2001

State of Utah v. Bettilyon's, Inc and Nolan Oswald : Brief of Appellant

Utah Supreme Court

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)URT OF THE STATE OF UTAH

STATE OF UTAH, by and through its Road Commission,

Plaintiff and Respondent,

vs.

BETTILYON'S, INC., and NOLAN OSWALD,

Defendants and Appellants.

No. 10277

BRIEF OF APPELLANTS

Appeal from the Judgment of the Third District Court for Salt Lake County
Honorable Marcellus K. Snow, District Judge

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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,

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STATEMENT OF THE KIND OF CASE

This is a condemnation action brought by the State of Utah, by and through its Road Commission, for the condemnation of 11 acres of ground located in Salt Lake County, State of Utah, in the vicinity of Knudsen's corner (6200 South and Holladay Blvd.)

DISPOSITION IN LOWER COURT

This case was tried to a jury and a verdict for $130,000.00 was awarded to the Defendants. The Defendants appeal from this verdict.

RELIEF SOUGHT ON APPEAL

Appellants seek additional damages for cost of platting and planning of the original subdivision, for expenses incurred by Defendants during a 3½ year period, during which time Defendants were prevented by acts of the State Road Commission from making any use of their land, and for interest on the award from January 10, 1961.

STATEMENT OF FACTS

The land involved in this condemnation action is a 35.75 acre wooded tract (formerly the Auerbach Estate), located approximately 200 feet East and South of Knudsen's corner in Salt Lake County, State of Utah. Throughout this Appeal, the two Defendants and Appellants, Bettilyon's, Inc., and Nolan Oswald, shall be referred to collectively, as "Defendants" or, individually, as "Bettilyon" and "Oswald", and the Plaintiff, State of Utah, by and through its Road Commission, shall be referred to as either "Plaintiff" or "Road Commission".

While other Defendants are shown in various places in the caption of this action, the trial court determined that the only parties who had any interest in the proceedings were Bettilyon's, Inc., and Nolan Oswald.

On May 15, 1959, Commerce Investment Company, a Utah Corporation, (later merged into Defendant, Bettilyon's, Inc.), purchased 35.75 acres of ground under a Real Estate Contract (R 278, Exhibit D 36), for $170,000.00, plus real estate commission. The purchase price was paid as follows: $10,000.00 cash, plus commission; $23,402.00 by assuming a mortgage with Tracy-Collins Trust Company, and the balance of the purchase price, amounting to $136,598.00 was paid in four annual installments on succeeding years. Interest was charged on the unpaid contract balance, at the rate of 4% per annum, commencing May 15, 1959. Interest on the mortgage at Tracy-Collins Trust Company was charged at the rate of 5% per annum. The Real Estate Contract, at Paragraph 3 (R 281), required the Buyer to "proceed forthwith" to develop the ground by the formation of a subdivision. The firm of Bush & Gudgell was immediately hired to proceed with the engineering and planning of the subdivision and on June 28, 1960, a Preliminary Subdivision Plat of the proposed Random Woods Subdivision was presented to the Planning Commission of Salt Lake County (hereinafter referred to as "Planning Commission") and approved by this body (R 275, Exhibit D 29-2).

On December 8, 1960, the Road Commission took the first of a series of steps designed to deprive Defendants of the beneficial use of their land, without compensation. Mr. C. Taylor Burton, Director of Highways, on this date wrote a letter to the Planning Director of the Salt Lake County Planning Commission. We quote this letter in full because it clearly shows the plan the Highway Department consistently followed during the next 2½ years, to prevent any use of the property in the path of the freeway without regard to the rights of the owners (**R 275, Exhibit D-29-5**):

"Utah State Department of Highways
Salt Lake City 14, Utah
December 8, 1960

Mr. Morris E. Johnson
Planning Director
Salt Lake County Planning Commissoin
355 South 200 East Street
Salt Lake City 11, Utah

Dear Mr. Johnson:

In order that steps may be taken to *protect the right-of-way needed for the construction of the southeast belt route* this is to request the Salt Lake County Planning Commission to *restrict further developments* along this route as provided by law. The attached plan shows the alignment.

A 400 ft. right-of-way is requested for reservation at this time. This width would be modified as detailed right-of-way plans can be developed. This route has been approved by the

Road Commission and it is anticipated that some right-of-way purchase may be undertaken within a year. Although actual date of construction is dependant upon availability of federal-aid funds there is some probability that actual construction may be started within two or three years.

Your assistance in preserving this right-of-way will be appreciated in the interest of keeping the public investment in this facility at a minimum.

Very truly yours,
/s/ C. Taylor Burton
Director of Highways

JEJ:iw
Attachment:"
(Emphasis added).

In June of 1960, Commerce Investment Company (prior to its merger with Bettilyon's, Inc.), sold an undivided one-half interest in the subject land to Nolan Oswald, the other Defendant.

On December 13, 1960, Defendants presented the final linen plat (Exhibit D 6) of the proposed Random Woods Division to the Planning Commission and action was deferred until January 10, 1961. The minutes of this meeting, relating to this transaction, are as follows: (R 275, Exhibit D 29-6):

"Mr. Johnson pointed out that the *State Road Commission has indicated they would put an interchange near or in the location of this subdivision; that perhaps they will need all of this area for this purpose.* Bush and Gudgell requested that disposition be tabled until the next Planning Commission meeting. By motion sec-

onded and unanimously passed the Planning Commission tabled decision of Random Woods Subdivision, 6300 South 2900 East, until the next meeting, January 10, 1961." (Epmasis added).

On December 20, 1960, Henry C. Helland, Chief Planning and Programming Engineer, Utah State Department of Highways, wrote a letter to the Planning Commission and the second and last paragraphs of this letter are quoted (R 275, Exhibit D 29-7):

> "It is noted from the small zoning map enclosed in your letter that the Random Woods Subdivision near Knudsen's Corner was given preliminary approval. The Belt Route location in this area would take a considerable portion of the northwest corner of this subdivision."
>
> "We are very much aware of the problems confronting the Commission *and also realize that right-of-way costs are increasing daily.* Because of this you can be assured that every effort will be made to expedite this work and furnish you with a map and legal description of the route at the earliest possible date in order that you may use whatever legal means available to you to protect the right-of-way from new building encroachments or other development." (Emphasis added).

On January 10, 1961, at its regular meeting ,the Planning Commission denied approval of the Random Woods Subdivision final linen subdivision plat. The minutes of this meeting relating to this transaction are as follows (R 275, Exhibit D 29-9):

"Random Woods Subdivision, 6300 South 2900 East, falls partially within the right-of-way requested by the State Road Commission for the Belt Route. By motion seconded and unanimously passed *the Planning Commission deferred approval of this final plat until one year from this date,* with the understanding that should the State Department of Highways find before that date that all or part of this subdivision will not be needed for the Belt Route, the Planning Commission would consider this subdivision, or parts thereof, for approval at that time." (Emphasis added).

Deferred for 1 year Minutes so reflect

On January 16, 1961, in a letter to Roscoe Boden, County Surveyor, Mr. Douglas H. Campbell, Assistant Director of the Planning Commission, stated (R 275, Exhibit D 29-10):

"The linen plat of Random Woods Subdivison was considered for final approval at the Planning Commission meeting on January 10, 1961. The Planning Commission has received plats of the proposed alignment of the Interstate Belt Roue with a request from the State Road Commission that this right-of-way be protected as much as possible."

On November 15, 1961, Mr. C. Taylor Burton, Director of Highways, wrote to the Salt Lake County Commission, as follows (R 275, Exhibit D 29-11):

"Utah State Department of Highways
Salt Lake City 14, Utah
November 15, 1961

Salt Lake County Commission
City & County Building
Salt Lake City, Utah

SUBJECT: Salt Lake Belt Route - I-215 & I-415

Gentlemen:

Previously we advised you as to the tentative location of the Belt Highway in the Southeast quadrant *and requested you to reserve this right-of-way*. Since that time, we have made definitive right-of-way plans which indicate the exact area required for the construction of the Belt Route. Attach find drawings showing the location of the Belt Route in the Southeast quadrant.

It is requested that you zone the right-of-way shown on the attached drawings to preclude the further construction in these areas.

Very truly yours,

/s/ C. Taylor Burton
C. TAYLOR BURTON
Director of Highways

Enclosure"
(Emphasis added).

This letter is quoted to show the continuing attitude of the Road Commission in attempting to preserve the right-of-way throughout the entire period covered by this matter.

From the date of December 7, 1960 (the time the Planning Commission first indicated that the Random Woods Subdivision Plat would not be approved), to

September 25, 1961, Mr. B. Lue Bettilyon, President of Bettilyon's, Inc., was in constant contact with officials of the Road Commission in an attempt to expedite matters, so that Plaintiff would be able to determine how much of Defendants' land would be required by the Road Commission (R 25 to 27), but it was not until February, 1962 (T 228), more than one year after the final linen plat was refused by the Planning Commission, that the Road Commission was able to present the first preliminary drawings (with tentative approval by the Bureau of Public Roads), of the interchange to be constructed on Defendants' ground. This was the first time that either Plaintiff or Defendants knew how much of the land would be required by the State.

From October 26, 1961 to July 30, 1962, Mr. B. Lue Bettilyon was in contact with the officials of the Right-of-Way Department, in an attempt to get them to make an offer of settlement on the ground that was being taken by the Road Commission (R 27-29), but even as late as September 1, 1962, the State had not even made an offer for the purchase of this land that they would require.

On July 30, 1962, Mr. B. Lue Bettilyon wrote a letter (R 16) to C. Taylor Burton, explaining that Defendants had payments to make on the ground in excess of $79,000.00 and requested the State to make a partial payment of $40,000.00 on the eventual purchase of the ground. On September 4, 1962 (R 20 and

29), the State made a partial payment of $40,000.00 to Defendants.

The State finally made its first offer on the land they were taking early in 1963 (T 241-2), more than two years after the Plenning Commission had refused to approve the final linen plat of Random Woods Subdivision.

Thereafter, the parties negotiated for approximately two months, but were unable to reach agreement upon the price to be paid and, finally, to force the State to commence condemnation action, Defendants appeared before the Planning Commission on May 28, 1963, and requested approval of the final linen plat of Random Woods Subdivision. The minutes of this meeting (R 275, Exhibit D 29-16) show that the plat was approved and on July 22, 1963, the State finally served Summons and Complaint in this action.

The land involved in this condemnation proceeding is quite heavily wooded with natural trees and, in one spot, a large old orchard. There are some open spots, as indicated on Exhibit D 4. Mr. B. Lue Bettilyon testified (T 171-2) that there was no use to which the ground could be used from January, 1961 to July, 1963, except for subdivision purposes; that the homes were not suitable for rental; that the orchard was too old for farming and, in addition, that the ground could not be used for agricultural purposes because of the wooded nature of the ground and, also, because there was no irrigation water available for this use.

In the planning and development of the Preliminary and final Random Woods Subdivision Plats, Defendants incurred the following expenses (R 72 and R 31): $3,893.25 for engineering expenses (Bush & Gudgell and County Surveyor); $1,996.25 paid to employees of Bettilyon's, Inc., for work and labor on the planning of this subdivision (Note: the Findings of Fact (R 72) indicate $1,296.25, but the Exhibits at (R 300-303, Exhibit D 37) and the testimony of B. Lue Bettilyon at T 168-G, which was uncontroverted, indicates the total sum of $1,996.25); $160.02, signs for the subdivision roads and photos used in the planning and development of the subdivision—or a total of $6,049.52 spent in developing the final subdivision linen plat.

During the period of January 10, 1961 and July 22, 1963, Defendants also incurred expenses caused by the delay of the State in preventing the development of the subdivision (R 300-301, Exhibit 37) and (Amendment Findings of Fact (R 71)) as follows: Real property taxes on property eventually taken by the State of Utah), $1,189.20; $200.00 for water connection required to bring water into a Caretaker's house (if the subdivision had been developed, this expense would have been reimbursed by Salt Lake City); $904.90 for water bills from Salt Lake City for water used at the premises during the period mentioned above; (this expense would not have been incurred except for the delay) $178.00 required for the removal of a dead tree that was endangering neighbor's property. This

tree would have been removed during the course of development of the subdivision by equipment already on the site, if the subdivision had proceeded according to plan, but subsequent windstorms required that it be removed at the expense indicated; $290.25 for fire insurance premiums on the buildings on the property, for a total of $2,762.35.

In addition to the above expenses, Defendants paid $3,781.73 as interest to Tracy-Collins Trust Company on the mortgage on the property and the sum of $7,182.15 as interest to Security Title Company, on the unpaid balance on the purchase contract, or a total of $10,963.88 interest paid for the acquisition on the land and the interest computation on invested capital in the real property amounted to $18,329.07 (R 33-4 and 73 A) and (R 302-303, Exhibit 37).

In summary, on January 10, 1961, the Planning Commission denied approval of the final linen plat. 2½ years later, on July 22, 1963, the State filed this condemnation action and the final Order of Condemnation was entered on August 31, 1964, making a total delay of more than 2½ years.

STATEMENT OF POINTS

POINT I. THE ACTS OF THE STATE ROAD COMMISSION, IN REQUESTING THE PLANNING COMMISSION OF SALT LAKE COUNTY TO DEFER ACTION ON THE FINAL LINEN PLAT OF RANDOM WOODS

SUBDIVISION, CONSTITUTED A TAKING OF DEFENDANTS' PROPERTY, FOR WHICH COMPENSATION MUST BE PAID UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION, AND ARTICLE I, SECTIONS 7 AND 22 OF THE CONSTITUTION OF UTAH. INTEREST SHOULD HAVE BEEN PAID ON THE JURY AWARD FROM JANUARY 10, 1961, THE DATE DEFENDANTS' PROPERTY WAS TAKEN BY THE ROAD COMMISSION.

POINT II. IN THE EVENT THAT THE COURT DOES NOT DETERMINE THAT THE ACTS OF THE PLAINTIFF, ROAD COMMISSION, BEFORE THE PLANNING COMMISSION OF SALT LAKE COUNTY, IN DEFERRING ACTION ON THE PROPOSED FINAL LINEN PLAT OF RANDOM WOODS SUBDIVISION WAS A TAKING OF DEFENDANTS' PROPERTY, THEN, IN THE ALTERNATIVE, DEFENDANTS ARE ENTITLED TO DAMAGES CAUSED BY THE PLAINTIFF, ROAD COMMISSION, IN PREVENTING DEFENDANTS FROM USING THEIR PROPERTY FOR 3½ YEARS.

POINT III. DEFENDANTS ARE ENTITLED TO THE COST OF THE ENGINEERING, PLANNING AND DEVELOPING OF

THE FINAL LINEN PLAT OF RANDOM WOODS SUBDIVISION, AS THE SAME CONSTITUTES AN IMPROVEMENT TO THE PROPERTY, UNDER 78-34-10 (1), U.C.A. 1953.

ARGUMENT

POINT I. THE ACTS OF THE STATE ROAD COMMISSION, IN REQUESTING THE PLANNING COMMISSION OF SALT LAKE COUNTY TO DEFER ACTION ON THE FINAL LINEN PLAT OF RANDOM WOODS SUBDIVISION, CONSTITUTED A TAKING OF DEFENDANTS' PROPERTY, FOR WHICH COMPENSATION MUST BE PAID UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION, AND ARTICLE I, SECTIONS 7 AND 22 OF THE CONSTITUTION OF UTAH. INTEREST SHOULD HAVE BEEN PAID ON THE JURY AWARD FROM JANUARY 10, 1961, THE DATE DEFENDANTS' PROPERTY WAS TAKEN BY THE ROAD COMMISSION.

This case presents an unusual factual situation which, as far as we can determine, has not yet been presented to this Court.

The Road Commission, in accomplishing its aims of keeping the cost of the Right-of-Way as low as pos-

sible, made use of a Salt Lake County Ordinance as amended, which provides in part: 9-7-3, *Parks, School Sites and Other Public Spaces*:

> "(1) *Provisions for Public Use.*
>
> When a preliminary plat is submitted for the division of property a part or all of which is deemed suitable by the Planning Commission for schools, parks, playgrounds, or other areas for public use, the Planning Commission shall apprise the proper agency in writing of the property owner's intent to subdivide. If any such areas proposed for public use have not been freely dedicated to the public by the owner or have not been purchased at a fair price by the proper agency within one (1) year from the date of notification, such areas may be divided into lots and sold in accordance with the provisions of this Title."

The letter of December 8, 1960, addressed to Morris E. Johnson, Planning Director, Salt Lake County Planning Commission, signed by C. Taylor Burton, the Chief Executive Officer of the Road Commission, sets the stage and indicates the attitude of the Department of Highways, regarding the acquisition of Defendant's land. In this letter, Mr. Burton says: "Steps must be taken to *protect the Right-of-Way*" and requested that the Commission *"restrict development."* He asked that 400 feet be reserved, at that time, to be "modified" (narrowed) at a later time, and then, in the final paragraph, summarizes the position of the Road Commission: "Your assistance in preserving this

Right-of-Way will be appreciated in the *interest of keeping the public investment in this facility at a minimum.*" (Emphasis added.) Several months later (on November 15, 1961), Mr. Burton stated, in a letter addressed to the Salt Lake County Commission: "Previously we advised you as to the tentative location of the Belt Highway in the Southeast quadrant and *requested you to reserve this right-of-way.*" In the same letter, he requested: "that you zone the right-of-way shown on the attached drawings *to preclude the further construction in these areas.*" (Emphasis added.) Other letters of a similar vein, were written by other officials of the Road Commission, as set out in the Statement of Facts.

On January 10, 1961, the Planning Commission of Salt Lake County deferred action on the final linen plat of Random Woods Subdivision and this was done solely at the request and instance of the State Road Commission and the sole purpose was to prevent the property from being put to any beneficial use by the landowner, by further development of a subdivision and to prevent construction of homes in the path of the freeway and thereby to substantially reduce the cost of right-of-way acquisition.

In this respect, the testimony given at the trial, indicates that the acts of the Road Commission in stopping the development of the Random Woods Subdivision saved the State of Utah approximately $800,000.00. Exhibits D 7, 8, 9 and 10 indicate that approximately 20 lots in the proposed subdivision were taken

by the State for freeway purposes and homes having an average value of $40,000.00 would have been constructed on these lots over the 2½ years prior to the commencement of the condemnation action (T 172). But even if, for the sake of argument, we say that only five or ten homes would have been constructed during that time, a tremendous savings was effected for the state. The value of one house is greatly in excess of the interest on the award that Defendants are claiming.

In view of the already high cost of freeway construction and limited funds available therefor, this was, and is, a worthy accomplishment (and we do not disagree with the results) — so long as the rights of the individual are safeguarded and private property is not taken without compensation.

Our point of view is expressed by this Court in the case of Springville Banking Co. vs. Burton, 10 Utah (2d), 100; 349 P(2d) 157 (at page 158):

> "On the other hand, if public officials act arbitrarily and unreasonably, causing, for example, total destruction of the means to get in and out of one's property, *without any reasonable justification for doing so in the public interest, in a manner that imposes a special burden on one not shared by the public generally,* principles of equity no doubt could be invoked to prevent threatened action of such character or to remove any instrumentality born of such conduct. Plaintiff did not allege or assert anything akin thereto." (Emphasis added).

There is little difference in the "total destruction of the means to get in and out of one's property," and the total prevention of any beneficial use of property, and there is no reason why one property owner should stand the entire burden that results in such an exceedingly great savings for the public in general.

The property in question (on January 10, 1961), as indicated in the Statement of Facts above, had only one use and that was for the development of a subdivision. When the Defendants were deprived of that use, there was an effective definite taking of Defendants' property, on that date.

The date of valuation of property in a condemnation action is set by statute as the date on which Summons is served (78-34-11, UCA, 1953), which, in this case, was July 22, 1963. This Court has consistently held that interest is allowed on the Judgment, either from the date of taking or, if there is no taking, then from the date the final award is made (Oregon Short Line R. Co. vs. Jones, 29 Utah, 147; 80 P 732; State vs. Peek, 1 Utah (2d), 263; 265 P (2d), 630.

In the instant case, the District Court allowed interest from the date of Judgment, but Defendants have consistently maintained throughout this trial that on the date the County Planning Commission refused to approve the final linen plat of Random Woods Subdivision, there was a taking of Defendants' property. Therefore, the issue to be resolved by this Court is:

What Constitutes a Taking and When Did the Taking Take Place in this Case?

2 Nichols on Eminent Domain, page 367 (paragraph 6.1(1)), states as follows:

> "It is well settled that a taking of property within the meaning of the constitution may be accomplished without *formally divesting the owner of his title* to the property or of any interest therein. *Any limitation on the free use and enjoyment of property constitutes a taking of property* within the meaning of the constitutional provision." (Emphasis added).

Also, we read at page 372:

> "Constitutional rights rest on substance, not on form, and the liability to pay compensation for property taken cannot be evaded by leaving the title in the owner, *while depriving him of the beneficial use of the property.* It has already been shown that *a legal restriction upon the use of land may constitute a taking, although the title is unaffected and the land is physically untouched,* and the same is true when the owner's enjoyment of the land is physically interfered with, although his legal rights remain unimpaired." (Emphasis added).

The U.S. Court of Claims, in the case of L. L. Richards vs. U.S., 282 Fed R (2) 901 (at page 904) in ruling on an invasion of Defendants' ground by raising the subterranean water table, stated:

> "We reiterate what we said in Cotton Land Co v. United States, 75 F. Supp. 232, 109 Ct.

Cl. 816, that it is not necessary to show that the defendant intended to take plaintiff's land; all that plaintiff need show is that the taking of its land was the natural and probable consequence of the acts of the defendant. It is not even necessary for plaintiff to show that defendant was aware of the taking of an interest in its property would result from its acts. It is only necessary to show that this was in fact the natural and probable consequence of them.

"In the instant case it appears that defendant in fact knew that there would be seepage and an accumulation of water unless it was carried off in some way. The only thing defendant did not know was where it would accumulate. It knew someone's land might be affected, but not whose. If it were necessary to show an intent—but it is not—an intent to commit acts that would probably result in the taking of some land has been shown. The particular land that might be taken was not within the control of defendant, but depended upon the laws of nature; but defendant did contemplate the possible taking of an interest in that land to which the forces of nature directed the accumultaion of water caused by its acts.

"We must hold that plaintiff's injury was the natural consequences of defendant's act, and that the defendant has taken a seepage easement under and through plaintiffs' property." (Emphasis added).

In case of Gerlach Livestock Co. vs. U.S., 76 F. Supp. 87 (at page 97), the Court quoted from the Supreme Court Decision in the case of Portsmouth

Harbor Land & Hotel Co. vs. United States, 260 U.S. 327, 43 S.Ct. 135, 137, 67 L.Ed. 287, and says:

> "Plaintiffs (in the Portsmouth case) alleged that the Government had installed a battery and a fire control tower on lands to the rear of plaintiffs' lands, and that the guns from this battery could be fired only over plaintiffs' lands, and it was alleged that the defendant intended to do so at will. The court said:
>
> ' * * * If the United States, with the Admitted intent to fire across the claimants' land at will should fire a single shot or put a fire control upon the land, it well might be that the taking of a right would be complete. But even when the intent thus to make use of the claimants' property is not admitted, while a single act may not be enough, a continuance of them in sufficient number and for a sufficient time may prove it. Every successive trespass adds to the force of the evidence. The establishment of a fire control is an indication of an abiding purpose.'
>
> "We think the reasoning behind this decision furnishes a guide for the determination of the time of the taking. That time, it would seem, comes whenever the *defendant's intent to take has been definitely asserted and it begins to carry out that intent.* So long as it is conjectural whether or not defendant will actually take plaintiff's property, a taking has not occurred, *but when conjecture ripens into a definitely asserted purpose and steps are taken to carry out that purpose, the taking may be said to have occurred."* (Emphasis added).

The effect of filing a map or a plan by governmental agency, under the ordinance referred to above, is discussed in 2 Nichols on Eminent Domain, 383, paragraph 6.12, as follows:

> "The mapping out of streets upon vacant land near large and growing cities has often been provided for, so that a systematic plan for the gradual enlargement of the city can be followed. A mere provision that after the recording of the map no streets shall be laid out which are not in accordance therewith is unobjectionable; but it is sometimes enacted that if the owner builds upon the land marked out for a street, when the street is actually laid out he shall receive no compensation for his building. *As the platting of a street under such a statute amounts substantially to a deprivation of the owner's use of the land within the limits of the projected street for any but temporary purposes, it is generally held that such statutes are unconstitutional unless the owner is compensated for his loss.*" (Emphasis added).

At page 386 of the same volume, the author says:

> "The mere passage of legislation authorizing the acquisition of property by eminent domain is ordinarily not sufficient, in and of itself, to constitute a taking. Where, however, the provisions of the statute and the circumstances under which the appropriation is to take place are such as to indicate *that the purpose of the law was to effect a taking by virtue of the statute itself, it has been held that a statute may be so construed as to vest title in the condemnor upon the mere passage of the law.*" (Emphasis added).

The invoking of an ordinance such as the one quoted above, can have but one effect and one purpose and this is, to prevent and owner from enjoying the beneficial use of his property and, therefore, when used, clearly constitutes a taking of the property, which must be paid for under our Federal and State Constitutions.

There are numerous cases that agree with this principle, including our own Courts. One early Utah case is, Fisher, et al vs. Bountiful City, 21 Utah 29; 59 P 520. In this case, the Legislature had passed a law giving a city the right to control water and water courses in the city, for city use. In the furtherance of this legislation, the city had passed an ordinance to implement it, and thereby took over the control of water that was previously under the sole control of the Plaintiffs. The Court says:

> ". . . Under Section 16, the city has the control of water and water courses leading to the city, and may regulate and control the same within the city, provided such control shall not be exercised to the injury of any right already acquired by the actual owners. This provision was clearly intended to protect the owner in his right to water already acquired. The right referred to carried with it such authority and dominion as the owner then and formerly had to the full control, supervision and use of the water belonging to him, without the exercise of the dominion, supervision, management, control, or the right to the distribution thereof by the city, or any other authority, except it emanated from the owner, it was a plain declaration that the right

to private property and private ownership of water should not be taken away from a citizen without just compensation, and that such right should be respected and protected in the owner. *The right to own property carries with it the right to exercise dominion and control over it. When the dominion, control, and management of one's property is taken away from him, the right to private property is violated. To take away the dominion and control over property is to take the property itself; for the absolute right to property includes the right of dominion, control, and the management thereof.*" (Emphasis added).

A similar factual situation was ruled on by the Pennsylvania Supreme Court, in the case of Miller, et ux, vs. City of Beaver Falls, 368 Pa 168; 82 Atlantic (2), 34, where the city laid out a plat for a park and provided that no buildings or structures that were constructed in a proposed park, during a three-year period, would receive compensation. In other words, the use of the land was frozen for a three-year period. The Court held that the act of plotting and freezing of the ground for three years was a taking, which would be in violation of the Pennsylvania Constitution and the Fourteenth Amendment to the Federal Constitution. The Court said, at page 37:

> "The action of the City of Beaver Falls in plotting this ground for a park or playground and freezing it for three years, is, in reality, a taking of property by possibility, contingency, blockade and subterfuge, in violation of the clear mandate of our Constitution that property can-

not be taken or injured or applied to public use without just compensation having been first made and secured. The contention of the City in this case, if adopted, would make a travesty of the constitutional provisions protecting rights of property."

In another case, Atton vs. City of Rochester, 197 New York Supp (2d), 302, the City passed a Zoning Ordinance prohibiting the Plaintiff's land from being used for heavy industry. The evidence indicated that because of the location of the property, fronting on a River and because the area surrounding Plaintiff's property was all used for heavy or commercial use, that the Palintiff was precluded from using the property for residential or hardly any other purpose, other than commercial use. The Court stated (at page 306):

> "An ordinance which permanently so restricts the use of property that it cannot be used for any other reasonable purpose goes, it is plain, beyond regulation, and must be recognized as a taking of the property."

It is clear, from these cases, and numerous others, that the "taking" can be non-physical or constructive. This rule is cited in 2 Nichols on Eminent Domain, page 407, paragraph 6.3:

> "The modern and prevailing view is that any subtantial interference with private property which destroys or lessens its value, or by which the owner's right to its use or enjoyment is in any substantial degree abridged or destroyed, is, in fact and in law, a "taking" in the con-

stitutional sense, to the extent of the damages suffered, even though the title and possession of the owner remains undisturbed."

At page 409, the author says:

> " . . . The broader view, which now obtains generally, conceives property to be the interest of the owner in the thing owned, and the ownership to afford the owner the rights of use, exclusion and disposition. Under this broad construction there need not be a physical taking of the property or even dispossession; any substantial interference with the elemental rights growing out of ownership of private property is considered a taking."

In the Oregon Shortline R. Co. vs. Jones case, cited above, at page 734, Justice Straup gives an exhaustive well-written opinion on the matter of payment of interest. In this case, apparently vacant ground was involved and Defendants claimed interest from the date Summons was served and the rule of law was set that has been consistently followed to the present time: That interest is paid only from *the date of taking or date of entry of Judgment.* Concerning the matter of an "actual" taking or a "constructive" taking, Justice Straup said:

> "In determining the claim to interest, much depends upon when, in the proceedings, the taking of the property took place. While the law is most exacting that private property shall not be taken without compensation, still the condemner is not required to make that compensation until he does take, either actually or

constructively. The cases cited by appellants on what constitutes a taking are not pertinent to the matter of inquiry. In earlier times it was held that property could be deemed to be taken, within the meaning of constitutional provisions, only when the owner was wholly deprived of its possession, use, and occupation. But a more liberal doctrine has long been established, and an actual, physical taking of property is not necessary to entitle its owner to compensation. A man's property may be taken, within the meaning of constitutional provisions such as ours, although his title and possession remain undisturbed. To deprive him of the ordinary beneficial use and enjoyment of his property is, in law, equivalent to the taking of it, and is as much a taking as though the property itself were actually taken . . . The question as to whether appellants are entitled to compensation for property injuriously affected or damaged, though not actually occupied or to be occupied, as illustrated by the cases cited by them, does not here arise. And if it had arisen, such claim is conclusively answered in their favor by express terms in the Constitution and in the statute. The material point, therefore, here, is not, was there a taking? for such fact must be conceded by everyone, but, when did the taking occur? For it is with respect to the time of the taking that compensation, under the Constitution, must be made."

In this case, Justice Straup is here discussing the question of the difference between "taking" and "damage," as appears in the Utah Constitution, and the construction of the word "taking" as it appears in the Federal Constitution, and some of the other State Constitu-

tions (see the discussion on this subject appearing under Point II below). But, clearly, this statement also has reference to the question involved in this case: "When Did the Taking Occur," and the fact there can be a "constructive taking" of property, without the governmental agency entering upon the land of the Defendants or disturbing their otherwise possessory right.

The Oregon Shortline case is cited by a 1953 Utah Supreme Court case — State, by and through its Engineering Commission, et al vs. Peek (cited above), where the Court upholds the same rule; that is, that interest is paid from date of taking or date of Judgment.

In the opening statement, at page 632, after setting out the facts, the Court makes this broad statement:

> "Appellants are not entitled to interest on the Judgment prior to the time when actual possession was taken, this Court has uniformly so held."

Then, the Court cites the Oregon Shortline case. While the words "actual possession" were used, we feel this was obiter dictum and is not binding upon this Court, since the matter of actual possession was not before the Court; the Defendants were asking interest from the date of service of Summons.

In addition, to further illustrate this point, the opinion then goes on, at page 634, to quote from the Oregon Shortline case. These words are used:

> "The court in that case conceded that property might be damaged by a public improvement although not actually taken, in which case the owner would be entitled to damages, it being held that Section 3599 fixed "the time with reference to which compensation is to be computed, rather than fixing the time of the taking, or when the property *shall be deemed to have been taken.*" " (Emphasis added).

It is interesting and important to note and the record is replete with evidence, that the Defendants fully cooperated with the State Road Commission with the aim of an early termination of the matter. It was only after negotiations failed, after more than 2½ years of waiting, that Defendants forced the issue, by having the subdivision plat approved (R 275, Exhibit D 29-18), which act finally resulted in the State commencing this condemnation action. The Defendants cooperated with the State because they, as almost all citizens, are interested in the Road Building Program, and because they felt they would eventually be fairly compensated for the land taken by the State of Utah.

There were other courses of action open to the Defendants. For example, they could have commenced an action to Mandamus the Salt Lake County Planning Commission to approve the final linen plat of Random Woods Subdivision, with the ultimate aim of testing the constitutionality of the County Ordinance, under which these acts were taken. However, under the calendar of the District Court of Salt Lake County and the calendar of this Court, it would have been a minimum

of two years before a determination could have been made and, irrespective of the result, Defendants would have been in about the same position that they were in when the State finally filed Summons and Complaint. Also, under the interpretation of County Ordinance 9-1-8(8) and 5-1-1 et seq., two building permits will be issued on a large tract of land before requiring a subdivision to be approved and recorded. Therefore, in spite of the fact that the linen plat had been deferred for one year, Defendants could have obtained two building permits and constructed two homes upon the land in the path of the freeway. This, certainly, would have been an act of bad faith but perfectly legal and, without question, under the provisions of 78-34-11, UCA, 1953, Defendants would have been fully compensated for the reasonable value of such homes so constructed.

In view of the extreme cost that has been incurred by Defendants, resulting from this delay, would this have been a proper action? We think not, nor do we feel that a Mandamus action with the resulting expense to the State, County and Defendants was necessary or the proper action.

It is a fair question to ask: Why the State Road Commission did not proceed in an orderly manner under the procedures set up by our statute (78-34-9, UCA, 1963) for an Order of Occupancy? This would have stopped construction; it would have insured the reduced cost of acquisition of right-of-way; in fact, it would have accomplished all of the things set out by Mr. C. Taylor

Burton and other officials of the Road Commission in their various letters to the Planning Commission, but there are obvious reasons why the State did not use this judicial procedure. First, the State did not even know how much, if any, of Defendants' land was needed. Therefore, they could not describe, with certainty, the property to be taken as required under 78-34-6 and 9, UCA, 1953. Secondly, and more important in the eyes of the State Road Commission, they would have been obligated to pay for the land much sooner than they otherwise did, and there would have been no question as to the obligation of the State to pay interest from the date the Order of Immediate Occupancy was entered. All of these things were realized by the officials of the State Road Commission.

Does the fact that the Road Commission chose to proceed under an Administrative Order of the Planning Commission of Salt Lake County, rather than seeking judicial authority vested in the District Court of Salt Lake County, change the factual situation? Does it change the legal rights or obligations involved? We see no difference and we add, by way of comparison, that even the status of the legal title under either of the two procedures, remains the same. Under the Order of Occupancy, the owner retains the fee title and loses his possessory right. Under the Administrative Order, the landowner loses the beneficial use of the property which, we submit, is only loss of possession, and the title is finally passed with the final Order of Condemnation

entered in this case. There is one other great distinction — if the Plaintiff had proceeded under the Complaint and Order of Occupancy, it would have been required to set forth, with particularity, the amount of Defendants' ground that it intended to use and, eventually, purchase. Under the Administrative Order, the State effectively tied up all of Defendants' ground for 2½ years, until it was finally determined how much would be required and, it is to be noted, Defendants are not now asking compensation for the delay caused by their being unable to use the balance of their land.

There is one additional point that should be considered on this matter. On September 4, 1962 (R 20 and 29), at the request of the Defendants, the State Road Commission made a partial payment to the Defendants, in the amount of $40,000.00. This was prior to any negotiation for the purchase and prior to any attempt being made to establish valuation. This clearly shows the attitude of the State Road Commission — that it had intended, by its acts, to deprive Defendants of the beneficial use of their property; that they had, in fact, taken the property and it was only a question of determining the purchase price to be paid therefor.

CONCLUSION

From these facts and from the law cited, Defendants feel that there can be only one conclusion — that the Plaintiff took Defendants' land on January 10, 1961 and that interest should be computed from that date, on the award of $130,000.00 (less a credit for $40,000.00, paid on September 4, 1962), at the rate of 6% per annum.

POINT II. IN THE EVENT THAT THE COURT DOES NOT DETERMINE THAT THE ACTS OF THE PLAINTIFF, ROAD COMMISSION, BEFORE THE PLANNING COMMISSION OF SALT LAKE COUNTY, IN DEFERRING ACTION ON THE PROPOSED FINAL LINEN PLAT OF RANDOM WOODS SUBDIVISION WAS A TAKING OF DEFENDANTS' PROPERTY, THEN, IN THE ALTERNATIVE, DEFENDANTS ARE ENTITLED TO DAMAGES CAUSED BY THE PLAINTIFF, ROAD COMMISSION, IN PREVENTING DEFENDANTS FROM USING THEIR PROPERTY FOR 3½ YEARS.

The District Court made a finding of fact (R 72-74 A), listing the claims of the Defendants for damages caused by preventing Defendants use of the property for more than 3½ years. These damages consisted of interest paid on the contract and mortgage balances in the amount of $10,963.88; interest paid on capital invested in the purchase of the land, $18,349.07 (credit

was allowed for the $40,000.00 paid by the State); real property taxes paid by Defendants on the ground eventually taken by the State, in the amount of $1,189.20, and other miscellaneous items set out in the Findings and explained in the Statement of Facts, amounting to $1,608.25, for total damages amounting to $32,110.40.

The Amended Conclusions of Law (R 74 A-75) states:

> "3. That such claims, as submitted, are separate and independent causes of action unrelated to any issue of evaluation and damage compensable in the eminent domain proceedings."

This paragraph infers that the claims of the Defendants are possibly valid and just, but that Defendants have no standing in this Court to adjudicate them.

Article 1, Section 22, of the Utah Constitution states:

> "Private property shall not be taken or damaged for public use without just compensation."

In the case of State vs. District Court, Fourth Judicial District, 78 P(2d), 502, Justice Wolfe, in the dissenting opinion, gives an exhaustive treatise on the meaning of the words "taken or damaged," as they appear in the section quoted above. The main opinion, in that case, has been overruled for all practical purposes (see Hjorth vs. Wittenburg, 121 Utah 324; 241 P (2d) 907; State of Utah, by and through its Engineering Commission vs. Fred Tedesco, 4 Utah (2d) 31; 286 P (2d) 785; Springville Banking Co., vs. Burton (cited

above); Fairclough vs. Salt Lake County, 10 Utah (2d), 417; 354 P (2d) 105; State vs. Parker, 13 Utah (2d) 65; 368 P (2d) 585. For all intents and purposes, the dissenting opinion of Justice Wolfe, has been accepted in total by all of these later decisions.

The holding of the dissenting opinion of Justice Wolfe and the later cases, cited above, can be summarized as follows: When there is *no actual taking* of the landowner's property, but only *damage* (referred to by these cases as *"consequential damage"*), the State cannot be enjoined from proceeding with a project, nor can the State be sued for damages — the principle of sovereign immunity standing as a bar to these suits. The word "damaged" in this section of the Constitution, gives rise to a substantive right that is not self-executing; that is, does not give rise to a procedural right. This must be done by the Legislature, which has provided that in case of redress for consequential damage, application must be made to the Board of Examiners, as stated by Justice Wolfe, at page 522:

> "I conclude, therefore, that when the State is the real party which has caused damages in pursuit of its lawful business through one of its agencies not acting negligently, the sufferers of that damage must resort to the Board of Examiners for redress, and that such is due process under our Constitution and the Constitution of the United States."

However, Justice Wolfe concludes his opinion with the following statement, at page 524:

"On the side of the line where acts done in pursuance of an authorized objective are not authorized, are all those cases which involve an actual taking of property. The State Road Commissioners do not act within their authorization when they attempt to build a road over my property without acquiring it or arranging for compensation. But, ordinarily, when they do not physically take any property, but only improve or build on the State's own highway, which is one of the purposes of their existence, they act within their authority, and any consequential damage which may incidentally occur or be caused by such acts does not divest them of authority. *It is true that they may in some cases so raise a grade or build a viaduct or do some other act on the State's highway which, while not actually intruding on the property of another, may cause such a serious interference with the enjoyment of that abutting property as to amount to a 'taking'* . . .

"Thus it is true that in the transition from consequential damages to damages from actual trespass *there may come a point before actual trespass where practically the entire usefulness of a building or lot is destroyed, as where a street is raised to a point practically contiguous to the upper window of a home. This has, as said before, caused the courts in the old cases where municipalities and public service corporations have used the streets to call a substantial injury to property a "taking" within the meaning of the condemnation statutes."* (Emphasis added).

This case presents a factual situation that falls within the rule cited by Justice Wolfe. Here, the State proceeded before an administrative body to stop De-

fendants from proceeding with the development of their subdivision. There is, or was, no other use for which the ground could be used. These acts destroyed the entire usefulness of the property for 2½ years, until the State finally commenced condemnation proceedings and another year before these proceedings were completed, or a total of 3½ years.

An analogy might be drawn to the factual situation set out in the State vs. Parker case, cited above. In that case, the Defendant attempted to Cross-Claim in a condemnation action against the State, for damages caused by the construction of a freeway to other property not involved in that condemnation action. Justice Henriod stated, at page 587, ". . . on numerous occasions, we have held that such damage is not recoverable because of the State's immunity," (citing the above cases). This is not the factual situation in this case. Here, damages were caused by acts of the State Road Commission to property owned by the landowner, which was later taken by this condemnation action. The acts were so severe that they amounted to an actual taking of the property, but more than 2½ years pass before the State eventually files an eminent domain proceeding. This is not a new or a separate cause of action, as in the Parker case, or as found by the District Court in the instant case, but damages arising out of the same cause of action; therefore, they cannot be considered as ancillary to, or a part of, any other proceeding. The State of Utah having waived its right to immunity by

filing a condemnation action, must pay for all damages arising out of the taking of this property. It would not be reasonable to adjudicate only part of the damages before the Court and save a portion to be heard at a later time, before the Board of Examiners, even if we were to say that it were a separate cause of action where, as in this case, the acts amount to a "taking," this becomes a matter that can, and should, be adjudicated before the Courts and the Defendants cannot be told to take their claim to another body. This would create an unreasonable burden upon the landowner.

Attention is also directed to the State vs. Tedesco case, cited above, where one of the property owners, not holding a vested interest in the real property, claimed damages for losses that he suffered. Here, Justice Henriod again says (at page 789):

> "Since we hold that at best the defendant may have had a contract right in the development of prospective residential land, which, if carried out, would have enhanced the value of its land, such a claim cannot be made the basis for intervention in a condemnation suit brought by the state against property in which defendant has no vested interest. This being so, the defendant could not sue the sovereign for the damages claimed here, and the State's defense of sovereign immunity is well taken in this case."

In the instant case, however, Defendants had *a vested interest in the property* and were involved in a condemnation action solely concerning that property.

As stated in the Springville Banking Co. vs. Burton case, cited above, this "imposes a special burden on one not shared by the public generally. . . ."

The Court in the case of State, by and through its Engineering Commission vs. Peek, cited above, recognizes the possibility of a case of this nature where Justice Wade (at page 634) states:

> "Appellants further argue that failure to allow such interest constitutes a taking of private property for a public use without just compensation, in violation of Article I, Sections 7 and 22 of the Utah Constitution and the Fourteenth and Fifth Amendments to the Federal Constitution. *There are many cases which allow interest from the beginning of the condemnation proceedings even though the owner retains possession.* Such cases require him to account for the income, rents and profits of the land during that period. Some of them cite the above mentioned Federal Constitutional provisions and State Constitutional provisions similar to ours above cited in support of such holding. *Some of such cases require a showing on the part of the land owner that he has been deprived of profits during the period in question which he would have made had the suit not been commenced, and that such profits were not included in the damages which were awarded. The record here does not show that such proof was made in this case."* (Emphasis added).

In this case, Defendants have not attempted to show profits since they would come only from the sale of lots in the subdivision over a period of time (although

such evidence was before the District Court, but not included in the record before this Court), because it might appear to be too speculative or remote. However, Defendants have approached this problem from the point of view of damages suffered in the nature of interest actually paid on the contract and mortgage balances, in the acquisition of the land, and interest paid on moneys invested, during the 3½ year total period that the Defendants were delayed, as well as the other expenses incurred by reason of this delay. These are realistic figures that can be computed (R 33-34; also, R 300 to 303, Exhibit D 37) and are not remote or speculative. These figures represent actual loss in dollars and cents to the Defendants. They represent a cost; an actual expenditure that Defendants would not have incurred if it were not for the acts of the Plaintiff.

CONCLUSION

In conclusion, we respectfully submit that these damages represent a loss not included in the verdict of the jury — these items were never submitted to the jury and were not considered by them in arriving at their verdict. The Court refused to present them to the jury and at the special hearing, refused to allow these damages. If the Defendants are not awarded damages arising out of the acts of the Plaintiff, in depriving Defendants of their property for such a long period of time, then the State has effectively taken their property with-

out compensation, in violation of the Fifth and Fourteenth Amendments to the Federal Constitution and Article I, Sections 7 and 22 of the Constitution of Utah.

POINT III. DEFENDANTS ARE ENTITLED TO THE COST OF THE ENGINEERING, PLANNING AND DEVELOPING OF THE FINAL LINEN PLAT OF RANDOM WOODS SUBDIVISION, AS THE SAME CONSTITUTES AN IMPROVEMENT TO THE PROPERTY, UNDER 78-34-10 (1), U.C.A. 1953.

Our statute concerning the assessment of damages in a condemnation action, reads as follows (78-34-10):

> "78-34-10. *Compensation and damages—How assessed*—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:
>
> (1) The value of the property sought to be condemned *and all improvements thereon appertaining to the realty,* and of each and every separate estate or interest therein; and if it consists of different parcels, the value of each parcel and of each estate or interest therein shall be separately assessed." (Emphasis added).

The words "appertaining to the realty" has reference to any improvement belonging to or used in connection with the land. See Volume 3 A of Words and Phrases, page 378.

The creation of a subdivision is an involved and

intricate process, requiring technical and artistic skills of a highly trained engineer, as well as the practical approach of saleability of the lots thus created, that is acquired by real estate developers only after years of experience. A subdivision is a special improvement that is planned and prepared for the particular land in question and the completed product depends on numerous factors, viz., zoning, the development of the surrounding terrain, location of existing streets, canals, the slope of the terrain, trees, location of sewer and water, and the overall estimated cost of installing the off-site improvements that become part of the subdivision. In this respect, it is as much appurtenant to the ground as a home or building and, in most cases, will be much more tailored to fit a particular piece of ground, than a building or a home.

We have been unable to locate any cases, either for or against the proposition that a fully developed proposed subdivision plat is appurtenant to the real property, in the sense used by the above statute, but it seems, in analyzing the meaning of the word "appurtenant" and its use in this statute, that the final linen plat of Random Woods Subdivision became appurtenant by reason of the specialized nature of the final product. Therefore, the cost of creating the subdivision should be used as part of the value of the improvements to the land.

Clearly, after the subdivision plat has been completed (and it makes no difference whether the plat has

been recorded, or not) the ground has more value than it had prior to the creation of the subdivision. Because the prospective buyer realizes this is work he will not have to do, or expenses that he will not have to incur, it would, therefore, increase the value of the land; at least by the cost of the development of the subdivision plat and, in all likelihood, would increase the value considerably more, because after the subdivision plat has been developed, the buyer is able to compute with more certainty the expenses of installing off-site improvements, and he will be able to estimate with greater certainty, the value of the individual lots and his eventual profit or loss in the overall development.

CONCLUSION

We conclude, under these circumstances, that the terms "appertaining to the realty," refers to and includes the costs of developing a subdivision plat, and Defendants should be awarded the sum of $6,049.52 as additional damages in this action.

Respectfully submitted,

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