

1979

Utah Department of Transportation v. Ira Hatch et al : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT

STATE OF UTAH

* * * * *

UTAH DEPARTMENT OF TRANS-
PORTATION,

Plaintiff-Respondent,

vs.

IRA HATCH, dba Marble Motel;
IRA HATCH, dba Sandman Motel;
BERTHA C. JENSEN, dba Golden
Spike Hotel, and HELEN REEDER,
et al.

Defendants-Appellants.

CASE NO. 16526

* * * * *

BRIEF OF APPELLANTS

* * * * *

APPEAL FROM THE ORDER OF
THE FIRST JUDICIAL DISTRICT COURT FOR BOX ELDER COUNTY
HONORABLE VENROY CHRISTOFFERSON, JUDGE

* * * * *

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BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

This is an action in eminent domain commenced by the Utah Department of Transportation. The State seeks to condemn certain outdoor advertising signs owned by the appellants pursuant to the Utah Highway Beautification Act, §27-12-136.1, Utah Code Ann., 1953, as amended.

DISPOSITION IN THE LOWER COURT

Respondent, the Utah Department of Transportation, moved for an order of Immediate Occupancy pursuant to the provisions of §78-34-9, Utah Code Ann., 1953, as amended. The lower court granted respondent's Motion for Immediate Occupancy, finding that

the right of eminent domain carried with it the right of immediate occupancy.

Appellants petitioned this Court for an order granting an intermediate appeal pursuant to Rule 72(b) of the Utah Rules of Civil Procedure which was granted by this Court.

RELIEF SOUGHT ON APPEAL

Appellants seek to have this court reverse the trial court's order granting Immediate Occupancy on the grounds that the trial court abused its discretion and erred as a matter of law by failing to properly apply the statutory standard to respondent's Motion for Immediate Occupancy.

STATEMENT OF FACTS

In 1967, the State of Utah passed the Utah Highway Beautification Act. The Act is codified in Section 27-12-136.1 et seq., Utah Code Ann., 1953, as amended. Since that time there have been periodic amendments. The Act was passed by the Utah State legislature in response to the Federal Highway Beautification Act, often referred to as the Ladybird Johnson Act, the purpose of which was to regulate and control outdoor advertising along federally financed highways. The federal government in the Federal Highway Beautification Act required each state to enact by statute or by rules and regulations sufficient authority to "effectively control outdoor advertising" or suffer a 10% penalty on all federal highway funds. In the event that control necessitated acquisition by means of eminent domain, the federal government would pay 75 percent of the condemnation award and the state would fund 25 percent.

The Utah Highway Beautification Act does not prohibit the maintenance or erection of outdoor advertising signs but merely controls their location, size, and spacing. Upon passage of the Utah Outdoor Advertising Act certain outdoor advertising signs became nonconforming due to their location, size, or spacing. For example, signs were not allowed in residential and agricultural areas. These signs then became nonconforming and subject to removal. However, outdoor advertising signs are allowed in certain commercial areas; areas which are otherwise unzoned but have actual commercial usage; and in other areas zoned for outdoor advertising and related highway uses. The Act provides that nonconforming signs are to be removed by eminent domain. In the 12 years that this Act has been in existence, the State of Utah has removed, by eminent domain, contract, purchase, or gift, approximately 80 percent of the outdoor advertising structures which are nonconforming under the Act and subject to removal pursuant to the control provisions of the Act.

On the 7th day of June, 1978, the State of Utah commenced condemnation proceedings against the appellants. Yet it wasn't until the 11th day of December, 1978, that the State filed its motion for immediate occupancy, which was subsequently ruled upon by Judge Christofferson on May 23, 1979.

ARGUMENT

I.

THE LOWER COURT ERRED AS A MATTER OF LAW
AS TO THE ESSENTIAL REQUISITES FOR
IMMEDIATE OCCUPANCY

Appellants' interlocutory appeal was predicated upon the premise that the lower court's order granting immediate occupancy was incorrect as a matter of law and an abuse of discretion and should therefore be reversed.

In the absence of an express statutory provision, a condemnor may only take possession of the condemnee's property after a full trial on the merits of the condemnation and the resulting damage. Some states have enacted provisions for immediate occupancy or "quick-take" which may be granted in appropriate circumstances. Because of the nature of this action, in derogation of the rights of private citizens, these statutes are strictly construed. (See, e.g., Department of Public Works v. Vogt, 366 N.E.2d 310 (Ill. 1977) and Town of Messena v. Niagra Mohawk Power Co., 383 N.Y. Supp. 2d 834 (N.Y. 1976).) The purpose of these "quick-take" statutes is to provide for immediate possession when delay would have adverse effects upon the condemnor such as increased costs and contractual obligations. (Vogt, supra.)

In Utah, the statute authorizing immediate occupancy, Utah Code Ann. §78-34-9 reads in pertinent part:

The court or a judge thereof shall take proof by affidavit or otherwise of the value of the premises sought to be condemned and of the damages which will accrue from the condemnation and of the reasons

for requiring a speedy occupation, and shall grant or refuse the motion according to the equity of the case and the relative damages which may accrue to the parties. (emphasis supplied).

The lower court erred in granting respondent's Motion in that the court, in its Memorandum Decision, failed to weigh the equities and reasons for immediacy required by statute when it granted the state's motion. The Order of the Court reads in its entirety:

The Court having reviewed the memoranda in these matters and also the transcript in the Davis County case of Utah Department of Transportation, plaintiff v. Grant Lloyd, defendant. The Court finds there is a right to condemn and with it the right for immediate occupancy. The Court, therefore, grants the requests for orders of immediate occupancy to Utah Department of Transportation in all four cases.

That ruling is improper in light of the requisites of §78-34-9 which require proof of necessity for immediacy. The State presented no proof of necessity for occupation and no proof of damage if the order were denied while appellants submitted affidavits of damage if the order were granted. Simply because the condemning party has authority to condemn does not, ipso facto, give it the right of immediate occupancy without a further offering of proof of necessity for immediacy and resultant damages.

In addition, the State made no showing of any need for speedy occupation or of any pecuniary or other damages which would result from delay, nor indeed any showing at all of need beyond the purposes of the challenged statute.

Appellants' will, by immediate occupancy, suffer immediate damage to their property and to their motels, which depend on travelers attracted by the signs for a large share of their business. (See Appellants' Affidavits).

Thus, while traditionally the discretion of the lower court in these matters must be given some weight, in this case the court totally abused its discretion by rejecting all of the evidence submitted by the appellants and accepted the State's premise, offered without proof or authority, that it is entitled to immediate occupancy whenever it wants.

The Court not only failed to weigh the relative damage to the parties, it didn't even consider them. The Court also failed to inquire into the reasons for immediacy as required by statute.

Therefore, regardless of whether or not the State is entitled to immediate occupancy or even to condemn, the lower court's decision is improper and inadequate when measured up to the standards of proof required by the statute.

II.

IMMEDIATE OCCUPANCY IS AN IMPROPER MEASURE IN THIS MATTER AND WILL RESULT IN IRREPAR- ABLE INJURY TO APPELLANTS

For purposes of this action, appellants admitted that the Utah Outdoor Advertising Act and more specifically §27-12-136.11(1), Utah Code Ann., appeared to grant to the Department of Transportation the power to condemn and eliminate outdoor advertising by means of eminent domain. Appellants do not concede

that this power is being lawfully exercised. However, respondent would have this Court believe that the question stops there and that the State may condemn at will. The power of eminent domain, however, is a creature of statute and its use must be compatible with its statutory source.

Compliance with the statute is even more important where the state would condemn property under a quick-taking statute. This is true because the constitutional rights of the property owner are more easily made secondary in the State's haste to acquire the property. Additionally, considerable damage would be suffered by a property owner during the interim period from the time when the State condemns prematurely to the time when the property owner may eventually prove that the taking is wrongful and unlawful.

In this regard Utah law has provided certain safeguards under its quick-taking statute, §78-34-9, Utah Code Ann. That statute reads in pertinent part:

The court or a judge thereof shall take proof by affidavit or otherwise of the value of the premises sought to be condemned and of the damages which will accrue from the condemnation, and of the reasons for requiring a speedy occupation, and shall grant or refuse the motion according to the equity of the case and the relative damages which may accrue to the parties.

Appellants do not contend that the Department of Transportation failed to provide the Court with proof of its evaluation of the property value as of the date of condemnation. Appellants are certain, however, that respondent did not and cannot prevail upon

the showing of necessity for speedy occupation nor upon the equities of the case and relative damages.

A. There is no Pressing Need to Justify Immediate Occupancy.

The quick-taking provisions are not merely a bonus remedy which the legislature grants to the condemning authority. They serve a particular and definite purpose. That purpose has been stated succinctly at 29A C.J.S., Eminent Domain, §220(2) p.966:

The declaration of taking is collateral, provisional, and supplemental to the condemnation proceedings, and its purpose is to provide a summary method for acquiring by the condemnor the title to and use of, the lands on short notice in order that public projects might be expedited and at the same time preserve to the owner all the protection of due process and to assure him just compensation.

In Department of Public Works v. Vogt, 366 N.E.2d 310 (Ill. 1977) the Court there held that a "quick take" or immediate occupancy is designed to be utilized only to "avoid delay in needed construction projects."

In one Utah case which was brought under Comp. Laws Utah 1919, §7339, the quick-taking predecessor statute, this Court held that a mining company with eminent domain power made a showing of need for immediate taking. The company had condemned rights of way and easements over the defendant's mining claim in order to excavate a tunnel and lay pipeline to collect copper bearing waters precipitating through plaintiff's overburden which was laying on defendant's mining claims. A showing was made that the copper bearing waters would produce annual net profits of Twelve Thousand to Fourteen Thousand Dollars and that without the pipeline

that water would be lost and the copper therefrom not recoverable. See Utah Copper Company v. Montana-Bingham Consolidated Mining Company, 69 Utah 423, 255 P. 672 (1926). The need for immediacy was evident in the case.

There is probably little argument from property owners whose land is condemned under the quick-taking provision of Utah law when construction of a freeway or dam or some other public project is imminent. Frequently in those cases the State has made contracts with construction companies so that the State becomes liable for penalties where the State causes delays. The State may also want to move quickly on a project so as to avoid rising costs of construction. In order to avoid these secondary effects the State must expedite condemnation of the necessary parcels of land. In such circumstances, the State no doubt can make a clear showing of an immediate necessity for the land. No such showing can be made by the State in the instant matter, and indeed the State has not even attempted such a futile task in its memoranda to the lower Court. Here respondent is under no contractual obligations with any kind of private companies which would impose a penalty on the state were it unable to obtain land by condemnation by a specific date. Respondent faces no increased construction costs, because no construction is planned. This fact also negates any argument by respondent that appellants' outdoor signs impede some construction project.

The State may also be concerned about inflation and the rising cost of real estate. Such concern may prompt the State to

act in condemnation matters with all expediency. This concern is of no moment in the instant matter since a summons has been served in the matter and, under authority of §78-34-11, Utah Code Ann., damages are assessed as of the date of service of the summons. Respondent cannot show a pressing need for the reason that inflation may cause damages to amass in the interim.

It is true that the U.S. Government will penalize, under authority of 23 U.S.C. §131, the Highway Beautification Act of 1965, states which do not pass laws to control outdoor advertising. Since this state has made provisions for control of outdoor advertising signs, Utah is not threatened by the Federal Highway Administrator with a reduction in Federal Revenue Sharing. Furthermore, the Federal Regulations specifically state that signs are not to be removed immediately:

- (3) Where it would not interfere with the State's operations, the State should program sign removal projects to minimize disruption of business. (23 CFR §750.304).

Finally, there is nothing in the Federal regulations that require an immediate taking, on the contrary the federal act merely provides that the state provide legislation which regulates outdoor advertising and that the federal government will provide 75 percent of the compensation when the sign is removed.

Respondent has chosen to ignore more than two hundred and fifty (250) other nonconforming signs throughout the State. (See affidavit of Raymond Paschke.) This itself would seem to indicate that there really is no need to hurry with condemnation of the

outdoor advertising signs in the State of Utah. It especially strengthens the contention that condemnation of appellants' particular road signs will not aid the State in achieving some pressing goal that requires immediate removal.

Additionally, the Utah Outdoor Advertising Act became law in this state in 1967. The State certainly has felt no immediate need up to the present to condemn road signs, a fact which stands as an insurmountable obstacle to any contention which respondent might now fabricate as to the need for immediate occupancy. The act itself at §27-12-136.10 granted a moratorium on removal of nonconforming road signs for a period of five years until December 31, 1972. Clearly the Act recognized that the State was not under any obligation to meet a specific deadline with regard to removal of nonconforming signs.

The Act provides that no condemnation of road signs can take place unless there are immediate funds available to pay the compensation required. (See §27-12-136.11.) This section, too, underlines the realization on the part of the legislature that condemnation would not take place by any specific date but could possibly be a gradual process as funds became available.

Finally, respondent could advance no credible argument to the effect that the Wasatch Range has been made ugly by the existence of appellants' road signs and that the deadline for beautifying the Wasatch Range is January, 1979. The Act itself does not set a timetable for the achievement of aesthetic beauty in the State of Utah, if indeed this Act would even achieve such a goal.

Furthermore, Section 27-12-136.5(2)(b)(iv), Utah Code Ann., 1953 as amended, provides specifically that signs are not allowed in scenic areas "designated as such by the state highway department or other state agency having and exercising such authority." This clearly exhibits a legislative intent that signs are not aesthetically unpleasant or degrading to the environment unless the Commission itself finds that the area is "scenic" in nature and therefore should be designated a scenic area. In that case, pursuant to statute and regulatory power, the State Department of Transportation has the authority to grant and order such an area to become a designated scenic area and signs are not allowed in such areas. Absent the declaration and finding by the Department of Transportation after a full public hearing, when competing interests may be heard, the signs are presumed, by the legislature and by statute, to be aesthetically proper. Accordingly, respondent's theory that signs may be condemned without a declaration of a scenic area for aesthetic purposes is improper under the express wording of this section of the Utah Highway Beautification Act. This in and of itself distinguishes the Utah Beautification Act from other state statutes and therefore makes such case authority upholding various state highway beautification acts as irrelevant to the present matter.

The purpose of quick-taking provisions is to expedite the construction of public projects so as to save the State increased cost because of penalty provisions in construction contracts or because of inflation. The value of property for purposes of

condemnation is determined as of the date the summons in the matter is served, so respondent in this case cannot claim harm in that regard if a premature occupancy is not allowed. Respondent faces no dangers of increased costs on a project nor does respondent face the danger of loss of federal revenues if an immediate taking is not granted. The State simply can show no reason why immediate occupancy is warranted in this case. Respondent therefore has not met its burden of proof which is required under the quick-taking provisions.

B. The Equities of the Case Weigh Heavily
in Favor of a Denial of the Motion for
Immediate Occupancy.

A second requirement of the quick-taking provision of the condemnation statutes is that the court must weigh the equities between the parties to ascertain the relative damages.

As pointed out above respondent will suffer no damage whatsoever if an immediate taking is not granted. The State has no timetable to meet which would justify immediate occupancy.

On the other hand, appellants will suffer irreparable harm if the state is allowed to remove appellants' advertising signs. First of all, the physical components of the signs--lumber, metal, and paint--are expensive. Appellants' signs will be damaged in removal and storage, and possibly reinstallation.

Secondly, these road signs are the only means of immediate information to the traveling public as to the location of appellant's motels. Appellants will lose revenues from members of the traveling public who are unable to find the motel or who are

unaware of it because the State has been granted an order of immediate occupancy. Appellants depend to a great extent upon these road signs for a continuation of their businesses. (See affidavits of Appellants). In the event that the road signs are ultimately condemned and removed as a result of a ruling favorable to the Department of Transportation in the main condemnation suit, appellants will be forced, at great expense of time and money, to find alternative means of informing the traveling public of the existence of their motels. The fact that this result may ultimately occur, however, should not work to the State's advantage in its attempt to condemn the road signs prematurely through the quick-taking procedure. Appellants should not be made to suffer hardship as a result of action by the State until it is absolutely clear that the State's doings are sanctioned by the law and this Court and then only after a proper showing at trial.

One area of the law which requires a court to balance the equities between the parties is with regard to preliminary injunctions. The courts frequently use the "balance of hardship" test as defined in Ohio Oil Company v. Conway, 279 U.S. 813, 815, 49 S.Ct. 256, 73 L. Ed. 972 (1929):

Where the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party will be certain and irreparable if the application be denied and the final decree be in his favor, while if the injunction be granted the injury to the opposing party, even if the final decree be in his favor, will be inconsiderable, or may be adequately indemnified by a bond, the injunction usually will be granted.

if appellants had sought a preliminary injunction in this matter to prevent the State from proceeding with the condemnation of the outdoor advertising signs, the trial court would have been called upon to balance the equities of the case just as it is called upon now under §78-34-9, Utah Code Ann., the quick-taking provision. If the court were to apply the "balance of hardship" test, cited above, the court would see that appellants have presented grave questions by their Answer as to the constitutionality of the Utah Outdoor Advertising Act. The injury to appellants, if immediate occupancy is allowed, has been outlined above. And finally it has been shown that the State will suffer no injury by having to wait for a complete airing of the matter in a trial.

Another principle in balancing the equities is that, where the preliminary injunction will have the effect of giving the movant what he ultimately seeks in the lawsuit, the court will not grant the preliminary injunction. Such a situation arose in Simpson v. Petroleum, Inc., 548 P.2d 1 (Wyo., 1976). In that case the moving party sought a preliminary injunction to restrain defendants from inhibiting plaintiff's paving a 4-mile ranch road. Defendants claimed a violation of a surface damage agreement and advanced the argument that paving the road was injurious to their ranching operations. The trial court granted the preliminary injunction, but the Wyoming Supreme Court reversed on the principle that the injunction would allow the plaintiff to proceed with the paving without the necessity of going to trial on the matter.

An analogous situation is presented in the instant matter. If the Department of Transportation is allowed to have immediate occupancy of appellants' outdoor advertising signs, then respondent will have achieved its ultimate goal in this lawsuit without having had to withstand the challenges set forth by appellants' Answer. Appellants meantime will be without their signs and will encounter great expense and loss of income if they ultimately triumph on the condemnation issue and are allowed to put their signs back up. It seems inherently unfair to allow the State the spoils of a conquest without requiring it to garner the victory.

The equities of this case weigh heavily in favor of appellants in that, if the order for immediate occupancy is affirmed appellants will suffer irreparable damage. Whereas, on the other hand, if the order is reversed, respondent will suffer no injury whatsoever.

III.

AN ORDER FOR IMMEDIATE OCCUPANCY SHOULD NOT
ISSUE ABSENT A THOROUGH DETERMINATION OF THE
CONSTITUTIONAL CHALLENGES TO THE ACT.

Appellants have raised a number of constitutional issues in their Answers to the condemnation complaint. These questions of law and fact can be properly decided by this Court only after appellants have been allowed to present evidence and to make a record in the matter. A hearing on a motion for an Order of Immediate Occupancy simply is not the proper forum for these complex issues to be decided by the court.

For example, appellants have raised a due process challenge on the ground that aesthetic values may not be of sufficient weight to justify a taking for public use under the eminent domain statutes in the State of Utah. Despite the numerous cases cited by respondent in its memoranda in the trial court to the effect that aesthetic values will justify a taking of land for public use without violation of due process rights, the State of Utah has itself never so ruled. This Court should not now make a ruling to that effect until Appellants have had an opportunity to substantiate their defenses by means of thorough evidence presented at trial.

The Utah Outdoor Advertising Act may also be unconstitutional as violative of the due process clause in that the law is overbroad and not reasonable. There are no legislative findings or statements to the effect that natural scenic beauty is destroyed or impaired by outdoor advertising. There simply is no rational relation between a goal of protecting scenic beauty along interstate and primary highways in the State of Utah and this vast prohibition of billboards. There is no evidence on the record in this case that billboards hamper scenic enjoyment. If the state seeks to justify its actions on the ground that scenic beauty is impeded by the existence of billboards, then respondent will have to make a record to that effect at trial.

Furthermore, appellants' road signs are informational in character. The Utah Outdoor Advertising Act provides for the

regulation of informational signs, but it does not provide for their total prohibition. The actions of the State in seeking to eliminate appellants' informational road signs is highly arbitrary and violative of appellants' due process rights. Again appellants should have the chance to present evidence to the court as to compliance with the Utah Outdoor Advertising Act in this regard.

Although respondent in its brief to the lower court cited many cases to the effect that Outdoor Advertising Acts in various states do not violate a sign owner's equal protection rights, nonetheless that has never been held to be the case in Utah. Furthermore, it should be pointed out that most of those cases which respondent cites are cases from eastern jurisdictions. Each act is different in each state. Respondent has not shown that the acts upheld in other jurisdictions are like the Utah law in pertinent respects. Each act must be examined in the context of the suit in which it was brought.

Additionally the geographic and geophysical nature of the State of Utah is totally unique. Distinctions between signs located in commercial areas as opposed to those located in non-commercial areas may not in fact be reasonable as a distinguishing characteristic with regard to the State of Utah. Consequently, respondent would not be able to demonstrate a rational basis for the Act in order to withstand a constitutional challenge. Here again it will be necessary to present these issues in their entirety to the court at trial.

More importantly, in this case there may be infringement of a fundamental right--the right to free speech. Here again respondent cited numerous cases to bolster a contention that outdoor advertising legislation is not an unreasonable restriction of time, place, and manner of commercial speech. But it must still be insisted upon that the State of Utah presents a unique situation with regard to media for communication and that appellants' type of business also presents a unique situation with regard to dissemination of information about the existence of his business. Recently a California Superior Court Judge held that the City of LaMesa had violated first amendment freedoms by its city ordinances restricting outdoor advertising signs entirely from the most heavily traveled streets. The judge granted summary judgment to the defendant sign owners, holding:

This much seems clear from the cases dealing with the subject: The control of a speech medium must be such as to permit the message to be delivered to those persons sought to be reached, and where a substantial portion of the target group is effectively screened from the message, the screening mechanism must be struck down. Since it seems clear that this ordinance will prevent the dissemination of messages to travelers now exposed to such messages in important areas of the city, the place and the manner of the regulation attempted is constitutionally overbroad. City of LaMesa v. Foster & Kleiser, Superior Court of California, County of San Diego, No. 349300 (decided May 31, 1977).

In the instant matter removal of appellants' signs will also effectively screen an important message from a target group, i.e., the traveling public.

Appellants have also defenses based on constitutional provisions in the Utah Constitution and upon common law theories of estoppel. These defenses cannot be dismissed merely because the State tells this Court there is no basis for these arguments. These arguments also must be dealt with at trial.

Furthermore, pursuant to 23 U.S.C. Section 131(o) of the Federal Highway Beautification Act, the Federal government specifically directed the state governments that they may exempt from condemnation certain tourist oriented signs whose removal would work a substantial economic hardship to the community. Appellants maintain that their signs would qualify under such exemption preventing their removal. Because of this directive, the State of Utah has failed to exhaust its administrative and legislative remedies before taking such a final act as condemnation.

The act of condemning appellants' signs is the ultimate act which can be effected. There is no further and final act than taking someone's property. It would seem abundantly clear to this Court that in order for the State to take appellants' property, it must exhaust all possible remedies short of condemnation prior to the taking of a private persons' property. One such example would be for the State either through administration procedures or legislative action to allow for an exemption, pursuant to the federal act. Clearly respondent has not exhausted its available remedies and as such the present lawsuit before this Court is premature and should be dismissed on those grounds alone.

Utah case law very clearly shows that, where challenges are made to the right to condemn, a condemnor will not be granted an order of immediate occupancy. In State v. Denver & Rio Grande Western Railroad Company, 8 Utah 2d 236, 332 P.2d 926 (1958), this Court upheld the trial court's denial of a motion for immediate occupancy where the State had sought to condemn 1.75 miles of a branch line operated by the railroad in order to construct a national highway. The Supreme Court agreed with plaintiff's contention that without the order of immediate occupancy plans for construction of the highway would remain conjectural. The Court also recognized that in the ordinary condemnation case the granting of a motion for immediate occupancy is routine, since there is never any real question as to the state's power ultimately to condemn the property. The Court was faced with two entities which had equal power of condemnation, so that the question was one of "better use". The Court concluded:

[T]here would be little doubt but that the freeway as proposed would serve a higher and better use than does the branch line. However, defendant, having made an issue of this matter should be allowed to meet it with the adduction of any competent evidence it may choose to present at a regular trial. 332 P.2d at 927.

Even where this Court was satisfied that the applicant for the order of immediate occupancy would ultimately prevail, nonetheless, since the case was not an ordinary condemnation suit because of the issue of better use and right to condemn had been raised by serious contentions in the pleadings, this Court held that the matter must go to trial and that an order of immediate occupancy was not appropriate.

In the instant matter this Court is faced with anything but the usual case for condemnation. As pointed out above this is not a case where the State is condemning property in order to build a road or construct a dam. Condemnation by the State for these types of construction projects have become so routine that no court is hesitant to grant an Order of Immediate Occupancy where the facts clearly indicate that the purpose for which the State is taking the property is an immediate and legitimate goal of the State. In the matter now before the Court the State is seeking to condemn outdoor advertising signs by a statute which has never been tested in court. This is a case of first impression in this jurisdiction and the law of Utah is not settled. To proceed in a hasty manner and in contravention of State v. Denver & Rio Grande, supra, would be to deny appellants an opportunity to advance serious arguments to test the validity of the Utah Outdoor Advertising Act.

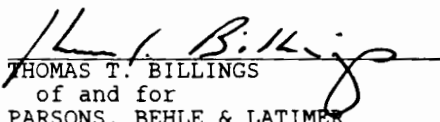
CONCLUSION

The Utah Department of Transportation made no showing of immediate need for condemnation of appellants' outdoor advertising signs. Quick-taking provisions are designed to allow the State to acquire land for which it has immediate need during a period when the question of compensation for the land is being litigated in court. Where serious questions as to the right to condemn the land in the first instance are raised by the owner, Utah case law clearly indicates that an Order for Immediate Occupancy is not appropriate.

Appellants raised serious questions as to the right of the state to condemn outdoor advertising signs under the Utah Outdoor Advertising Act. The State will suffer no harm by having to wait until a final adjudication of all constitutional challenges is arrived at before it is allowed to occupy and remove the outdoor signs. Appellants on the other hand will suffer damages if the signs are removed immediately.

For the foregoing reasons appellants respectfully request that this Court reverse the Order of Immediate Occupancy granted by the lower court.

DATED this 15th day of November, 1979.


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MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Brief of Appellants was mailed, postage prepaid, to Robert B. Hansen and Stephen J. Sorenson, Attorney General's office, State Capitol Building, Salt Lake City, Utah 84114, this 15 day of November, 1979.

