

1980

Utah Department of Transportation v. Ira Hatch et al : Reply 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.)

CASE NO. 16526

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

Defendants-Appellants.)

* * * * *

REPLY BRIEF OF APPELLANTS

* * * * *

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

* * * * *

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TABLE OF CONTENTS

	<u>Page</u>
REPLY.....	1

AUTHORITIES CITED

A. Statutes and Rules

Utah Code Ann. §78-34-9.....	2
------------------------------	---

B. Cases Cited

<u>Department of Public Works v. Vogt</u> , 366 N.E. 2d 310 (Ill. 1977).....	3
<u>Town of Messena v. Niagra Mohawk Paper Co.</u> , 383 N.Y. Supp. 2d 834 (N.Y. 1976).....	5

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REPLY BRIEF OF APPELLANTS

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Respondent's brief is an attempt to divert this Court's attention away from the central issue on appeal. That is, did the lower court properly apply the law to the facts when it granted the State's motion for immediate occupancy? The State's brief is filled with arguments as to why it is entitled to condemn the appellants' signs but is strikingly deficient in reasons for acquiring immediate possession.

Respondent has failed to present even a prima facie case for immediate occupancy. That is, the State sets forth no urgent need or necessity for immediate occupancy; neither its Brief nor

its earlier memoranda state that respondent will suffer any monetary or other damage if the order is not granted; and there is nothing before this Court or the lower court stating that the respondent will suffer a greater harm than the defendants if immediate occupancy is not granted.

Instead of meeting its burden of proof, respondent asserts first that appellants must allege a "special injury different in kind from that which would be suffered by any other sign owner whose sign is condemned." (plaintiff's Reply Memorandum, page 2). Second, respondent asserts that because it is given the right to condemn it therefore, ipso facto, has the right to immediate occupancy (see generally plaintiff's Reply Memorandum and Respondent's Brief on Appeal).

Fortunately, for the protection of the citizens of the State of Utah, the legislature did not see fit to condition the taking of a person's private property on those two premises. On the contrary, as stated in appellants' Brief, the procedure for immediate occupancy is governed by statute. Section 78-34-9 states 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)

Accordingly, by statute, the State must show: first, that it has the power to condemn; second, that this power is being lawfully exercised; third, that there is an immediate necessity for immediate occupancy; and fourth, that the relative damages would weigh in favor of the State as opposed to the condemnee. As stated time and again, the State has not met the requirements of the third and fourth elements. Appellants contest all four issues, however, while the State concerns itself with the first and second requirements, only the third and fourth elements are presently before this Court.

Respondent, in its Brief, would have us believe that had the legislature wanted an order of immediate occupancy not granted whenever a defendant raises constitutional issues, it would have done so. The State glosses over the fact that on the contrary, had the legislature wanted the State to have an order of immediate occupancy on every single occasion in which it exercised its power of condemnation it would have done so. However, the legislature did not see fit to do so, but rather it put that burden upon the condemnor to give reasons why immediate occupancy was both necessary and that relative damages would accrue to the condemnor.

As stated in Department of Public Works v. Vogt, 366 N.E.2d 310 (Ill., 1977):

The purpose of the quick take procedure is to expedite those matters relating to the authority to take when delay would impede a construction project.

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That is, when there are secondary damages that would accrue to the condemnor. Those are as set forth in Appellants' Brief. For example, if the State had construction projects and delay would cause increased costs that would either delay, impede or indefinitely postpone those project, or if there were certain penalty provisions applied to the state either through contract or federal regulation, then an order of immediate occupancy should be granted. In those cases the State can show necessity and relative damages. Here the State can show neither. On the other hand, Appellants have set forth in their Affidavits that they would suffer considerable amount of monetary loss. They have also set forth that they will suffer a loss of business; that there is no other form of adequate advertising that they can undertake at this particular time. The State, on the other hand, has simply stated that because this order has been granted in other occasions it should be granted here. (Note that in the latest sign condemnation case, the Second District Court for Davis County denied the State's motion).

The State also takes the interesting position that the defendant signowners must show a damage different than other condemned sign owners. This is both absurd and not consistent with existing law. The State has the burden to show necessity and damage, in the absence, a defendant must merely show that its relative damages would be greater than the State's.

Appellants have done so and therefore the lower court's ruling should be reversed.

Other courts have also construed immediate occupancy statutes and have denied those motions for immediate occupancy when the state has not shown both the necessity and the relative damages. For example, in Town of Massena v. Niagara Mohawk Power Company, 383 N.Y.Supp.2d 834 (N.Y., 1976) the New York court expressed a view that such factors as inflation, increased costs, possible need for new bonding and other considerations would favor the granting of a request for immediate occupancy. But in the absence of such factors, such an order would be denied.

Finally, other states have immediate occupancy statutes. In some of those states, the immediate occupancy statute does not provide for the court to take notice and inquire whether or not the relative damages would accrue either to one side or the other. The Utah legislature has passed a relatively unique statute, the sole purpose of which is to protect the integrity of the owner of private property from wanton condemnation by the State of Utah. Appellants respectfully maintain that had the State of Utah, through the legislature, desired to State to have immediate occupancy in every case, it clearly could have done so by legislative mandate. However, the legislature did not see fit but rather directed the courts for the protection of its

citizens, to inquire into the relative merits, the weight of the damages, and the necessity for immediacy of the condemnor's action.

In this case, the State will suffer no damage. There are numerous signs existing through the state that are both lawful and conforming. These signs are close in proximity to the signs of the defendants. These signs will exist for as long as they meet proper zoning requirements. The State will suffer no aesthetic damage or deterioration, no damage to the right-of-way, no damage to the highways and is under no contract provision, penalty clause, or any other factor that would force an increased cost or penalty by virtue of its waiting until a trial on the full merits of this issue and having the order for immediate occupancy reviewed.

Respondent maintains that it, through the State of Utah, has a vested interest in maintaining and preserving the beauty of the highway system. If this were the case, then the State should seek an order of immediate occupancy condemning each and every outdoor advertising sign along the roadway. However, as is clear by the express wording of the Utah Outdoor Advertising Act, a considerable amount of outdoor advertising is both lawful and proper. It is inconceivable to appellants that a sign in one location that is not conforming to zoning requirements would be aesthetically less pleasing to passing motorists than a sign which conforms to zoning requirements.

Finally, the State contends that the decision of the lower court is discretionary and that there is nothing in the record showing any abuse of that discretion.

As far as the record goes, there is nothing in the record except the various memoranda of counsel for the parties. There was no evidence presented to the court, the court did grant oral argument but rather indicated it would rule on a basis of the briefs of counsel.

The State presented (by stipulation) evidence of value and the signs non-conforming use. The State never presented nor did the court consider evidence as to immediacy and of relative damages.

The only evidence relating to the issue of relative damages that would accrue was that presented by the appellants.

Accordingly, this Court should reverse the order of the lower court on the grounds that the State did not meet its burden in proving an immediate need for immediate occupancy and the relative damages that would accrue to plaintiff. Thus, the lower court abused its discretion and was in error as a matter of law. This court should also look to the decision in The State of Utah v. Cherry Hills Campground where Judge J. Duffy Palmer, in considering the identical issues raised by the same counsel for the parties as are present here, denied plaintiff's

Motion for Immediate Occupancy.

RESPECTFULLY SUBMITTED this 30th day of April, 1980.

VAN COTT, BAGLEY, CORNWALL &
McCARTHY

By

Thomas T. Billings
Thomas T. Billings

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Order to Steven J. Sorensen, Attorney General's Office, State Capitol Building, Salt Lake City, Utah, 84114, postage prepaid, this 30th day of April, 1980.

Thomas T. Billings