

1967

State of Utah, by and Through Its Road
Commission v. Charles W. Taggart, Trustee, a
Partnership, First Security Bank of Utah, a Utah
Corporation, and Zions First National Bank, a Utah
Corporation, Mortgagees : Appellant Partership's
Petition For Rehearing

Utah Supreme Court

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TABLE OF CONTENTS

	Page
APPELLANT PARTNERSHIP'S PETITION FOR REHEARING	1
STATEMENT OF LEGAL POSITION	3
ARGUMENT	4
THE OPINION OF THE COURT ERRONEOUSLY CONSTRUES AND MISINTERPRETS FACTS AND LAW IN POINT II OF THE APPEAL	4
1. The question underlying the assignment of error was leading, specific, pointed and by its nature, required no "offer of proof as to what other matters counsel wished to pursue"	5
2. A sufficient foundation and showing was made to prove similarity of the Condas property with the subject property	7
3. The ruling of the trial court was prejudicial to the Defendant's guaranty to a full and fair trial	13
CONCLUSION	16

AUTHORITIES CITED

5 Am. Jur. 2d, Appeal and Error Sec. 604 p. 70 (1962)	7
---	---

CASES CITED

Basch v. Iowa Power and Light, 95 N. W. 2d 714 (Iowa 1959)	13
Bingaman v. City of Seattle, 139 Wash. 68, 245 Pac. 411 (1926)	13
Contra Costa County v. East Bay Munic. Dist., 1 Cal. Rptr. 60 (1960)	13

TABLE OF CONTENTS—Continued

	Page
Cummings v. Nielson, 42 Utah 157, 129 Pac. 619 (1913)	4
Fahey v. Clark, 125 Conn. 44, 3 A. 2d 313 (1938)	7
Koppang v. Sevier, 106 Mont. 79, 75 P. 2d 790 (1938) ..	7
McKie v. Chase, 73 Ida. 491, 253 P. 2d 787, 793 (1953)	7
New York Life Ins. Co. v. Doeksen, 75 F. 2d 96 (10th Cir. 1935)	7
Panagopulos v. Manning, 93 Utah 215, 72 P. 2d 456 (1937)	3
People v. Murata, 326 P. 2d 947 (Cal. 1958)	13
Salt Lake City v. Telluride Power Company, 82 Utah 622, 26 P. 2d 822 (1933)	3
Southern Pacific Company v. Arthur, 10 U. 2d 306, 352 P. 2d 693 (1960)	12
State of Utah v. Peek, 1 U. 2d 263, 265 P. 2d 630 (1953)	12, 14
State Road Comm. v. Peterson, 12 U. 2d 317, 366 P. 2d 76 (1961)	12
State Road Comm. v. Woolley, 15 U. 2d 248, 390 P. 2d 860 (1964)	12
Venard v. Old Hickory Mining Co., 4 Utah 67, 6 Pac. 415 (1885)	4
Weber Basin Conservancy District v. Moore, 2 U. 2d 254, 272 P. 2d 176 (1954)	15
Weber Basin Water Conserv. Dist. v. Ward, 10 U. 2d 29, 347 P. 2d 862 (1959)	12

RULES CITED

Rule 76(e) U. R. C. P.	1
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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

STATE OF UTAH, by and through its
ROAD COMMISSION,

Plaintiff and Respondent,

vs.

CHARLES W. TAGGART, Trustee, a
partnership, Salt Lake County, a body
politic, First Security Bank of Utah,
a Utah corporation, and Zions First
National Bank, a Utah corporation,
Defendant and Appellant.

Case No.

10594

APPELLANT PARTNERSHIP'S
PETITION FOR REHEARING

Pursuant to Rule 76(e) U. R. C. P., the Appellant Partnership herewith petitions this Court for a rehearing of the law issue underlying Point II of this Appeal. The Appellant urges that based upon the grounds set out in this Petition, seen in view of the facts of record and the accompanying Brief, the Court should reconsider its Opinion of July 10, 1967, as to the second assignment of error, by ordering a rehearing of the same.

This Petition is grounded upon the basis that with respect to said Point II, the Opinion of the Court is, as a matter of law, mistaken in its conclusions that:

- (1) "The defendant made no offer of proof so we are unable to determine from the record before us what other matters counsel wished to pursue on that subject."
- (2) "Without a showing or an offer to prove similarity of the Condas property with the subject property, we are unable to say that the ruling of the Court was arbitrary and unreasonable."

As to ground (1), the record of trial evidences beyond reasonable contest that the import of the cross-examination (prohibited and stricken by the trial court) was clear from the very question, itself, thus eliminating the necessity for a formal offer of proof. As to ground (2), the record of trial will further evidence that a foundation and showing of similarity of the Condas property to the condemned property under consideration, was adequately made.

Thus the Court can and should determine that the trial court ruling, which stopped the cross-examination on this key point, was "arbitrary and unreasonable" so as to substantially prejudice the Appellant and deny to it a full hearing in the matter. A new trial on the issues of Just Compensation should be ordered upon rehearing, the Appellant respectfully submits.

Respectfully submitted,

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Partnership*

IN THE
SUPREME COURT
OF THE
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STATE OF UTAH, by and through its
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BRIEF IN SUPPORT
OF
PETITION FOR REHEARING

STATEMENT OF LEGAL POSITION

It is not the aim of this petition to simply restate and urge again issues which have been submitted to and resolved by the Court in the appeal. Such is not the foundation of the rehearing procedure and it will not be countenanced as a basis for a Petition. *Salt Lake City v. Telluride Power Company*, 82 Utah 622, 26 P. 2d 822 (1933); *Panagopulos v. Manning*, 93 Utah 215, 72 P. 2d 456 (1937). Rather, it is urged in this Petition that the Opinion of the Court of July 10, 1967, has overlooked or misinterpreted

material facts of record and has reached erroneous conclusions of law relating to Appellant's second assignment of error, and upon which the judgment of the trial court is substantially upheld. The correction of those facts and conclusions on rehearing should result in a reversal of the trial court and the entry of an order of new trial on Just Compensation in the case. A petition for rehearing is properly made out on these grounds. *Cummings v. Nielson*, 42 Utah 157, 129 Pac. 619 (1913); *Venard v. Old Hickory Mining Co.*, 4 Utah 67, 6 Pac. 415 (1885).

ARGUMENT

THE OPINION OF THE COURT ERRONEOUSLY CONSTRUES AND MISINTERPRETS FACTS AND LAW IN POINT II OF THE APPEAL.

The full-fledge of facts involved in the Defendant's second assignment of error will not be recounted here, they having been set out at pages 21-22, 39-41 and 46-49 of Defendant's appeal Brief. In order that the gravity of the assignment be completely weighed, the court's attention is invited to a review of those pages of Defendant's Brief, as well as to the authorities cited and discussion given to the assignment of error, generally, at pages 39-49 of the Brief.

Suffice to say that Point II of the appeal stems from the refusal of the trial court to permit the Defendant to cross-examine the last expert witness for the State, A. B. C. Johns, with respect to his prior but recent appraisal of the

Condas land abutting the condemned property. Johns had testified on direct-examination for the State, that the fair market value of the north section of the subject property condemned was \$4,000.00 per acre (Tr. 800). Defendant's counsel, on cross-examination, asked the witness if he had not previously appraised the Condas property next door for \$10,000.00 per acre, that appraisal having been made for the landowner (Tr. 843). The objection of the State on the grounds of *immateriality* was sustained, the trial court remarking to the jury that while cross-examination of factors in nearby areas was normally proper, it was outweighed in this instance by the risks of introducing other issues which time did not permit (Tr. 842-844).

The Opinion of this Court, in holding that prejudicial error was not committed by this limitation of cross-examination, states that:

“The defendant made no *offer of proof* so we are unable to determine from the record before us what other matters counsel wished to pursue on that subject. Without a showing or an *offer to prove similarity* of the Condas property with the subject property, we are unable to say that the ruling of the court was arbitrary and unreasonable.” (Emphasis added.)

Such holding is unfounded in law and unsupported by the facts of record and should be corrected by rehearing, the reasons being:

1. *The question underlying the assignment of error was leading, specific, pointed and by its na-*

ture, required no "offer of proof as to what other matters counsel wished to pursue".

The key question, "that you appraised the Condas Piece for the landowner for \$10,000.00 an acre", was not one of general inquiry. It did not pose an open question, such as [for what amount did you appraise the Condas property next door]. Had that been the nature of the question, Defendant's counsel would have been obligated, as the Court's Opinion suggests, to make an offer of proof as to what was intended to be shown.

BUT THE QUESTION HEREIN WAS NOT OF THAT TYPE. Its nature was pointed, specific, leading and clear as to its effect. It seared the credibility of Mr. Johns' opinion as perhaps no other question could have properly done on cross-examination in the case. There can be no doubt in the minds of reasonable men as to what was to be shown by the question or what its effect was to be. And the trial court was not misled or unadvised that the question went to the heart of the bias, credibility and integrity of the witness (a witness whose answers to that point had been mostly clipped and indifferent). The question, ipso facto and in the light of earlier testimony both on direct and cross, unequivocally offered to prove that this witness, who had appraised the subject property at \$4,000.00 per acre for the State Road Commission, had previously appraised abutting property (separated only by a fence) at \$10,000.00 an acre for the landowner, Condas.

Under such circumstances, the prevailing rule is that an offer of proof to apprise the court of the matter to be

pursued, is unnecessary. *Koppang v. Sevier*, 106 Mont. 79, 75 P. 2d 790 (1938); *New York Life Ins. Co. v. Doerksen*, 75 F. 2d 96 (10th Cir. 1935); *Fahey v. Clark*, 125 Conn. 44, 3 A. 2d 313 (1938). The Idaho Supreme Court, in *McKie v. Chase*, 73 Ida. 491, 253 P. 2d 787, 793 (1953) put it this way:

“In each instance, where the evidence offered by the plaintiffs was rejected by the court, the plaintiffs made formal offers of proof. However, such offers, under the circumstances, appear to be unnecessary because the questions to which the objections were made were sufficient to indicate the pertinency, materiality and nature of the testimony sought.”

In 5 Am. Jur. 2d, Appeal and Error Sec. 604 at p. 70 (1962) the principle is affirmed:

“The general rule that the trial court cannot be put in error in excluding evidence unless an offer of proof is made showing what the evidence or testimony would have been if received, has been applied to preclude review of alleged error in excluding evidence. However, the making of an offer of proof is not a condition of the right to a review of a ruling excluding evidence unless the nature of the evidence intended to be elicited by the challenged question is not apparent.”

2. *A sufficient foundation and showing was made to prove similarity of the Condas property with the subject property.*

The Opinion of the Court further states herein that the Defendant made no offer to prove similarity of the

Condas ground with the condemned property. The court's attention is invited to the following portions of the record of trial regarding the Condas property, all of which preceded the focal question :

Beginning at Tr. page 827, line 14

(By Def's counsel on cross-examination)

Q. Mr. Johns, tell us, you have appraised properties in this area before, have you not?

A. Yes, sir, I have.

Q. And you have, as a matter of fact, appraised a piece of property over here in the corner for a Mr. Condas whose property was also condemned by the Sttae Road Commission?

A. Yes, sir.

Q. But that was in connection with the Twenty-first South Expressway, isn't that right?

A. Yes, sir.

Q. And that property wound up in a condemnation suit, isn't that right?

A. Yes, sir.

Q. And you were called as a witness to testify in connection with your opinion as to the market value of the Condas piece, isn't that correct?

A. Yes.

Q. Part of that Condas piece lay in a zone that was the same zoning as the north part of the subject property M-1, isn't that correct?

A. Yes, sir.

Q. Lay in the County?

A. Yes, sir.

Q. And it had access to Redwood Road and it also had access to 2100 South Street?

A. Yes, sir.

And at Tr. 841, line 3.

(Examination by Def's counsel)

Q. And you have acquainted yourself, have you not, with the sales in the industrial area just across the street from the subject property?

A. Yes.

Q. U. S. Steel property for one?

A. Yes.

Q. We will talk about that one in a minute but in any event you have acquainted yourself over the last couple of years with other sales in the industrial center, in the interior of the industrial center as well as those on Redwood Road, isn't that correct?

A. Yes, sir.

Q. And as a matter of fact, you took some of those sales into consideration in appraising this piece of property for the Condas's, did you not?

A. Yes, sir.

Q. In fact, you went up into — you appraised this for the Condas's. You went to the 1700 South

area to the sale of the Kameral areas for \$17,000 an acre or something?

A. As I recall.

* * *

Tr. 842, line 3

Q. You took into consideration the Williamson sale up on Redwood Road and the Overmeyer sale?

A. Yes, sir.

Q. And you went clear up to Ninth South in appraising the Condas tract?

A. Yes, sir.

Q. And the Condas tract abutted upon the Gedge tract, didn't it, immediately south?

A. I don't recall. It probably did.

Q. The Gedge tract, before part of it was taken for the expressway, it abutted immediately on the Condas land?

A. Yes, sir.

Q. Same zoning, wasn't it?

A. Yes, sir.

Q. And that Condas piece was immediately east of the M-2 property, isn't that correct, in the subject property?

A. I don't think it extended — did it actually touch? I don't recall.

Q. It was in the same proximity?

A. Yes.

Q. Had the same proximity on the Pole Line Road?

A. Yes.

Q. You testified in that condemnation case on behalf of the land owner, didn't you?

A. Yes, sir.

Q. You recall the — you testified the fair market value of \$10,000 —

MR. NOVAK: Objection, your Honor.

MR. CAMPBELL: I have the right, I think, to state my question — that you appraised that Condas piece for the landowner for \$10,000 an acre?

MR. NOVAK: I object, your Honor, on the ground that it is immaterial and I move the remarks of counsel be stricken. That is not material to any issue in this case as to what he might have appraised another piece of property for.

All of the testimony referred to above was received as a part of the evidence in the trial devoted exclusively to unimproved property, industrial in this instance, and under conditions where the trial court had admitted as comparable sales, property more than ten city blocks distant from the subject land. (See Johns' testimony on direct, Tr. 775, 782, 788).

Thus the record of trial shows without reasonable dispute, that with respect to the Condas property, it was next

door to the subject land, it had the same use and zoning as the subject property, it possessed the same access to 2100 South Street and Redwood Road as did Taggart, the Johns' appraisal of the Condas property was made at a time within reasonable proximity to the value date of the subject property, and that the witness had appraised both Condas and the subject under the same standard, fair market value and had utilized the same comparable sales. What essential element needs to be added to prove reasonable similarity between the two properties? None, it is submitted. Certainly, under the test announced by this Court in *State of Utah v. Peek*, 1 U. 2d 263, 265 P. 2d 630 (1953), *Southern Pacific Company v. Arthur*, 10 U. 2d 306, 352 P. 2d 693 (1960), *Weber Basin Water Conserv. Dist. v. Ward*, 10 U. 2d 29, 347 P. 2d 862 (1959), *State Road Comm. v. Woolley*, 15 U. 2d 248, 390 P. 2d 860 (1964), and the leading case, *State Road Comm. v. Peterson*, 12 U. 2d 317, 366 P. 2d 76 (1961), the foundational requirements of comparability were met in the Condas evidence. Undoubtedly, they could have been more elaborate, but as made, they were reasonably sufficient and adequate to advise the trial court and this Court of the nature and factors surrounding the comparable property.

True enough, the issue of similarity or comparability is one initially for the trial judge as a preliminary question of law. *State Road Commission v. Peterson*, *supra*. If the property appears to the court to be within the area of reasonable comparison to the condemned tract, the testimony is to be received. The weight to be accorded it is a jury matter. *State of Utah v. Peek*, *supra*. But the trial

court herein was not at all worried about the comparability test. Indeed, the court's remarks, upon sustaining the State's objection, necessarily implied that Condas *was similar* to the subject ground (Tr. 843-844). Nor was there any objection ever made by the State to the question posed, on the basis of lack of foundation.

It is respectfully and earnestly submitted that contrary to the opinion of July 10, a review of the record will reveal that an adequate foundation was made to show reasonable similarity of the Condas property, thus enabling this Court to say that the exclusionary ruling was arbitrary, unreasonable, and prejudicial to the Defendant.

3. *The ruling of the trial court was prejudicial to the Defendant's guaranty to a full and fair trial.*

Although the opinion of the court does not pass directly on the issue, the implication from the language is that the exclusionary ruling of the lower court was error, but that because of the claimed lack of foundation and an offer or proof, the issue of whether the ruling was prejudicial could not be determined. The law of the case~~s~~ leaves little to doubt that the stopping of cross-examination herein was error. *Bingaman v. City of Seattle*, 139 Wash. 68, 245 Pac. 411 (1926); *Contra Costa County v. East Bay Munic. Dist.*, 1 Cal. Rptr. 60 (1960); *Basch v. Iowa Power and Light*, 95 N. W. 2d 714 (Iowa 1959); *People v. Murata*, 326 P. 2d 947 (Cal. 1958). For this case, as well as for precedent value, it is respectfully submitted that on rehearing, the Court should state that the trial court ruling did consti-

tute error and then address itself to the issue of whether the error was prejudicial.

The error was prejudicial. It deprived the Defendant of the full sweep of cross-examination of the key expert for the Government. Nothing is gainsaid by the observation that a land evaluation expert, experienced as he is in the art of rendering testimony, is the most difficult type of witness to effectively dispute on cross-examination. Every measure within reason should be extended to counsel in his attempt to place such a witness in the rightful setting.¹ But more than that, the ruling of the trial court herein took away from the Defendant its chief attack upon the credibility and bias of Mr. Johns, an attack which, as evidenced by the record, constituted a substantial portion of the cross-examination. The foundational questions regarding the Condas tract as quoted-above, were pursued by Defendant without State objection, and were all keyed to the very question which the trial court refused to allow. Not only was the Defendant prohibited by the ruling from exploring the reason, if any, why Johns had made inconsistent appraisals for different clients (one a condemnor and another a condemnee) on the same class of ground, but Defendant was as well prohibited in closing argument from

¹In ordering a new trial, this court said in *State of Utah v. Peek*, 1 U. 2d 263, 265 P. 2d 630 (1953):

“There is no other instrument so well adapted to discovery of the truth as cross-examination, and as long as it tends to disclose the truth, it should never be curtailed or limited. Any inquiry should be allowed which an individual about to buy would feel it in his interests to make.”

drawing to the jury's attention, the obvious bias and discredit which the question reasonably portrayed.

And it is the very testimony of Mr. Johns on the value before the acquisition, upon which the legal validity of the jury interrogatories depends. The interrogatory of the jury as to the value of the total property before condemnation was \$106,709.00 below that value estimate of all other witnesses. Only Mr. Johns' estimate was lower than the jury interrogatory, by some \$334,000.00. But for Johns' appraisal of the subject property before condemnation, the verdict is without the range of the testimony, and as a matter of law, would be set aside or subject to additur procedure. *Weber Basin Conservancy District v. Moore*, 2 U. 2d 254, 272 P. 2d 176 (1954).

CONCLUSION

A rehearing should be ordered to review the second assignment of error and treatment given to it by the Opinion of July 10. Respectfully, it is submitted that said Opinion should be found erroneous in that regard, that it be held that an offer of proof was unnecessary as to the nature of the Condas inquiry, and that there was a sufficient showing of similarity of the Condas ground with the subject property.

Upon rehearing, the Court should determine and state that the cross-examination ruling was clear error and that it was prejudicial to the Defendant's rights to a full and fair hearing. A new trial on Just Compensation should be thereupon ordered, it is respectfully submitted.

Respectfully,

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