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State of Utah, by and Through Its Road Commission v. General Oil Company, a Utah Corporation : Brief of Respondent

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

STATE OF UTAH, by and through
its Road Commission,
Plaintiff and Appellant,

vs.

GENERAL OIL COMPANY, a Utah
corporation, et al.,
Defendant and Respondent.

Case No.

11178

BRIEF OF RESPONDENT

Appeal from Judgment of the Third District Court
for Salt Lake County
Honorable Leonard W. Elton, District Judge

ROBERT S. CAMPBELL, JR.

STEWART M. HANSON, JR.

520 Kearns Building
Salt Lake City, Utah
*Attorneys for Respondent
General Oil Company*

PHIL L. HANSEN

Attorney General

S. REX LEWIS

Assistant Attorney General

120 East 300 North

Provo, Utah

Attorneys for Appellant

State Road Commission

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BRIEF OF DEFENDANT

STATEMENT OF THE CASE

Respondent agrees with Appellant's Statement and adds thereto the following Statement. Upon the filing of the condemnation Complaint by the State, Respondent (referred to herein as the General Oil Company) admitted the right to condemn, public use, necessity and proper project design, leaving as the only issue for trial that of Just Compensation to be paid for the appropriation (R. 43). No claim for severance damage was made by General Oil and the case thus proceeded to trial on the single question of

the fair market value of the condemned property as of March 19, 1964 (R. 177).

DISPOSITION IN THE TRIAL COURT

In this regard, the Statement by the Plaintiff in its Brief is incorrect. The matter was originally submitted to trial before the Honorable Maurice Harding, District Judge, sitting with a jury in February, 1967 (R. 127). From a verdict of \$4,147.52, the property owner moved for a new trial and alternatively, for an additur to the verdict based on alleged errors of law and the legal inadequacy of the jury award (R. 132-134). Judge Harding granted the Defendant's motion by entering an additur of \$10,852.48 to the jury verdict, conditioned upon the State's acceptance of the additur within 30 days; otherwise a new trial was ordered (R. 137). The State refused such additur award and thereupon petitioned this Court for interlocutory appeal of the new trial and additur order, on the ground that Judge Harding had manifestly abused his discretion and judgment (Supr. Ct. No. 10903). Such interlocutory Petition was by the Court denied on May 9, 1967.

The case was set down and tried anew before the Honorable Leonard W. Elton, District Judge, sitting with a jury, in January, 1968. On the fourth day of trial, a verdict was returned assessing Just Compensation in the sum of \$22,050.00 (R. 147). The State did not file a motion for new trial or other relief before the trial Court, but appealed directly from the judgment entered upon the verdict (R. 247).

RELIEF SOUGHT BY STATE ON APPEAL

The State, by its Appeal, seeks to nullify and void the second trial before Judge Elton and the judgment entered therein, by asking that this Court enter "judgment upon the verdict of the jury returned in the first trial of this action." (App. Br. p. 2). Alternatively, the State requests in this Appeal a new and further trial.

STATEMENT OF FACTS

The Plaintiff's fact statement, while mostly accurate, is quite incomplete in its account of the evidence of trial. Furthermore, it is apparent that the citations of Plaintiff to the transcript are in error as to the first trial of the case, since such transcript has not been designated by Plaintiff for inclusion in the record on appeal.¹

So that the Court may have a full digest of the facts upon which the new trial order was entered and of the relevant factors in the market at the date of condemnation, Defendant hereby makes its own Statement.

1. *Property Development.* The condemned property of General Oil, consisting of 1.04 acre, was situated on the west side of South University Avenue at

¹And in fact, the transcript of the first trial before Judge Harding has not been certified to the Court as a part of the record. It is Respondent's understanding, however, that the reported transcript of the first trial is prepared and could be certified and made available in accordance with the provisions of Rule 75(h) U.R.C.P. if deemed material to Appellant's appeal.

approximately 1500 South in Provo City (R. 330, 367, 408). Its frontage on the Avenue was some 316 feet with full access (R. 408). When the Defendant purchased the property in 1957 as a potential service station site, the parcel lay within an agricultural zone of the City (R. 271, 300). In 1958, as result of planning on the part of the State Road Commission and Provo City, of community meetings and of public hearings, it became a matter of public and common knowledge that Interstate Highway 15 would be constructed and developed in the south Provo area on a northwest-southeast diagonal crossing South University Avenue at approximately 1700 South (R. 239-245, 268, 269, 284), and that South University Avenue would serve as the main south access-way of Provo to and from the Freeway (R. 250).

2. *Zoning.* In 1959, in contemplation of the freeway coming through the south Provo area and of South University Avenue serving as the Interstate connector street, the subject property, along with others having frontage on the west side of the Avenue between 900 South and 1600 South, was rezoned by Provo City from agricultural to a special highway service zone, S-3 (R. 270). The zone, specially enacted for the property of Defendant and others along South University, was highly restrictive in its scope (R. 277-281, Ex. D-6), permissive uses under the ordinance being limited to service stations, motels,

restaurants, and other allied highway service purposes.

3. *Other Developments.* A further public hearing was held in 1961 as well as other public and private meetings regarding the corridor alignment of the freeway through south Provo and the interchange at South University Avenue at 1700 South (R. 267-270). The buying public had notice of such meetings and hearings and of the freeway alignment via news media and public maps. By 1963, actual freeway construction was commenced in the west Provo area including the development and opening of the West Center Street interchange (R. 257-259). At that time, final planning and designing of the freeway and the South University Avenue interchange had been accomplished and some freeway construction had actually taken place (R. 257, 542-544). As of March 1964, it was a matter of general information that the State Highway Department planned to complete the freeway and interchange system at South University Avenue and open the same to traffic in the Fall of 1966.² (R. 258, 283, 422, 542.) The foregoing factors were received in evidence as elements of which the informed and prudent buyer and seller in the market place would have been aware in the Spring of 1964, with respect to the subject property (R. 244, 268-269, 336-342, 416-418, 421).

²Completion and opening of the freeway and interchange took place in November, 1966, as anticipated. (R. 543)

4. *Condemnation.* In March 1964, the property of General Oil was condemned not for the freeway, but for the widening of South University Avenue which was to serve as the access road to the freeway (Ex. D-1). Sewer, water and other utilities were available to the property as of that date (R. 301, 408).
5. *Highest and Best Use — Potential Commercial.* While the actual use of the subject property and others in the area along South University Avenue was predominately agricultural, the development and imminency of the freeway system had for some time prior to 1964 provoked substantial market interest for commercial use (R. 304-305, 310). Prior to condemnation, buyers representing motel and service station concerns, had contacted owners along South University Avenue within the S-3 zone (R. 304-310), and several sales were thereafter made reflecting the commercial value of the area (R. 287-289, 358-360, 439-440).

I. Dale Despain, the City Planner of Provo for 23 years, testified that in light of the S-3 zoning, the planned freeway in the area, and the demonstrated interest for commercial development along South University Avenue, the highest and best use of the subject property as of March 1964, was potential commercial (R. 285-287). The two evaluation witnesses for General Oil concurred in the judgment — that because of the zoning, market knowledge of the actual plans for the freeway system and the

interchange on South University Avenue to be constructed within approximately two years, and because of the intensive commercial use of the property along the Avenue to be reasonably expected in the foreseeable future, the willing and informed buyer and seller would be motivated to buy and sell the condemned property for its commercial potential as of the date of condemnation and in the foreseeable future (R. 339, 422).

6. *Landowners Value Witnesses.* The experts for General Oil based their estimates of market value on commercial transactions in the immediate area,³ a holding period of two years on the subject property being considered (R. 340, 361-364, 418-435). The evaluation estimates of Defendant's witnesses of \$75.00 a front foot and \$.53 a square foot for the subject property as of March 1964, was substantially supported by competent evidence (R. 367, 448).
7. *State's Value Witnesses.* It was the theory of the two appraisers for the Plaintiff that notwithstanding the foregoing, the highest and best use of Defendant's property was agricultural or transitional as of March 1964 (R. 523, 572). It was their collective opinion that farming would have been the motivating force in the purchase and sale of the property,

³The State is in error in its Brief, page 3, by the statement that the appraisals of the owner were based on service station site sales on West Center Street. To the contrary, market value was premised on South University Avenue transactions, and West Center sales were used by General Oil witnesses to demonstrate only the market anticipation and influence in advance of the opening of a freeway interchange on West Center.

commercial potential being rejected as a speculative use of the unforeseeable future (R. 529, 640). Neither appraiser reflected any value, whatsoever, to the commercial zoning or to the imminent influence of the freeway upon the marketability of the premises (R. 549-550, 639).

Both witnesses for the Plaintiff evaluated the condemned property at \$3,000.00 per acre (R. 505, 598). On cross-examination, it was revealed that each witness had previously appraised substantially similar property at 1200 South University Avenue, located in the same S-3 zone, and as of the same time in 1964, for \$10,000.00 and \$12,000.00 per acre, respectively (R. 556, 643).

8. *Instructions and Verdict.* Instruction No. 7 of the Court's charge advised the jury that in determining the market value of the condemned property, those factors which affected and influenced land use and land value as of the time of condemnation and within the *foreseeable future* could be taken into account, including any enhancement, if any, in value brought about by the freeway development as would have been reasonably foreseen as of March 1964 (R. 180). Plaintiff has not raised as error in this appeal the giving of such Instruction.

From a jury verdict of \$22,050.00, Plaintiff undertook its appeal to this Court directly. No motion for new trial was filed before the lower Court.

9. *Earlier Trial.* The case was first tried before District Judge Maurice Harding in February 1967 (R. 129). From a verdict of \$4,147.52, General Oil moved for a new trial and alternatively, for an additur to the verdict. It is not contested by Plaintiff but what *there was substantial and competent evidence to support the new trial and additur Motion.* (App. Br. p. 3, 4). The Motion was granted by Judge Harding, and it was ordered that an additur be entered to the verdict of the jury or a new trial be had if the additur were not accepted by the Plaintiff (R. 137).

The State in its Brief has not referred the Court to any transcript citation to support the claim that the new trial and additur Order of Judge Harding lacked substantiality in the evidence of the first trial or that Judge Harding abused his discretion by the Order.

ARGUMENT

POINT I.

JUDGE HARDING DID NOT ERR IN GRANTING A NEW TRIAL BASED ON THE INADEQUATE AWARD OF DAMAGES AND OTHER ERRORS OF LAW.

1. *The granting of a new trial lies within the sound discretion of the trial judge and such order will not be overturned on appeal unless an abuse of discretion is clearly and manifestly apparent.*

The basic claim of Plaintiff's Appeal herein is that District Judge Harding, in ordering a new trial because of

whether the verdict returned is against the clear weight of the evidence so as to indicate bias, prejudice or misunderstanding, and whether the verdict represents substantial justice in the matter. This post-verdict function has long been accepted in Utah as the rightful duty and responsibility of the trial judge. *Paul v. Kirkendall*, 1 U.2d 1, 261 P.2d 670 (1953); *Wellman v. Noble*, 12 U.2d 350, 366 P.2d 701 (1961). The rule is fundamental in this jurisdiction that the trial judge has wide discretion to grant or deny a motion for new trial and additur under Rule 59. Thus in the early case of *Lehi Irrigation Co. v. Moyle*, 4 Utah 327, 9 Pac. 867 (1886), this Court said:

“Motions for new trials are always addressed to the sound discretion of the court, and whether granted or denied, the discretion of the trial court will be presumed to have been properly exercised, and will be so held unless the contrary be made clearly to appear.”

“Wide latitude” was the description given to the trial Court’s discretion on new trial motions in *Beck v. Dutchman Coalition Mines Co.* 2 U.2d 104, 269 P.2d 867 (1954). And in *Klinge v. Southern Pacific Co.* 89 Utah 284, 57 P.2d 367 (1936), it was held that such wide discretion will not be lightly regarded or overturned by this Court on appeal:

“Hence, a wide discretion is given the trial court in such matter and rarely is interfered with by an appellate tribunal whether the awarded compensation by the court below was held adequate or inadequate.” P. 297 of 89 Utah.

In reality, the argument of Plaintiff herein reduces the role of the trial judge to that of a ministerial officer. It

the legal inadequacy of the damage award, committed prejudicial error entitling Plaintiff to a reversal of the Order and a reinstatement of the initial jury verdict. That Order made under Rule 59 and on motion of the Defendant, found and declared that the jury award of \$4,147.53 was "*as a matter of law, inadequate and that good cause supports Defendant's Motion.*" (R. 137). The motion made by Defendant cited as grounds for new trial that the verdict was against the clear weight of the testimony under any reasonable view of the evidence so as to manifest prejudice and misunderstanding by the jury, and was further based on errors of law independent of the inadequacy of the jury award.

Plaintiff's argument is that the trial court's function is limited to the impanelment of the jury, ruling upon evidence and instructing upon the applicable law. So far as the review of the adequacy or inadequacy of a damage award by the jury, Plaintiff contends that the trial judge has no involvement. Thus, it is concluded that Judge Harding had no authority to review the verdict on just compensation or to order a new trial because of its inadequacy. (App. Br. p. 4).

A fair diagnosis of such argument quickly reveals its error. For not only does the argument fail in the end result, but its very structure rests upon a misconception of the inherent function of the trial judge. For that function is not only one of an administrator during the jury trial as Plaintiff argues, but consists also of conducting, upon motion or *sua sponte*, a post-verdict review to determine

does not recognize the implicit power and discretion which Judge Harding possessed and exercised in granting the new trial motion. Plaintiff was not by such Order denied its right of trial by jury as possibly might be the case on a Judgment N.O.V. Jury trial was fully preserved to the parties and in fact, the matter was subsequently tried to and determined by a jury before Judge Elton after the Plaintiff refused the additur award of Judge Harding.

2. *The rule of wide discretion of the trial judge on new trial motion is observed in eminent domain litigation.*

In the review of an eminent domain verdict to determine its legal adequacy or inadequacy, there is no break with the dominant rule that the trial judge maintains broad discretion to grant a new trial because of the inadequacy of the damage award. As noted in 27 *Am. Jur.* 2d 364, Sec. 448 Em. Dom., the power to order a new trial is fully maintained:

“The trial court has a wide discretion in granting a new trial in a condemnation case. It is held that where the court is dissatisfied with the verdict in eminent domain proceedings, the court has not only the authority but also the duty to set the verdict aside and grant a new trial. *Similarly, it is held to be the duty of the trial court to set aside a verdict in eminent domain and grant a new trial where it appears to the court that the verdict is inadequate under the evidence.*” (Emphasis added)

In holding that the trial judge has the responsibility to determine under a new trial motion, whether a con-

demnation verdict was a legally inadequate assessment of damages, the South Dakota Supreme Court stated in *State Highway Commission v. Madsen*, 119 N.W. 2d 924 (S. D. 1963):

“The trial judge has the primary responsibility for determining whether a new trial should be granted because of inadequate damages. In making that decision he is vested with a broad judicial discretion. Manifestly because of his participation in the trial he is in a far better position than are the judges of this court to say whether the award does substantial justice. Consequently we may not disturb his decision except for a clear abuse of that discretion.”

To the same effect is *Abercrombie v. Kansas State Highway Commission*, 185 Kan. 47, 340 P.2d 377 (1959).

This Court in *Porcupine Reservoir Co. v. Keller*, 15 U.2d 318, 392 P.2d 620 (1964) sustained an additur and new trial order of the trial Court entered because of the latter's findings that the severance damage verdict of the jury was inadequate. In so doing, this Court held firm to the rule that:

“Granting or denying a new trial is largely in the discretion of the trial court.”

3. *Judge Harding found as a matter of law, that the jury verdict was legally inadequate.*

The record is clear on the point that Judge Harding, in granting the new trial Order of which the State herein laments, did not simply substitute his judgment of damages for that of the jury. It was not, as the Plaintiff seems to contend, just a case of the trial court disagreeing with a jury verdict. Rather, it was the judgment of Judge

Harding that this verdict was, *as a matter of law*, against the manifest weight of the evidence at trial, i.e., that reasonable minds would not differ that in light of the testimony adduced, the damage award of the jury was clearly inadequate. In such conclusion, Judge Harding came within the full measure of his discretion as outlined by this Court under the ruling law cited herein as well as within the framework of the recent opinion in *Haslam v. Paulsen*, 15 U.2d 185, 389 P.2d 736 (1966) :

“While we agree that the trial court cannot, without any reason whatsoever, grant such a motion [new trial] upon mere whim or caprice, it nevertheless has a wide latitude of discretion with respect thereto in conformity with the general supervisory powers which it necessarily has over the verdicts of juries in the interest of the administration of justice.”

POINT II.

THE PLAINTIFF HAS WHOLLY FAILED IN THIS APPEAL TO DEMONSTRATE WHEREIN JUDGE HARDING ABUSED HIS DISCRETION IN GRANTING A NEW TRIAL.

1. *The presumption is in favor of the new trial Order and against the Plaintiff.*

While plaintiff has expressed its displeasure with the new trial Order of Judge Harding, it has fallen short of the required mark of demonstrating wherein the trial court manifestly or clearly abused its discretion in the matter.⁴

⁴This Court has left no doubt in its decisions that to turn back a new trial order of a District Judge, the appellant has the burden of showing there to be a *manifest* or *clear* abuse of discretion. *Klinge v. Southern Pacific Co.*, *supra*; *Lehi Irrigation Company v. Moyle*, *supra*. “Manifest and clear” normally means that there is no reasonable basis, whatsoever, to support the ruling. *State v. Fischer*, 38 N.J. 40, 183 A.2d 11. (1962)

It has not referred this Court to a solitary fact that would reasonably form the basis for a claim of manifest and clear abuse. To the contrary, Plaintiff relies on the argument that since there was some evidence admitted in the first trial from which the jury might find for the Plaintiff, that such evidence forecloses the trial judge from finding the damage award to be legally inadequate. (See App. Br. p. 4 last para). The trouble with such argument is that it was rejected out of hand in *Wellman v. Noble*, 12 U.2d 350, 366, P.2d 701 (1961). In sustaining the lower court's order of a new trial because of inadequate damages, this Court said therein:

“The court did not abuse its discretion in granting a new trial.

The trial court has a broad discretion in ruling on such a motion which we should not disturb unless there is a plain abuse thereof. * * *

* * * The mere fact that the jury verdict is supported by substantial evidence sufficient to make a prima facie case and furnish a reasonable basis for their decision does not require that the trial court's order granting a new trial should be reversed. This is especially true where the order for the new trial is based on the amount of the verdict.”

The Court went on to say in *Wellman* that on the question of inadequacy of damages, if there was substantial evidence to support the motion for new trial, the trial judge will not be deemed to have abused his discretion:

“This court has held in determining whether there has been an abuse of discretion, that where there is substantial evidence showing a reasonable basis to support a verdict in favor of the party mov-

to damages." *Paul v. Kirkendall, supra*. The new trial Order of Judge Harding was clearly within his discretion under the wilderness of precedent of this Court and should stand affirmed.

POINT III.

THE TRIAL COURT DID NOT ERR IN RECEIVING EVIDENCE ON MARKET VALUE BASED IN PART ON FACTORS ATTRIBUTABLE TO THE IMMINENT FREEWAY PROJECT.

1. *Under the Ward decision in Utah, evidence of enhancement in value of the condemned property as well as of enhanced comparable properties is a proper element of consideration in determining market value.*

Little time need be taken with Point II of Plaintiff's Appeal, for the issue of law raised there has been fully settled by the decision of this Court in *Weber Basin Conserv. District v. Ward*, 10 U.2d 29, 347 P.2d 862 (1949). Simply stated, it is Plaintiff's claim that elements of value which are referable to or caused by the development of the proposed freeway project are not admissible and are not compensable in fixing the market value of the subject property, which was condemned for the widening of an access-road to the freeway. Accordingly, factors in the market, including sales of comparable property, which have been influenced by the imminency of the freeway development are not, under Plaintiff's argument, relevant on the compensation issue. This argument was advanced by the Plaintiff on several occasions before Judge Harding

ing for a new trial, there is no abuse of discretion in granting a new trial."

That there was substantial evidence underlying the motion for new trial of General Oil in the case at bar, is not open for debate. Plaintiff, in fact, acknowledges substantiality. The rationale of *Wellman* is dispositive of Plaintiff's argument and of its appeal herein. Plaintiff cites as its only other authority for reversal of the Harding new trial Order, the decision of this Court in *Lund v. Phillips Petroleum Co.*⁵ That case does not at all control this Appeal, for involved therein was the issue of whether the trial court committed error in permitting a case to go to the jury and in the subsequent refusal of the judge to disturb the verdict. If *Lund* stands for anything in the case at hand, it upholds the principal of discretion of the trial judge in granting or denying a new trial.

The law presumes that the new trial Order of Judge Harding was regular and that it was made upon proper foundation. As stated by this Court in *Klinge v. Southern Pacific Co., supra*:

"The rule is well established that a presumption exists that a trial court did not err or abuse his discretion in granting or refusing a new trial, and that the burden is upon him complaining of the ruling to show a clear abuse of discretion."

The Plaintiff's burden as required by *Klinge* has not been met in this Appeal. In the absence of a clear showing thereof, this Court is "slow to interfere with a trial court's ruling granting or refusing a new trial on questions relating

⁵ 10 U.2d 276, 351 P.2d 952 (1960)

v. Miller, 317 U. S. 369 (1942) to the effect that the value of property for condemnation should be determined "without consideration for the fact that the condemnor plans improvements." In its opinion, this Court first referred to the *Miller* doctrine and then *expressly* rejected the same by holding that all factors (including enhancement of value from the public project) could be taken into consideration by the trier of fact in determining the fair market value of the condemned property:

"The basis of the attack made upon the defendants' expert evidence is that they relied upon the increased value of the land occasioned by Weber Basin's plans for improvement of the area in increasing farm values thereabouts. * * * The argument supporting such rule appears to be that the condemnnee should not be allowed an advantage from the fact that the condemnor is improving the area and the latter be required to pay a higher price and thus in effect suffer a penalty because of its own improvements. The contrary view is that eminent domain statutes are designed only to give the condemnor the power to purchase property whether the condemnnee desires to sell or not, but are not purposed to give the condemnor any superior bargaining position as to price.

We are in accord with what appears to be the better view, adopted by the trial court, that the condemnnee is entitled to the fair market value of his property at the time of the service of summons in the condemnation proceedings as provided by statute; and that all factors bearing upon such value that any prudent purchaser would take into account at that time should be given consideration, including any potential development in the area reasonably to be expected."

(including an earlier and independent case) and in the trial before Judge Elton from which Plaintiff now appeals. Both Judges Harding and Elton ruled against Plaintiff's argument and permitted evidence of enhancement in value from the freeway project, such rulings being largely made on the strength of the *Ward* decision.

Plaintiff cites as authority for its argument an encyclopedia and three cases from other jurisdictions.⁶ But it has ignored and failed to even cite in its Appeal Brief the plain holding of this Court in the *Ward* case. Indeed, "ignore" is a proper characterization of the Plaintiff's Brief herein, for the *Ward* decision and its rationale was fully researched, explored and argued by both parties before both trial Judges Harding and Elton.

The answer to the contention made by Plaintiff was laid to rest in *Weber Basin Conserv. District v. Ward*, for the Court therein held, without dissent, that factors in the market attributable to the public project for which the property in question is condemned, may be taken into consideration in determining the fair market value of the condemned property. In *Ward* as here, the condemnor argued that the judgment of the trial court was erroneous, since the testimony of the owner on market value was based on the *increased value of the condemned land* which the water project of condemnor brought about in the area. In so arguing, the Conservancy District relied upon *U. S.*

⁶ These citations are unauthoritative and should carry no weight with this Court for they all have their footings in the doctrine announced in *U. S. v. Miller*, 317 U. S. 369 (1942), which decision was expressly rejected by this Court in *Ward*.

CONCLUSION

It is plain that the new trial Order of Judge Harding is substantially supported by the record and testimony in the case and is presumed proper. The Plaintiff has not met its burden of showing such Order to be an abuse of discretion whatsoever, much less making a showing of manifest and clear abuse. It was Judge Harding who heard the witnesses, who had a first hand view of all the evidence and proceedings throughout the trial and who observed strategy of counsel and the reaction of the jury. His judgment on new trial matters cannot under the ruling precedent of this Court be overturned, it is submitted.

The rulings of the trial court on the admissibility of the evidence relating to market value as enhanced by the imminency of the freeway project, was in full accord with the unequivocal holding of this Court in *Weber Basin Conserv. District v. Ward*. There was no error committed.

The judgment of the trial court herein should be affirmed in all respects.

Respectfully submitted,

ROBERT S. CAMPBELL, JR.

STEWART M. HANSON, JR.

520 Kearns Building
Salt Lake City, Utah

*Attorneys for Respondent
General Oil Company*

It is apparent from the record herein that the property of General Oil, at the date of condemnation, had been for better than six years past situated in a market which was fairly teeming with activity and interest oriented toward freeway development and the South University Avenue Interchange. Zoning, utility services, public hearings, and market attitudes were all geared toward the potential and commercial use of the area proximately due to the imminency of the freeway project. To have placed a veil over the trial so as to eliminate that primary factor as an element of market value (which is what the State would have had us do) would have been to create a false and hypothetical market which never in fact existed. The appraisal process, itself, under such an artificial system would become a hopeless attempt to evaluate the subject property under market conditions which were plainly not prevalent. The guiding philosophy of the *Ward* decision requires that the parties look the facts in the face and that just compensation be tied to the genuine realities of the extant market.

In his charge to the jury, Judge Elton instructed in accordance with the *Ward* decision, "that all factors which the prudent buyer and seller would take into account including market value influence caused by the construction and development of any public improvement or project at the time or within the reasonably foreseeable future" were proper considerations for the jury in arriving at its verdict. The State has not alleged as error in this Appeal the giving of such Instruction. (See Instruction No. 7, R. 180).

The rule and charge on the evidential issue were proper and should be affirmed.