

1955

# State of Utah et al v. Burton F. Peek and Charles D. Wiman : Supplementary Statement by Respondents

Utah Supreme Court

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**IN THE SUPREME COURT  
of the  
STATE OF UTAH**

STATE OF UTAH, by and through  
its ENGINEERING COMMISSION,  
D. H. Whittenburg, Chairman, H. J.  
Corleissen and Layton Maxfield, Mem-  
bers of the ENGINEERING COM-  
MISSION,

*Plaintiff and Appellant,*

— vs. —

(Fred Tedesco) et al., and BURTON  
F. PEEK and CHARLES D. WI-  
MAN, Trustees under the Will and of  
the Estate of CHARLES H. DEERE,  
Deceased,

*Defendants and Respondents.*

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**RESPONDENTS' PETITION FOR REHEARING**

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*Defendants and Respondents.*

Case No.  
8290

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## RESPONDENTS' PETITION FOR REHEARING

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Respondents respectfully request a rehearing of the  
above cause on the following ground:

(1) The court erred in its decision that "The test is  
not what the lots will bring when and if 62 willing buyers  
come along, but what the tract as a unit, and as is, platted  
or not, and in whatever state of completion, will bring  
from a willing buyer of the whole tract."

If that statement was intended to mean what it seems to say, then the ruling is in contravention of Section 78-34-10, Utah Code 1953; of Article I of Section 22, Constitution of Utah, and of the Fourteenth Amendment, Section 1, of the Constitution of the United States, in that said ruling would authorize the taking of respondents' property without just compensation and without due process of law.

## **BRIEF**

### **1.**

## **POINT**

**A condemner is not, by reason of his singleness, entitled to a discounted price.**

We are here concerned with Parcel 1 only, and of Parcel 1, only sub-parcels A and B.

By this petition it is sought to clarify the court's statement quoted and here repeated as follows:

“The test is not what the lots will bring when and if 62 willing buyers come along, but what the tract as a unit, and as is, platted or not, and in whatever state of completion, will bring from a willing buyer of the whole tract.”

If that statement was intended to mean literally what it would seem to say, then we respectfully submit that one will search in vain for authority to support it, either in the citations set forth in the court's opinion or anywhere else, so far as we are informed. It is out of step with the court's reasoning expressed in its opinion and the uni-

versal rule, which quite obviously it is the court's intention to follow.

We concur in the court's conclusion that the experts must take into consideration all costs reasonably to be anticipated as those to be incurred after July 12, 1951 necessary to the marketing of these lots; and like the opinion of an expert responsive to an hypothetical question, the record must fully and accurately encompass the factual basis upon which the expert's opinion shall rest—otherwise the opinion will be irrelevant and inadmissible and on motion should be stricken.

The question is as to the fair market value on July 12, 1951 of the property condemned—the whole tract of course, and in its then condition, but that does not imply that the State may conjure up a fictitious purchaser and discount the fair market value of the tract on July 12, 1951, by whatever amount may be thought sufficient to assure this imaginary creature a profit sufficient to interest him in doing the very thing these respondents were doing, i.e., selling the tract in lot units to purchasers, whatever their number, who might come to buy.

The State might just as well attempt to defend its seizure of a part of the tract without paying for it, as to assume that, as to these respondents, the tract was of less than its market value because the State had made it impossible for respondents to continue to sell in lot units to those willing to buy. Two parties are necessary to a sale and respondents were not discounting

the tract's market value to enable some one else to step in at a discounted figure and carry the project to the very conclusion to which the respondents were committed. What such an imaginary individual, pursuing the fiction, might be willing to pay for the tract whereby to **usurp** respondents' rightful function, by himself selling it in lot units to others, bears no relation whatever to the issue before the court, namely, what was the fair market value of the tract on July 12, 1951, viewed from "the most advantageous use in the future to which the land may be reasonably applied."

It is respectfully submitted that a condemner may not so arbitrarily subject the owner to such fantastic presumptions. Respondents had no intention of liquidating their enterprise, and the market value of their property cannot be measured on the basis of a forced sale in liquidation. Respondents had not labored and planned over the years merely to bring their project to the final stage of fruition, then to unload and voluntarily surrender their profit by selling for a price discounted sufficiently to enable another to reap their harvest. The value of an owner's right to sell his tract in such manner as to realize from such sale the greatest possible return, whatever number the purchasers, is a very substantial part of the fair market value of the tract, of which the owner may not be deprived. What is sought here is the damage sustained by respondents because deprived of their right. Any contrary conclusion belies the very authorities upon which the court relies, and accordingly we cannot think the court intended by

its language to announce any other decision than that so expressed in the universal rule. But such is the State's theory, and it is the very antithesis of just or fair compensation. It is a denial of compensation, it precludes a recovery of fair market value because it forbids consideration of the principle element of fair market value, i.e., "the most advantageous use to which the property may reasonably be applied," and eliminates the very use to which the respondent owners were applying the land and to which it was the purpose of respondents to continue to apply it.

A condemner is not, by reason of his singleness, entitled to a discounted price.

## CONCLUSION

Whatever may be the correct interpretation of the court's statement, not only should the court below be advised in language susceptible to no other interpretation, but the parties also should be made aware in no uncertain language, of just what issue they will be required to meet in the further progress of this litigation.

Respectfully submitted,

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