly abutted, and not merely

to the general system of public highways or streets. The validity of this premise is substantiated by an examination of the nature of the right taken or impaired. The generally accepted theory of the nature of an abutter's right of access to the roadway upon which his property fronts is that the right of access is in the nature of an easement appurtenant to the property, subject to reasonable regulation through exercise of the police power. This right (or appurtenance) attaches to the property only and is incapable of separate definition or valuation. An equally significant characteristic of the right is that it is appurtenant to the land with respect to the particular frontage disturbed regardless of the fact that the property may front on other public or private roadways or streets thereby providing alternate means of access, even though its value is determined in light of other and alternate means of access available to the property on other frontages.

It is not practical or advisable to enunciate any general rules or principles which are applicable in all cases for the reason that the decisive aspects of each case are the specific facts involved and any nuance, however slight, can produce a different legal result. It follows that in making a legal determination in a highway access problem involving frontage roads, it is of paramount importance for the attorney to have before him all available facts in the case.

### 3. Highways built on new location

The general rule is that a landowner is not entitled to damages for denial of access to a highway crossing or abutting his property on new location. The reasoning expressed by the majority of courts so holding is that since no right has been taken from the owner he is not entitled to compensation for denial or loss of a right which never existed.

### 4. Bisection of a land unit with resulting inaccessibility between the severed portions

Where a non-access highway, either on new location or by virtue of improvement, bisects an economic unit and prevents access between the remaining portions on either side, the general rule is that denial of access to and between the separated portions of an economic unit caused by the construction of a non-access highway is an element of damage for consideration by the jury. The theory of compensation has no relation to access to the highway as such; rather, it concerns damages to the economic unit caused by separation of the unit. In this respect, the jury could consider such otherwise non-compensable factors such as circuitry of travel and inconvenience affecting the same economic unit. Frontage roads, the proximity of interchanges and alternate means of access via intersecting roadways are factors to consider in mitigation of damages.

### 5. Cul-de-sacs

A significant problem area in the field of highway access control and the compensability of damages sustained by landowners affected by highway construction is the situation where denial of access leaves a parcel with access only to a cul-de-sac roadway. This classification includes numerous factual situations:

- (1) landlocked cul-de-sacs,

- (2) cul-de-sacs opening away from the highway,
- (3) instances where there is a taking of property and/or access rights,
- (4) instances where the rights of non-abutters are affected, and various other possibilities.

Certain general rules have evolved regarding cul-de-sacs:

- (1) The historical distinction between urban and rural situations has been abandoned in the more recent cases.
- (2) All factors are to be considered in determining reasonableness of remaining access in a compensable situation. Great care must be used in applying the "next intersecting street" rule or theory.
- (3) In situations where property is not physically adjacent to a street or roadway to which the landowner is not entitled to compensation for denial or impairment of access to the through highway if the property retains other reasonable means of access to the street or highway system. (cf. discussion relative to frontage roads where the rule is contra.)
- (4) Where control of access causes the closing of a dedicated subdivision street, a non-abutting lot owner in the subdivision does not become entitled to recover damages.
- (5) Circuity of travel and inconvenience are damages suffered in common with the general public and are not proper considerations in cul-de-sac cases.
- (6) To be compensable, the property must suffer special damages in the nature of substantial impairment of access to the highway system.
- (7) Damages to property abutting the closed portion of a roadway are treated in the same manner as other frontage cases with the remaining access on a cul-de-sac to be considered in mitigation of damages.

#### 6. Frontage on two or more roadways

This category of cases is isolated for the principal purpose of emphasizing the legal principle that remaining access which a property has or retains by way of streets or roadways other than the one to which access is denied or substantially impaired does not necessarily eliminate the owner's claim for damages. The right of access between an abutting property and the adjacent roadway is in the nature of an easement and a taking or substantial impairment of this right entitles the owner to compensation for damages sustained thereby. This right of access exists between the property and the roadway irrespective of other means of access which the property may have by reason of frontage on streets or roadways other than the one being improved through access control and

upgrading; other means of access should be considered in mitigation of damages due the landowner.

The classic example of cases in this category is the situation where a parcel is located at the corner of two streets or roads in the before condition. Direct access to one of the streets is denied but there is no interference whatever with the property's access to the other. Since a legal right in the nature of an easement for purposes of ingress and egress between the property and the closed roadway has been taken, the landowner is entitled to damages, be they nominal or substantial. In determining damages, the jury may consider alternative means of access in mitigation thereof.

#### 7. Other takings of access rights

Takings of access rights for access control on freeways does not involve the Police Power. Control of access is a feature of freeway design and although both design standards and the Police Power are directly concerned with the safety of persons using the highways, the latter is exercised only in control of movement on the highway itself and access impairment resulting to abutting property is ordinarily a non-compensable incident to the primary purpose. On the other hand, control of access is directly concerned with regulation of movement between the highway and abutting property and has only an incidental relationship with the movement of traffic on the highway. As previously stated in discussion of the Police Power, the line between non-compensable regulation through exercise of the Police Power and a compensable taking of property rights through exercise of the power of Eminent Domain cannot be defined in abstract terms.

#### 8. Change of grade within existing right-of-way

The courts are not in agreement concerning the compensability of impairment of access made necessary because of changes in the grade of a roadway completely within the existing right-of-way which involves no direct taking of land or access rights. Probably a majority of the courts which have dealt with such situations hold that the owner is not entitled to compensation unless the change of grade is so dramatic that a substantial impairment of access results. In cases where there is a taking of land and/or access rights coupled with a change in established grade, most courts hold that the change of grade may properly be considered by the jury in determining damages. In actual practice, change of grade situations are different only in degree from other access impairment situations.

#### 9. Miscellaneous interference with or reduction of access to the through highway

This final category of cases collects the residuum and includes situations not falling within the other classifications. Most of them deal only incidentally with impairment of access and are decided on such other points as contractual rights, zoning, dedication of subdivision streets and various other legal theories. There are no rules which can be stated as applicable to cases where access impairment is incidental to another legal issue; however, in treating the access question raised most courts have discussed and applied the general principles regarding whether or not the impairment was substantial and the reasonableness of remaining access, disallowing evidence concerning circuitry of travel, diversion of traffic, loss of business and inconvenience.

### Summary and Conclusions

By reason of specific constitutional provision, or development of the common law, each State is required to pay "just compensation" to landowners whose property is taken by the State for a public purpose. The law of eminent domain further provides that an owner is also entitled to just compensation for damages to property remaining after a portion thereof has been taken -- commonly referred to as "severance damages." Loss or impairment of access is an element of severance damage since it can relate only to property remaining after a taking. An abutting owner's right of access is a property right in the nature of an easement which affords reasonable access for purposes of ingress and egress between the roadway and the property. Therefore, interference with this property right through the exercise of eminent domain exposes the State to a claim by the abutting owner for just compensation, even in cases where there is no actual taking of property.

The right of access appurtenant to property abutting a public roadway does not include the privilege of unrestricted entry at each and every point along the frontage. Through exercise of the police power a State is authorized to control access and the abutting owner is not entitled to compensation if the property retains or is furnished reasonable access. Therefore, a landowner does not become entitled to compensation under the law of eminent domain for an impairment of access until it has been determined that there has been a substantial impairment of the right of access; or, stated differently, the remaining property does not retain reasonable access to the roadway.

### TABLE OF CASES

#### HEADING NO. 1

Fletcher v. State, 367 P.2d 272 (Arizona, 1961)  
Rayburn v. State, 378 P.2d 496 (Arizona, 1963)  
Fort Smith v. VanZandt, 122 SW.2d 187 (Arkansas, 1938)  
Holman v. State, 217 P.2d 448 (California, 1950)  
People v. Sayig, 226 P.2d 702 (California, 1951)  
People v. Ayon, 352 P.2d 519 (California, 1960)  
Heckendorf v. Littleton, 286 P.2d 615 (Colorado, 1955)  
Bare v. Department of Highways, 401 P.2d 522 (Idaho, 1965)  
Bank v. City of Salem, 198 NE.2d 137 (Illinois, 1964)  
Kuker v. Iowa State Highway Commission, 114 NW.2d 290 (Iowa, 1962)  
Nelson v. Iowa State Highway Commission, 115 NW.2d 695 (Iowa, 1962)  
State v. Sherrod, 367 SW.2d 844 (Kentucky, 1963)  
State v. Yates, 383 SW.2d 340 (Kentucky, 1964)  
State v. Denny, 385 SW.2d 776 (Kentucky, 1964)  
State v. Lawton, 386 SW.2d 466 (Kentucky, 1965)  
Commonwealth v. Dowdy, 388 SW.2d 593 (Kentucky, 1965)  
Commonwealth v. Faucher, 390 SW.2d 164 (Kentucky, 1965)  
Houghs v. Mackie, 137 NW.2d 289 (Michigan, 1965)  
Handlan-Buck Company v. State Highway Commission, 315 SW.2d 219  
(Missouri, 1958)

HEADING NO. 1

Filger v. State Highway Commission, 355 SW.2d 425 (Missouri, 1962)  
Painter v. State Department of Roads, 131 NW2d 587 (Nebraska, 1964)  
WEW Truck Lines v. State Department of Roads, 132 NW.2d 782  
(Nebraska, 1965)  
Swanson v. State Department of Roads, 134 NW.2d 810 (Nebraska, 1965)  
Tubular Service Corporation v. New Jersey State Highway Department,  
191 A.2d 745 (New Jersey, 1963)  
Barnes v. State Highway Commission, 126 SE.2d 732 (North Carolina, 1962)  
Lysaght v. Fort Worth, 359 SW.2d 128 (Texas, 1962)  
Moorlane Company v. State, 360 SW.2d 918 (Texas, 1962)  
State v. Williams, 394 P.2d 693 (Washington, 1964)  
Kabin v. Seattle, 395 P.2d 79 (Washington, 1964)

HEADING NO. 2

Houghs v. Mackie, 137 NW.2d 289 (Michigan, 1965)  
Sullivan v. Marcelle, 214 A.2d 181 (Rhode Island, 1965)  
Christensen v. Woodbury Company, 114 NW.2d 897 (Iowa, 1962)  
Hendrickson v. State, 127 NW.2d 165 (Minnesota, 1964)  
State v. Kohler, 128 NW.2d 90 (Minnesota, 1964)  
Balog v. State Department of Roads, 131 NW.2d 402 (Nebraska, 1964)  
Stephan v. State Highway Commission, 124 NW.2d 319 (Wisconsin, 1963)  
Darnall v. State, 108 NW.2d 201 (South Dakota, 1961)  
State v. Thelberg, 350 P.2d 988 (Arizona, 1960)  
James v. State, 397 P.2d 766 (Idaho, 1964)  
Brock v. State Highway Commission, 404 P.2d 934 (Kansas, 1965)  
State v. Silva, 378 P.2d 595 (New Mexico, 1963)  
State v. Danfelser, 384 P.2d 241 (New Mexico, 1963)  
State v. Lavasek, 385 P.2d 361 (New Mexico, 1963)  
State v. Central Paving Company, 399 P.2d 1019 (Oregon, 1965)  
Utah Road Commission v. Hansen, 383 P.2d 917 (Utah, 1963)  
McMoran v. State, 345 P.2d 598 (Washington, 1959)  
Feverborn v. State, 367 P.2d 143 (Washington, 1961)  
State Highway Commission v. Newton, 395 P.2d 606 (Wyoming, 1964)  
Shelby Company v. Hatfield, 88 So.2d 842 (Alabama, 1956)  
Florida Turnpike Authority v. Anhoco Corp., 107 S.2d 51 (Florida, 1958)  
Florida Turnpike Authority v. Anhoco Corp., 116 S.2d 8 (Florida, 1959)  
Lewis v. Florida State Road Department, 95 S.2d 248 (Florida, 1957)  
Arkansas State Highway Commission v. Union Planters Bank, 333 SW.2d 904  
(Arkansas, 1960)  
Arkansas State Highway Commission v. Bingham, 333 SW.2d 728  
(Arkansas, 1960)  
State Highway Commission v. Manney, 411 P.2d 1009 (New Mexico, 1966)  
Abdalla v. State Highway Commission, 134 SE.2d 81 (North Carolina, 1964)  
Moses v. State Highway Commission, 134 SE.2d 664 (North Carolina, 1964)  
State Highway Department v. Allison, 143 SE.2d 800 (South Carolina, 1965)  
Wiley v. State Road Commission, 133 SE.2d 113 (West Virginia, 1963)  
Anhoco Corp. v. Dade Company, 144 S.2d 793 (Florida, 1962)  
State v. Sumrall, 167 S.2d 503 (Louisiana, 1964)  
Commonwealth v. Adkins, 396 SW.2d 768 (Kentucky, 1965)  
State v. Brockfeld, 388 SW.2d 862 (Missouri, 1965)  
State v. Meier, 388 SW.2d 855 (Missouri, 1965)  
Pennysavers Oil Company v. State, 334 SW.2d 546 (Texas, 1960)  
Holbrook v. State, 355 SW.2d 235 (Texas, 1962)  
State v. Baker Bros. Nursery, 366 SW.2d 212 (Texas, 1963)  
Blount County v. McPherson, 105 So.2d 117 (Alabama, 1958)



HEADING NO. 3

Commonwealth v. Faucher, 390 SW.2d 164 (Kentucky, 1965)  
Pennysavers Oil Company v. State, 334 SW.2d 546 (Texas, 1960)  
Wiley v. State Road Commission, 133 SE.2d 113 (West Virginia, 1963)  
State Highway Commission v. Newton, 395 P.2d 606 (Wyoming, 1964)  
State v. Silva, 378 P.2d 595 (New Mexico, 1963)  
James v. State, 397 P.2d 766 (Idaho, 1964)  
Darnall v. State, 108 NW.2d 201 (South Dakota, 1961)  
State v. Kohler, 128 NW.2d 90 (Minnesota, 1964)  
Phillips v. Argraves, Highway Commissioner, 170 A.2d 882  
(Connecticut, 1961)  
Dorago v. Maryland State Road Commission, 180 A.2d 488 (Maryland, 1962)  
Lehman v. Iowa State Highway Commission, 99 NW.2d 404 (Iowa, 1959)  
Belle v. Iowa State Highway Commission, 126 NW.2d 311 (Iowa, 1965)  
Holloway v. Purcell, 217 P.2d 665 (California, 1950)  
People v. Thomas, 239 P.2d 914 (California, 1952)  
Schnider v. State, 241 P.2d 1 (California, 1952)  
Rosenthal v. Los Angeles, 13 Cal. 824 (California, 1961)  
Moore v. State Highway Commission, 383 P.2d 549 (Kansas, 1963)  
Talley v. Wallace, 39 So. 2d 672 (Alabama, 1949)  
Pike County v. Whittington, 81 So. 2d 288 (Alabama, 1955)  
St. Clair Company v. Buksek, 131 So. 2d 683 (Alabama, 1961)  
State v. Payton, 134 So. 2d 198 (Alabama, 1961)  
Hempstead Co. v. Huddleston, 31 SW.2d 300 (Arkansas, 1930)  
State Highway Department v. Jack Ford, 144 SE.2d 924 (Georgia, 1965)  
State Road Department v. Lewis, 170 S.2d 817 (Florida, 1964)  
State Highway Commission v. Kesner, 388 SW.2d 905 (Arkansas, 1965)  
Smick v. Kentucky, 268 SW.2d 424 (Kentucky, 1954)  
State v. Raybourne, 364 SW.2d 814 (Kentucky, 1963)  
McDonald v. State, 279 P.2 777 (California, 1955)  
Jahoda v. Florida State Road Department, 106 So.2d 870 (Florida, 1958)  
Woods v. State Road Commission, 136 SE.2d 314 (West Virginia, 1964)  
State Highway Commission v. McNeill, 381 SW.2d 425 (Arkansas, 1964)  
State v. Clevenger, 291 SW.2d 57 (Missouri, 1956)

HEADING NO. 4

State v. Clevenger, 291 SW.2d 57 (Missouri, 1956)  
Belle v. Iowa State Highway Commission, 126 NW.2d 311 (Iowa, 1964)  
Lehman v. Iowa State Highway Commission, 99 NW.2d 404 (Iowa, 1959)  
Arkansas State Highway Commission v. Union Planters Bank, 333 SW.2d  
904 (Arkansas, 1960)  
Christensen v. Woodbury Company, 114 NW.2d 897 (Iowa, 1962)  
Cullum v. Van Buren Company, 267 SW.2d 14 (Arkansas, 1954)  
Commonwealth v. Burns, 394 SW.2d 923 (Kentucky, 1965)  
State v. Ridgeway, 397 SW.2d 744 (Missouri, 1965)  
State v. Meyer, 403 SW.2d 366 (Texas, 1966)

HEADING NO. 5

Handlan-Buck Company v. State Highway Commission, 315 SW.2d 219  
(Missouri, 1958)  
State Highway Commission v. Kesner, 388 SW.2d 905 (Arkansas, 1965)

HEADING NO. 5 (Continued)

Commonwealth v. Adkins, 396 SW.2d 768 (Kentucky, 1965)  
State Highway Commission v. Manney, 411 P.2d 1009 (New Mexico, 1966)  
Stephen v. State Highway Commission, 124 NW.2d 319 (Wisconsin, 1963)  
State v. Geiger & Peters, Inc., 196 NE.2d 740 (Indiana, 1964)  
Tassinari v. Mass. Turnpike Authority, 197 NE.2d 584 (Massachusetts, 1964)  
Fongeron v. Seward Company, 119 NW.2d 298 (Nebraska, 1963)  
Constantine v. Sunnyvale, 204 P.2d 922 (California, 1949)  
People v. Russell, 309 P.2d 10 (California, 1957)  
People v. Symons, 9 Cal. 363 (California, 1960)  
Breidert v. S.P.(RY) Co., 394 P.2d 719 (California, 1964)  
Valenta v. Los Angeles Co., 394 P.2d 725 (California, 1964)  
Gayton v. Department of Highways, 367 P.2d 899 (Colorado, 1962)  
Fleming v. State Road Department, 25 So. 2d 373 (Florida, 1946)  
Rutledge v. State, 412 P.2d 467 (Arizona, 1966)  
State Highway Department v. McClain, 114 SE.2d 125 (Georgia, 1960)  
Tift Co. v. Smith, 131 SE.2d 527 (Georgia, 1963)  
Snow v. State Highway Commission, 136 SE.2d 678 (North Carolina, 1964)  
Wafford v. State Highway Commission, 140 SE.2d 376 (North Carolina, 1965)  
Sease v. Spartenburg, 131 SE.2d 684 (South Carolina, 1963)  
State Highway Commission v. Fleming, 157 So.2d 792 (Mississippi, 1963)  
State Highway Commission v. Rhymes, 160 So.2d 197 (Mississippi, 1964)  
State Highway Commission v. Jacobs, 160 So.2d 201 (Mississippi, 1964)  
State Highway Commission v. Myers, 184 So.2d 409 (Mississippi, 1966)  
Wenderoth v. Baker, 378 SW.2d 578 (Arkansas, 1964)  
Sweetwater Valley Mein. Park v. Sweetwater, 372 SW.2d 168 (Tennessee, 1963)  
Archenhold v. Waco, 396 SW.2d 111 (Texas, 1965)

HEADING NO. 6

State v. Geiger & Peters, Inc., 196 NE.2d 740 (Indiana, 1964)  
Baldwin-Hall Company v. State, 265 NYS.2d 664 (New York, 1965)  
Hurley v. State, 143 NW.2d 722 (South Dakota, 1966)

HEADING NO. 7

State v. Sherrod, 367 SW.2d 844 (Kentucky, 1963)  
State v. Yates, 383 SW.2d 340 (Kentucky, 1964)  
State v. Denny, 385 SW.2d 776 (Kentucky, 1964)  
State v. Lawton, 386 SW.2d 466 (Kentucky, 1965)  
Swanson v. State Department of Roads, 134 NW.2d 810 (Nebraska, 1965)  
Barnes v. State Highway Commission, 126 SE.2d 732 (North Carolina, 1962)  
State v. Williams, 394 P.2d 693 (Washington, 1964)  
Hurley v. State, 143 NW.2d 722 (South Dakota, 1966)  
Fleming v. State Road Department, 25 So. 2d 373 (Florida, 1946)

HEADING NO. 7 (Continued)

Woods v. State Road Commission, 136 SE.2d 314 (West Virginia, 1964)  
Anhoco Corp. v. Dade Co., 144 So.2d 793 (Florida, 1962)  
Abdalla v. State Highway Commission, 134 SE.2d 81 (North Carolina, 1964)  
Utah Road Commission v. Hansen, 383 P.2d 917 (Utah, 1963)  
Feverborn v. State, 367 P.2d 143 (Washington, 1961)  
Maryland State Road Commission v. Jones, 216 A.2d 563 (Maryland, 1966)  
Mueller v. New Jersey Highway Authority, 158 A.2d 343 (New Jersey, 1960)  
State v. Williams, 215 NE.2d 612 (Ohio, 1966)  
State v. McDonald, 352 P.2d 343 (Arizona, 1960)  
Fletcher v. State, 367 P.2d 272 (Arizona, 1961)  
People v. Loop, 274 P.2d 885 (California, 1954)  
Blumenstein v. Long Beach, 299 P.2d 347 (California, 1956)  
Boxberger v. State Highway Commission, 251 P.2d 920 (Colorado, 1952)  
State v. Keneally, 284 P.2d 770 (Montana, 1963)  
State v. Bleus, 371, P.2d 972 (Oregon, 1962)  
Weir v. Palm Beach Co., 85 So. 2d 865 (Florida, 1956)  
Tampa v. Texas Co., 107 So. 2d 216 (Florida, 1958)  
Hedrick v. Graham, 96 SE.2d 129 (North Carolina, 1957)  
State Highway Commission v. Raleigh Farmers Market, 139 SE.2d 904 (North Carolina, 1965)  
Ashworth v. State Road Commission, 128 SE.2d 471 (West Virginia, 1962)  
Standiford Civic Club v. State, 289 SW.2d 498 (Kentucky, 1956)  
Commonwealth v. Carlisle, 363 SW. 2d 104 (Kentucky, 1962)  
Kansas City v. Berkshire Lbr. Co., 393 SW.2d 470 (Missouri, 1965)  
DuPuy v. Waco, 396 SW.2d 103, (Texas, 1965)

HEADING NO. 8

Moorlane Co. v. State, 360 SW.2d 918 (Texas, 1962)  
State v. Williams, 394, P.2d 693 (Washington, 1964)  
DuPuy v. Waco, 396 SW.2d 103 (Texas, 1965)  
Kansas City v. Berkshire Lbr. Co., 393 SW.2d 470 (Missouri, 1965)  
Weir v. Palm Beach Co., 85 So. 2d 865 (Florida, 1956)  
Tampa v. Texas Co., 107 So.2d 216 (Florida, 1958)  
State v. Williams, 215 NE.2d 612 (Ohio, 1966)  
Baldwin-Hall Co. v. State, 265 NYS.2d 664 (New York, 1965)  
People v. Russell, 309 P.2d 10 (California, 1957)  
State v. Meyer, 403 SW.2d 366 (Texas, 1966)  
State Highway Commission v. McNeill, 381 SW.2d 425 (Arkansas, 1964)  
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HEADING NO. 8 (Continued)

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(Washington, 1965)  
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HEADING NO. 9

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