1976

Provo City Corp. v. Donna I. Knudsen : Brief of Respondent

Utah Supreme Court

GLen J. Ellis; Attorney for Appellant;
Glen E. Fuller; Marlin K. Jensen; Attorney for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

PROVO CITY CORPORATION,

Plaintiff and Appellant,

-vs-

Case No. 14637

DONNA I. KNUDSEN,

Defendant and Respondent

RESPONDENT'S BRIEF

Appeal from the Judgment of the

Fourth District Court

The Honorable J. Robert Bullock

GLEN E. FULLER and
MARLIN K. JENSEN
15 East 4th South Street
Salt Lake City, Utah
Attorneys for Respondent

GLEN J. ELLIS, Esquire
P.O. Box 1849
359 West Center Street
Provo, Utah 84601
Attorney for Appellant

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STATEMENT OF FACTS

Appellant has furnished a general summary of the basic facts applicable to this case. This brief will, however, detail additional facts which are pertinent and necessary to a complete argument on behalf of respondent.

Respondent questions the necessity on the part of appellant in reciting portions of the facts, particularly those relating to evidence adduced at the trial, inasmuch as the only issue certified on appeal by appellant was the abstract principle of ". . .the propriety of the Court granting severance damages in addition to an award for an air easement only in a condemnation lawsuit." (R. 7)

ARGUMENT

POINT I

NO AUTHORITY CAN BE FOUND TO SUPPORT APPELLANT'S CONTENTION THAT SEVERANCE DAMAGES TO REMAINING PROPERTIES CANNOT BE AWARDED AS A MATTER OF LAW IN SITUATIONS INVOLVING THE TAKING OF AERIAL EASEMENTS.

At the outset it should be pointed out to this Court that appellant certified a single legal issue on appeal (R. 7) involving the abstract proposition that, as a matter of law, severance damages cannot be awarded in a condemnation taking of an air easement only. Further, appellant certified to the lower Court that ". . .he does not intend to rely on a transcript of the record, proceedings and evidence in the appeal presented hereby to the Supreme Court."

Faced with the foregoing representations, respondent now faces a situation where appellant has relied heavily in its brief upon factual matters developed at the trial in attempting to support a supposedly abstract legal principle and, in addition, raises an additional point on appeal complaining that the trial court allowed the introduction of speculative evidence to support the severance damages awarded. In anticipation of this very thing happening — and knowing full well that no case law could possibly be found to support the abstract legal principle certified on appeal, respondent sought to protect her position by designating for inclusion in the record the transcript of the testimony of the respective expert appraisal witnesses and respondents Exhibit 8 (an aerial map and overlay). But the difficulty has not been completely protected against since those portions of the record designated by respondent do not completely provide this Court with everything which took place at the trial, such as the testimony of other witnesses and discussions and arguments with the lower Court. With the foregoing explanation and caveat, respondent will nevertheless meet the contentions of appellant's brief with such portions of the record as have actually been certified.

Appellants appears to place substantial weight on the language found in the case of *Provo River Water Users Association v. Carlson,* 103 U. 93, 133 P. 2d 777 in support of its position that severance damages can never be awarded in aerial easement situations. On

page 5 of its brief is found the commentary from that case observing the policy of awarding—

> " severance damages and damages to lands not taken, on some physical injury to lands not condemned. . . so as to render it less valuable for purposes to which it was formerly adapted. . .or some other condition which would operate to depreciate the market value of the property remaining."

The quoted language taken from the *Carlson* case is somewhat vague, but if examined in connection with our Code provision and if the entire quotation is examined, its meaning and intent is clear and its interpretation furnishes no assistance whatsoever to appellant's position.

Section 78-34-10 (2), Utah Code Annotated, 1953, provides that in situations where a portion of a larger property is condemned, recovery may be had for the —

> ". . .damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned and the construction of the improvement in the manner proposed by the plaintiff."

In other words, where property rights are taken, damages to remaining properties not taken can be predicated upon the *severance* from the larger tract of the property taken whether it be fee title or some other interest (such as an easement) which takes away a portion of the "bundle of rights" from the property. In addition, damages to properties not taken can also be recovered in those situations involving a taking of a property right where they result from the ". . .*construction of the improvement in the manner proposed by the plaintiff.*" Our courts and the courts of every jurisdiction have recognized that the two contributing features of severance damages and damages to lands not taken include the future use which will be made of the rights acquired in the condemnation proceeding.

It should be pointed out that many legal writers and trial attorneys classify all damages resulting from taking situations under sub-section (2) of Section 78-34-10 under the general terminology of "severance" damages. Where there is no taking involved, but where damages result to a property by the construction of a public improvement, as provided in sub-section (3), of Section 78-34-10, the nomenclature generally applied is that of "consequential" damages.

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It should be pointed out that many legal writers and trial attorneys classify all damages resulting from taking situations under sub-section (2) of Section 78-34-10 under the general terminology of "severance" damages. Where there is no taking involved, but where damages result to a property by the construction of a public improvement, as provided in sub-section (3), of Section 78-34-10, the nomenclature generally applied is that of "consequential" damages.

If we revert to the same quotation from the *Carlson* case, and include the portion deleted by appellant, it reads as follows:

> "All of the cases in the Court which we have been able to find, have predicated both severance damages and damages to lands not taken, on some physical injury to lands not condemned, such as lowering or raising the level of a street or highway so as to impair access, obstruction of light and view, *restriction of the remaining area in size or shape* so as to render it less valuable for purposes to which it was formerly adapted, *or the creation of noise, smoke, or some other condition* which would operate to depreciate the market value of the property remaining."

In the instant case severance damages to the remaining property of respondent fits neatly within the illustrations of the quoted statement from the *Carlson* case, particularly since remaining lands not subject to the easements were left in such a size and shape as to be less valuable for purposes to which they were formerly adapted and because of aircraft noise. This will be brought out in argument in the following point. Decisions since the *Carlson* case have clearly established the rule that properties not taken need not necessarily sustain physical injury in order for an award of severance damages to be made, and a reading of the quotation taken from the *Carlson* case makes it manifestly clear that the word "physical" was used in a very broad sense in view of the illustrations enumerated.

Both the *Carlson* case the the *Church Farm* case (*State v. Cooperative Security Corp.*, 1 U. 2d 178, 264 P. 2d 281) were cases involving the taking of farm pasture lands from dairy operations in the Heber Valley area. In each case the claim was made that the actual taking of lands resulted in an imbalance of the total dairy farm such as would result in a diminution in value of other lands not taken. In short, damages to the remaining properties were based solely upon the loss of the lands taken. The crux of the decisions in both cases was that there were other pasture lands in the immediate vicinity which were so similar in use and location, and which could have been purchased, as would restore the operating efficiency of the farm units. Since such restoration or cure was possible, the basis for awarding severance damages due to the loss of the use of the property taken became untenable. The denial of severance damages therefore was proper.

Oddly enough, the *Carlson* and *Church Farm* cases have been referred to in the

condemnation field as being leading cases in the area of procedural law, rather than substantive law. For many years some district court judges have insisted that property owners who seek severance damages resulting from the loss of use of properties taken should assume the burden of proving that there were not other adequate and suitable substitute replacement lands in the area, thus placing an additional burden upon property owners in the preparation of their cases. However, this particular matter was challenged in 1968 in the case of *State Road Commission v. Bingham,* 20 U. 2d 246, 436 P. 2d 803 and, notwithstanding appellant's commentary on page 6 of its brief that the *Carlson* case "has been quoted approvingly by the Utah Supreme court at least three subsequent times and has never been overruled. . .", this Court in the Bingham case did in fact overrule that case insofar as it was being interpreted up to that time:

> "The State's position, in the instant case, would, in effect, require the landowner to prove a negative — that he could not with reasonable diligence acquire a new access — before he could prove severance damage for loss of access. In support of this position, the State cites State v. Cooperative Security Corp. and Provo River Water Users Assn. v. Carlson. . . Although neither of the cited cases specifically held that the burden is upon the landowner to prove that he was unable to mitigate or minimize severance damages, if the language in these cases implies such a rule, the same is hereby rejected.
>
> "We hold that in a condemnation action it is the condemnee's burden to prove severance damage, but that before doing so he does not generally have the burden of first showing that such damage, if any, could not be minimized or mitigated."

The *Carlson* case serves appellant no succor because the damages in the instant situation have not been founded upon the actual loss of all use of the adjoining lands or of the lands from which the easements have been taken; and, even if such claim had been made, the *Bingham* case would place the burden of proving availability of substitute lands upon appellant — a burden it did not undertake to establish.

Since the *Carlson* decision this Court has also seen fit to approve an award of severance damages to properties not taken where the taking and the construction of the project (an adjoining viaduct overpass) affected property rights inherent in the properties not taken. In the case of *State Road Commission v. Miya*, 526 P. 2d 926 (1974), this Court held that

easement rights of access, light, air, view and privacy are property rights which may not be impaired without just compensation.

Before proceeding too far into this discussion, we should look at the aerial easements actually being taken. Appellant's brief (P.6) suggests that the only easement being acquired is that necessary ". . .to limit the heighth to which buildings or other obstructions would be allowed to exist." Further, in support of its position, reference is made to *United States v. 48.01 Acres of Land*, 144 F. Supp. 258, *Olsen v. U.S.*, 292 U.S. 246, 54 S. Ct. 704, 78 L. Ed. 1236, and *Boyd v. U.S.*, 222 F. 2d 493. The federal cases included holdings that, under their facts, compensation could not be awarded resulting from the flights of aircraft. The difficulty with plaintiff's contention, and its quoted cases in support thereof, is that it has not read the easement which it has acquired in this case (R. 20):

AVIATION EASEMENT

". . . a perpetual and assignable easement over and above the following described land in which the Grantor holds a fee- simple estate:

(13.1961 acres described)

"The grantor agrees that they, their heirs, successors and assigns, shall not hereafter erect, or permit the erection of any structure or any growth, tree or other object within the boundaries of the hereinabove described land in excess of 24 feet above ground level.

"The Grantor further agrees that the easement and right hereby granted to the Grantee in and over the hereinabove described land are for the purposes of insuring that the said land remain free and clear of any structure, tree or other objects for the protection of the flight of aircraft in landing and taking off at the Provo Municipal Airport; that the rights shall include but not be limited to the following:

1. The continuing and perpetual right to cut to 24 feet above ground level and remove trees, brushes, shrubs or any other perennial growth or undergrowth.

2. The right to remove, raise or destroy existing buildings, or structures and the right to prohibit the future erection of buildings or other structures above the height limit of 24 feet.

3. The right of ingress and egress from and passage over the land of the Grantor, hereinabove described, for the above purposes.

"4. *For the use and benefit of the public, the right of flight for the passage of aircraft in air space above the hereinabove described land, to*

gether with the right to cause in such air-space such noise as may be inherent in the operation of aircraft, now known or hereinafter used for navigation of or flight in air, using such air-space or landing at or taking off from or operating on the Provo Municipal Airport.

5. To have and to hold said easement and all rights appertaining thereto unto the Grantee, its successors or assign, until said Provo Municipal Airport shall be abandoned and shall cease to be used for public airport purposes.

It is understood and agreed that these convenants and agreements shall run with the land and shall be binding upon the heirs, administrators, executors, successors and assigns of the Grantor and for the purpose of this instrument, the land hereinabove described, shall be an approach area and shall be the servient tenement and said Provo Municipal Airport shall be the dominent tenement."

(R. 20, 21)

A brief examination of the foregoing Aviation Easement makes it abundantly clear that an easement of limitation of buildings or other obstructions as to height exists, but it is also clear (paragraph 4) that the appellant is also acquiring a flight easement to utilize in the future the airspace above the 13.1961 acres and to subject the property to all manner of noise as may occur from any type of air flight activity whenever it may occur at any time in the future. The easement is extremely broad, it contains both types of easement rights and it is certainly very physical in the type of use which can be made of the property; i.e.; ingress and egress, aerial overflights, height restrictions on buildings, trees and other objects, and the impression of noise upon the land.

To attempt to argue that the instant situation fits that of the federal cases cited by appellant is unfounded in the light of the express language of the easements being acquired.

One citation found at page 7 of appellant's brief taken from the *Boyd* case is, however, appropriate to show that severance damages are the subject of a factual inquiry in aerial easement cases, as a matter of law:

> "Whenever there has been an actual physical taking of a part of a distinct tract of land, the compensation to be awarded includes not only the market value of that part of the tract appropriated, but the damage to the remainder resulting from that taking, embracing. . . injury due to the use to which the part appropriated is to be devoted."

RESPONDENT'S EXPERT WITNESS DID NOT FURNISH SPECULATIVE EVIDENCE PERTAINING TO SEVERANCE DAMAGES.

As previously pointed out, appellant certified to the Court that its only issue on appeal was that of the legal propriety of granting severance damages in an aerial easement case. In its brief it now comes forth with a new contention, claiming that speculative evidence was offered by respondent's appraiser, Wilbur Harding. However, even as to the additional point raised on appeal, an examination of the transcript fails to reveal any place where counsel for appellant objected to the introduction of evidence on the ground that it was speculative in nature. The gist of the objection to testimony concerning severance damages was raised by appellant's counsel (R. 98) in an effort to exclude any evidence pertaining to severance damages as a matter of law:

"MR. ELLIS: The measure of damages, according to the law, is the before and after value, *and severance damages has no part in that.*

MR. FULLER: That's the most incorrect statement of law. . . that I ever heard of.

MR. ELLIS: Well, I will stand on it. . ."

At this point appellant is simply arguing to this Court the matter of the weight of the evidence, claiming that (as his appraiser analyzed the matter) the lands of respondent were simply agricultural in every respect. Appellant's appraiser Paul Brown, however, placed a value on the property prior to the taking of $4,000.00 per acre (R. 68), a figure which Mr. Brown admitted was not consistent with agricultural uses and admittedly premised upon the assumption that buyers at that price would be ". . .looking for other reasonable uses in the future." (R. 73, 74)

Appellant attempted to restrict the highest and best use of the Knudsen property to that solely involving agricultural uses, relying on the applicable zoning at the time of the condemnation. But Mr. Wilbur Harding, respondent's appraiser, pointed out that in his opinion the highest and best use of the property at the time of the taking was that of a

suburban residential use (R. 88) in the reasonably foreseeable future and that a probability of rezoning to accommodate that use would have been very likely had not the airport project been known and provided for in advance of the time of the taking (R. 104). Mrs. Knudsen's testimony, had it been transcribed and included in the record, would have pointed out how Provo City and the airport authorities had for quite some time manipulated the zoning of her lands so as to restrict sales and building activities in the immediate area prior to the actual condemnation.

In any event, the land values of $4,000.00 per acre furnished by Mr. Brown for appellant and $5,000.00 per acre as testified to by Mr. Harding for respondent are not so much apart as to create a substantial argument on the issue of highest and best use of the properties, And, for that matter, the amount of diminution in value of the land actually taken for the easement itself did not reflect any substantial differences between the two appraisers.

This leaves us with the contention of appellant that severance damages to lands not impressed with the aviation easements could not be awarded in any event. In this respect Mr. Harding pointed out that the lands carried a highest and best use of suburban residential, being serviced with highways and utilities and located in an area of growth on Center Street in Provo (R. 89). He testified that, except for the airport project, there would have been a reasonable probability of re-zoning in the foreseeable future to that use and, in fact, it was brought out (R. 80) that the zoning had actually been changed from 20 acres per building site to 10 acres in the last year. He further explained that the farming activity on the property was simply an interim, or temporary, use (R. 90).

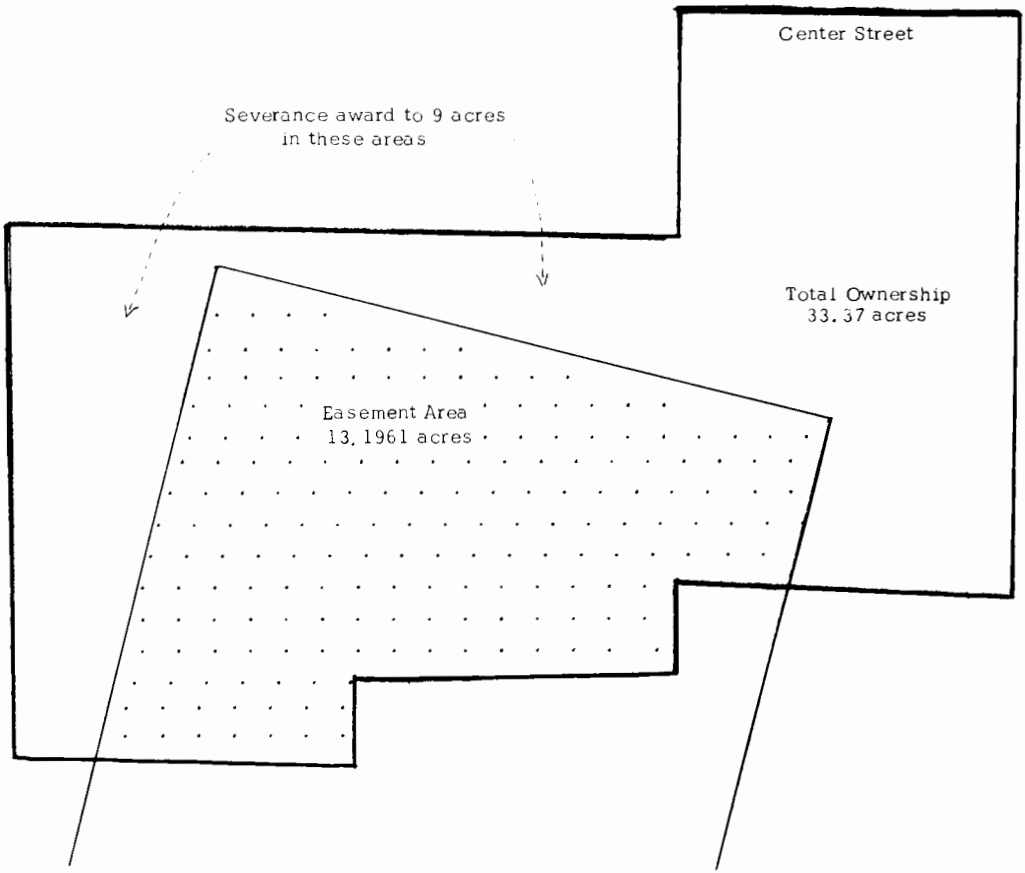
The matter of probably rezoning of property was discussed in the case of *State Road Commission v. Jacobs,* 16 U. 2d 167, 397 P. 2d 463 (1964) where this Court held:

> ". . .The owner of property under condemnation is entitled to a value based upon the highest and best use to which it could be put at the time of the taking, without limitation as to the use then actually made of it. However, the projected use, affecting value, must be not only possible, but reasonably probable. It must not be merely in the realm of speculation because the land is adaptable to the particular use in the remote and uncertain future. In any event, the admission of such evidence is within the sound discretion of the trial court. . . ."

"Where the enactment of the zoning restriction is not predicated upon the inherent evil of the proscribed use. . . and there is a possibility or probability that the zoning restriction may be in the near future be repealed or amended so as to permit the use in question, such likelihood may be considered if the prospect of such repeal or amendment is sufficiently likely as to have an appreciable influence upon present market value."

In arriving at the amount of the value of the easement taken, Mr. Harding reasoned that combination of noise (R. 95, 96), restrictions on height of trees, roofs, and the easement cloud on the title (R. 94, 95) would have the result of reducing the 13.1691 acres to a "lower density use, much more so with the easement on it than you would without." He explained that homes would still be placed on the property, but that the land would not bring as much money (R. 97), that the homes would be lower priced and of lower quality, and that financing would be harder to get (R. 98). From these factors, he assessed the value of the easement taken and, although Mr. Brown did not elaborate as to his reasons for assigning a value to the easement taken, the two appraisers did not differ substantially.

Coming next to the matter of any possible severance damages to remaining properties, Mr. Harding pointed out that to the north and to the west of the easement area — and part of the Knudsen property — were two remaining narrow, long and irregular shaped tracts of land upon which no easement had been taken. Although Mr. Harding did not assess damage to the lands to the east of the easement area which had frontage against Center Street (R. 99), he testified that those two fringe areas, being 9 acres in total, would sustain the same general type of altered use as the land within the easement area (i.e. lower quality homes and lower priced homes and land) because the 9 acres of fringe areas were "so involved" as an integral part of the development of the tract from which the easements were taken (R. 100). He explained that their size, shape and location required that they necessarily be developed with the easement-imposed lands and that the 9 acres of fringe lands sustained a diminution in value of $1,000.00 per acre, being half of that sustained by the areas subjected to the easements, mainly because the restriction as to height would not involve the 9 acres nor would there be a cloud on the title showing the easement (R. 103, 104, 105).



It is sometimes helpful to produce an illustration or diagram to explain why a severance damage can occur in a case such as this. Exhibit 8 has been reproduced showing the long, triangular and irregular shaped fringe areas located to the north and west of the easement area taken. It takes little imagination to see why any reduction in the nature of the use of the 13.1961 acres would also substantially apply to those 9 acres.

CONCLUSION

Respondent submits that the judgment entered by the lower Court be affirmed because.

1. Appellant has failed to produce any law, and none can be found, which holds that severance damages cannot be awarded as a matter of law in any situation to properties of an owner which lie contiguous to lands upon which an aerial easement has been taken.

2. Appellant did not certify an issue on appeal pertaining to the admissibility of evidence; and, in any event, appellant took no proper exception to the admission of evidence claimed to be speculative in nature, has not furnished law which would justify any such objection being takeneither at the trial or at this time, and is arguing the weight of evidence before this Court.

3. The evidence introduced by respondent is adequate to sustain an award of $4,500.00 severance damages to 9 acres of contiguous lands of respondent which have been reduced in value by reason of the imposition of the aerial easements in this case.

Respectfully submitted,

GLEN E. FULLER and
MARLIN K. JENSEN
15 East 4th South Street
Salt Lake City, Utah 84111
Attorneys for Respondent