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

Utah Supreme Court

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

PROVO CITY CORPORATION,
Plaintiff and Appellant,

vs.

DONNA I. KNUDSEN,
Defendant and Respondent.

Case No. 14637

APPELLANT'S BRIEF

Appeal from the Judgment of the
Fourth District Court
The Honorable J. Robert Bullock

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STATEMENT OF THE NATURE OF THE CASE

This is an eminent domain lawsuit which was instituted by the City of Provo for the purpose of condemning aerial rights only across private property at the end of a runway at the City airport.

DISPOSITION IN THE LOWER COURT

The condemnation action went before the Court sitting without a jury on the sole issue of damages and the amount of compensation to be paid for the taking. The Lower Court awarded compensation in the amount of $16,495.00 for the easement taken and $4,500.00 as severance damages.

NATURE OF RELIEF SOUGHT

The appellant seeks a reversal of that portion of the judgment assessing severance damages.

STATEMENT OF FACTS

The respondent is the owner in fee of a 33.37 acre parcel of undeveloped agricultural ground on the south side of Center Street in Provo, Utah, in the general vicinity of the appellant's Municipal Airport.

As a part of the airport improvement program funded by the F.A.A. the City requested the respondent to grant to the City an aerial easement across 13.1961 acres of the respondent's property. The closest boundary of the respondent's property to the end of the airport was 1428 feet north of the pavement edge, the runway under F.A.A. regulations requires a twenty-to-one approach surface so that the present height limitation would be 61.4 feet. The minimum approach surface that could ever be anticipated to be used would be a fifty-to-one approach surface which would indicate a height limitation of 24.5 feet at the part of respondent's property closest to the airport runway. The proposed easement would limit building and vegitation growth on the respondent's property within the perimeter of the condemned easement to a maximum of 24 feet in height.

Counsel for the respective parties stipulated that the matter go before the Court on the sole issue of compensation to be paid for the taking.

The appraisers selected by the City assessed the damages accru-

ing by reason of the aerial easement to be one-fourth of the total value of the fee. In his opinion, the total value of the property was $4,000.00 per acre and he therefore assessed the damages at the rate of $1,000.00 per acre for the 13.1961 acres.

The property was zoned A-1 Agricultural and except for stock fences was bare of any improvements, being used as pasture ground for cattle. The agricultural zoning at the time of the taking required 20 acres for one dwelling. The ordinance had been since modified to allow a dwelling on each ten acres. Mr. Brown, the City's appraiser appraised the value based upon comparables establishing a market value of $4,000.00 per acre and based upon the highest and best use being that of pasture, and the agricultural uses to which it was then devoted. (See partial transcript of trial, Page 11.) The appraisal of Mr. Paul Brown was based on the diminution of value of the 13,1691 acres and he gave as his opinion that there was no damage to the remaining approximately twenty acres which were unaffected by the aerial easement.

Mr. Wilbur Harding, the appraiser for the land owner gave as his opinion that the 13,1961 acres were worth $5,000.00 per acre and that the value would be diminished 40 per cent because of the aerial easement, or $2,000.00 per acre. (See transcript, Page 39.)

Mr. Harding felt there was additional damage in the nature of severance damage to the remaining property in the amount of $9,000.00.

The apparent formula adopted by the Court in evaluating the

taking for the aerial easement only, was to utilize the $5,000.00 per acre figure asserted by the property owner's witness and to apply the 25 per cent damage factor utilized by the City's witness resulting in a figure of approximately $1250.00 per acre as the damage occasioned to the area within the taking of the easement. The severance damage figure used by the Court of $4500.00 is 50 per cent of the figure used by the landowner's witness and appears to be a compromise figure halfway between the two appraisers' estimates as to severance damage.

ARGUMENT

POINT I

THE COURT ERRED AS A MATTER OF LAW IN ALLOWING SEVERANCE DAMAGES TO PROPERTY NOT INCLUDED IN THE AERIAL EASEMENT.

Severance damages are allowed under Utah law only in connection with a physical taking of land which results in an easily discernable damage to the remaining property.

The applicable statute is 78-34-10 UCA 1953, as amended, which reads in part as follows:

> "The court, jury or referee must hear such legal evidence as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess: . . . (2) If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the por-

tion 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."

The Utah Supreme Court has considered this aspect of condemnation a number of times. The case of *Provo River Water Users Association v. Carlson* 103 Utah 93, 133 P.2d 777, stated at Page 779:

"All of the cases in this 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 . . . 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."

See large number of cases quoted on Page 780 of that opinion. The Court goes on further to discuss the aspect of replacing agricultural ground which was not in any way unique, (that being the case of the instant lawsuit) in which case the only value to be awarded to the condemnee was the value of substitute farmland of substantially the same quality.

Quoting further:

"Furthermore, even if no uncultivated pasture land were available to defendant after his 18.75 acre tract was taken by plaintiff, he still would not be entitled to severance damages if there are in fact other farmlands available for purchase which would produce relatively the same results."

This 1943 case has been quoted approvingly by the Utah Supreme Court at least three subsequent times and has never been overruled and is therefore presumed to still be the law of this jurisdiction. See, for instance, *State v. Cooperative Security Corp.* 1 Ut 2d 178, 264 P.2d 281 where the Court held that the facts did not warrant severance damages because there was other contiguous available comparable land which easily could have been put to the same use as that taken. The Trial Court, who had awarded severance damages generally was reversed and the same result should be found in this case.

The suit at law is a *condemnation* action in which the sole issue was the value of the taking of an aerial easement, the sole function of which was to limit the height to which buildings or other obstructions would be allowed to exist. Such an aviation easement is unique to airport cases and is to be strictly differentiated from such things as power line easements, etc. The rationale for the doctrine set forth in airport cases is stated succinctly in the case of *United States v.* 48.01 *Acres of Land* 144 F. Supp. 258 at Page 260 as follows:

> "As was held in U.S. v. 4.43 Acres of Land, etc. DC, 137 F. Supp. 567, 569, the interest acquired "has but one function, insofar as these condemnation proceedings are concerned, and that is to serve as the ceiling of the land in question beyond which obstructions or structures may not be allowed to extend upward into the adjacent airspace. Its nomenclature is unimportant." The Court further said that *by such easements, the Government did not acquire, and should not be required to pay compensation, for damages to the lands resulting from the flights of aircraft.* The easements there acquired, as here, were limited to the preven-

> tion of obstructions or structures on the land extending into the airspace above the "glide angle plane" . . . (Emphasis added)

Any loss, or depreciation in value, incident to the low level flights of aircraft over the premises has to do with the future, and is not to be considered here. *Olson v. U. S.* 292 U. S. 246, 54 S. Ct. 704, 78 L. Ed. 1236.

The fact that a condemnation of ground adjacent to an airport does not give rise to "severance damages" is well established in Federal Law where we find most of the airport cases. For instance, see *R. E. Boyd et al. v. U. S.* 222 F.2d 493. I quote at Page 494:

> The applicable general principles are well settled. "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, ambracing . . . injury due to the use to which the part appropriated is to be devoted." U. S. v. Grizzard 219 U. S. 180, 183, 31 S. Ct. 162, 163, 55 L. Ed. 165, 31 LRA, NS. 1135. The uses to which an appropriated part of a tract is to be devoted means, for purposes of any depreciating injury occasioned to its adjoining remainder, "the uses to which the land taken may, or probably will, be put" Sharp v. U. S. 191 U. S. 341, 24 S. Ct. 114, 116, 48 L. Ed. 211. "but a landowner's right to compensation for such a depreciating injury to his remainder has relation only to the effecting use that may be made of the taken part of his own tract and "does not *include the diminution in value of the remainder caused by the acquisition and use of ad-*

joining lands of others for the same undertaking." Campbell v. U. S., 266 U. S. 368, 372, 45 S. Ct. 115, 117, 69 L. Ed. 328." (Emphasis added)

Boyd v. U. S. on Page 496 summarizes the position taken by the Federal Courts and sustained by the U. S. Supreme Court,

". . . It must be remembered in this connection that any subsequent operation of the field in such a manner as to cause appellant's remainder to be subject to flights of aircraft over it, so low and frequent as to constitute a direct and immediate interference with their enjoyment and use thereof, would itself give rise to a wholly independent right of compensation for the appropriation of an easement as to the remainder. See U. S. v. Causby, 328 U. S. 256, 66 S. Ct. 1062, 90 L. Ed. 206. The present condemnation does not cover any such possible, subsequent and additional taking."

The Federal Courts have adopted this position and have held firmly as in the Causby case above cited that the passage of airplanes above property will result in a taking for which condemnation must result either upon institgation of the government or as an inverse condemnation. There is a long line of cases such as *Batten v. U. S.* 306 F.2d 580 (1962) in which the Courts found that the operation of airplanes which constituted a nuisance to adjacent property over which they did not fly did not constitute a taking of an interest in the property for which compensation had to be paid because the government did not operate any planes over the property in question. As stated in *U. S. v. Cress* 243 U. S. 316, 328, 37 S. Ct. 380, 385, 61 L. Ed. 746:

"It is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether or not it is a taking."

POINT II

THE TRIAL COURT ERRED IN ALLOWING SPECULATIVE EVIDENCE AS THE BASIS FOR SEVERANCE DAMAGES.

The Court has erred in allowing speculative evidence to be put into the record over objection from counsel as to severance damages to properties outside of the condemned area. (See Transcript Pages 44 and 45.) Counsel for the landowner was asking the questions and his own appraiser was giving the answers as set forth below:

"Q And in considering the reduction in value of $1,000.00 per acre to this particular nine acres, did you give any effect to the fact that that area would not have an easement of record on it?

A That is the reason that I cut the damage in half. They could have taller buildings, they could have taller trees, they could have this and that that they couldn't have on the yellow area.

Q As you view it, in your opinion, would there be any logic in attempting to utilize the nine acres to a more concentrated type of building or whatever than the yellow area?

A No, because of the size of the property. Now there may be a few, one or two areas where they put larger homes, and one thing and another, and they know they are not effected by the easement. And so, therefore, it becomes more of an

inconvenience of developing and arranging of property. And the diminution in value is because of that."

It is important to remember that this property is zoned agricultural, not residential, and the zoning in effect at the time of the taking limited residential use to one residence on each lot having twenty or more acres. Highest and best use under the applicable zoning was agricultural, yet the Court heard and granted severance damages on the assumption that the property would be used for suburban residential. (See Transcript Page 31.) It is wholly unfair and contrary to accepted law to allow such speculative evidence to be the basis for a severance figure in addition to already calculated compensation for the lands within the taking itself. It is as true in this case as it was in the case of *U. S. v. 48.01 Acres of Land* 144 F. Supp. 258 at Page 264 where the Court said:

"There is no evidence to indicate that the utility of the remaining lands . . . if used solely for farming and agricultural purposes, has been, or will be, impaired as a result of the easements taken on the aforesaid parcels. Furthermore, the proof fails to show that there was, at the time of taking, an immediate demand and market for the residential developments of the land. . .

Agricultural and farming purposes are the only ones to which the Finley and Maroney lands have heretofore been put. This was true as of the time of taking, and such uses are the only basis upon which market value can fairly be determined. Citing *U. S. v. Miller* 317 U. S. 369, 63 S. Ct. 276, 86 L. Ed. 336."

Our Utah Supreme Court has held the same thing in the case of *State v. Tedesco* 4 Ut 2d 248, 291 P.2d 1028 in holding that the evaluating of condemned farm ground would not support the proposition that *if* the land were subdivided into residential lots that it would be of a higher value. The Court says:

> "A condemnee is not entitled to realize a profit on his property. It must go to the condemnor for its fair market value as is, irrespective of any claim to value based on an aggregate of values of individual lots in a subdivision which one hopes to sell at a future time to individuals rather than to an individual."

The Supreme Court of Utah further quotes in that case at Page 1030:

> "The jury are to value the tract of land and that only. They are not to determine how it could best be divided into building lots, nor conjecture how fast they could be sold, nor at what price per lot. A speculator or investor, in deciding what price he could afford to pay would consider the chances and probabilities of the situation as then actually existing.
>
> A jury should do the same thing. They are not to inquire what a speculator might be able to realize out of a resale in the future, but what a present purchaser would be willing to pay for it in the condition it is now in. *Pennsylvania SVR Company v. Cleary* 125 Pa. 442, 17A. 468 quoted with approval in *U. S. v. 3,544 Acres of Land, etc.* 147 F.2d 596, 598

Also see *Utah Road Commission v. Hanson* 14 Utah 2d 305, 383 P.2d 917:

"Defendants' additional claim that limitation of access will lesson the value of their remaining land should they desire to divide and sell it in smaller pieces is likewise without merit. The valuation must be on the basis of what a willing purchaser would pay now and not what a number of purchasers might be induced to pay in the future for the land in smaller parcels."

CONCLUSION

In a suit for condemnation of an aerial easement at the end of an airport landing strip, it is improper for the Court to assess severance damages for two reasons applicable in this case.

The first is that severance damage does not have any application where an aerial easement only has been condemned and where there is no fee being acquired.

The second is that it was improper for the Court to allow severance damages when the property being condemned was agricultural and only by speculation as to a residential development which is not probable nor likely could the Court arrive at a figure upon which to grant severance damages.

Respectfully submitted this 20th day of August, 1976.

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