1968

The State Of Utah, By And Through Its Road Commission v. Style-Crete, Inc. : Citation Of Newly Decided Case In Support of Position of Respondent In Point I Of Style Crete, Inc

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH by and through its ROAD COMMISSION,	)	
Plaintiff and Appellant,	)	
vs.	)	Case No.
STYLE CRETE, INC., a Utah corporation,	)	10902
Defendant and Respondent.	)	

CITATION OF NEWLY DECIDED CASE IN SUPPORT OF POSITION OF RESPONDENT IN POINT I OF STYLE CRETE, INC., BRIEF

The Respondent, Style Crete Inc., pursuant to Rule 75(p)(2) U.R.C.P. submits in connection with the Court's consideration of the appealable issue of "replacement land" raised by the State and discussed in Point I of Respondent's Brief, a newly decided case, State Road Commission v. Rowland S. Bingham, et al, No. 10831, issued and filed by this Court under the opinion of Mr. Justice Callister on January 23, 1968.

"pincer" effect of the two public projects, inadequate drainage, physical and functional disutility of the building, slicing of the property into three separate parcels, proximity of the railroad and highway to the building (11 feet from the office area) and substantial impairment of access, air, view and site prominence. None of these damaged factors could in any way have been mitigated or cured by the acquiring of other "available ground". Indeed, Style-Crete could have purchased the neighboring Arnold Machinery land and *each and every other piece of industrial land in Salt Lake County for that matter, and it could not have cured in the slightest, these elements of damage which were occasioned by the location, proximity and design of the State acquisitions.*

The severance damage which evolved herein was of a category seen in *Southern Pacific* v. *Arthur* and *State Road Comm.* v. *Ward* and accordingly, the general rule of the "before and after" was the legal measurement. Had Style-Crete claimed that severance damage was caused by the removal and loss of the condemned 1.99 acreage and the consequent contraction of the remaining property, the State's proffer could have some merit since other available property would replace the land condemned and thus cure the severance damage. But that hypothesis is not of this case and it would have been flagrant and prejudicial error if the trial court had not rejected the irrelevant offer of proof of the State.

POINT II.

CASES CITED BY THE STATE ARE UNAUTHORITATIVE AND DO NOT SUPPORT

ITS CONTENTION THAT ITS PROFFER OF AVAILABLE LAND SHOULD HAVE BEEN ADMITTED BY THE TRIAL COURT.

The State's reservoir of case authority, on the admissibility of its proffer of available land to replace that condemned, is limited to five decisions. Two of those decisions are from intermediate courts and only one could be characterized as a recent view (1943, with the others being decided in 1847, 1886, 1900 and 1917). While they support the position of Style-Crete herein rather than that of the State, they deserve only limited attention in light of development of the Utah decisions.

In *Hannibal Bridge Co.* v. *Shaubacher,* 57 Mo. 582 (1847), *St. Louis* v. *St. Louis I. M. & S. R. Co.,* 196 S. W. 107 (Mo. 1917), and *St. Louis* v. *Paramount Shoe Mfg. Co.,* 168 S. W. 2d 149 (Mo. Ct. App. 1943), the cost of purchasing other land was found to fully cure the severance damage by restoring the economic unit and placing the owner in the same position as before. The rational expressed in *St. Louis* v. *St. Louis, I. M. & S. R. Co., supra,* is representative:

> "But in a case where the taking of a part of a tract which is devoted to a special use results in large depreciation in value for that special use, the measure of that depreciation ought to be the sum required to be expended in order to rehabilitate the property for such use *or replace the plant in statu quo ante capiendum; provided, of course, that rehabilitation in such manner be practicable.* * * * In cases where no available property is owned by

> him whose land is taken, the price at which other lands adjacent *equally as valuable intrinsically, as convenient, as economical in use, and as accessible,* and which can be bought, may be shown as measuring the amount of depreciation to which the lands damaged but not physically taken, have been subjected" P. 112 of 197 S. W.

The Missouri cases are irrelevant in this Appeal, since the purchase of neighboring land would not return Style-Crete to the status quo before condemnation. Nor is the case of *Illinois and St. L. R. Co.* v. *Switzer, et al.*, 117 Ill. 399 N. E. 664 (1886) germane since the owner there claimed the loss of water to a mill site. The acquisition of water from other sources would have cured the damage. And lastly, in *Gulf C. & S. F. R.* v. *Brugger,* 59 S. W. 56 (Tex. Civ. 1900), the condemnee urged that the balance of his economic unit of timber land had been damaged because of the removal or loss of the condemned property. The Texas Court held that the economic balance could be restored through the substitution of equal replacement property. The *Brugger* case is of no significance in the disposition of this appeal.

Thus it is that the State has not sited a single decision, treatise, or authority which would factually support the result of which it asks in this appeal. The insecurity of that position is matched by the rather celebrated fact that this appeal is the first time since the commencement of Interstate Highway acquisitions in 1956, where the State of Utah has sought to apply the replacement rule in a non-agricultural taking and under facts such as the case at bar.

POINT III.

THE STATE'S THEORY ON REPLACEMENT RULE OF SEVERANCE DAMAGE, AS SET OUT IN PLAINTIFF'S REQUESTED INSTRUCTION NO. 15, IS IMPOSSIBLE OF PRACTICAL APPLICATION.

As previously pointed out, the "replacement rule" has no application to the facts of this case where the State condemns two trips of land in opposite directions through the middle of an industrial operation. It was not entitled to an instruction on "replacement land". However, the lack of understanding which permeated the State's approach to severance damage herein, is demonstrated by its Request No. 15 submitted to the trial Court. In part, it provided that with respect to determination of severance damage:

> "In order for the defendant to recover such severance damages it has the burden of proving, by a preponderance of the evidence, that as of December 28, 1965, the date of service of the summons, no comparable land was available to it in the area which could be *substituted* for the land *taken or severed.* If such comparable land was available to the defendant, proximity and severance damages should total an amount representing the difference between (1) the value of the remainder before the taking and (2) the value of the remainder plus the comparable land after the taking, *less the cost of the comparable* land."

This requested charge is not only inconsistent with the "replacement rule" under the *Carlson* and *Co-op Security*

decisions (even assuming arguendo, that such rule were applicable), but it is inconsistent inter se. To begin with, the Request seeks to amalgamate the replacement doctrine within the "before and after rule" by providing that severance damage shall be the difference between the before and after values, less the cost of the "comparable land". Such flies in the face of the very theory of the rule which the State advocates is pertinent. *State Road Comm.* v. *Co-op Security* holds that if the replacement rule is applicable, severance damage in the traditional sense cannot be recovered:

> "Where there is other comparable land available to the condemnee that would accomplish the same use to which the land taken had been put — *severance damages are not available to one refusing to accept such land;*" (Emphasis added) P. 180 of 1 U. 2d.

Further, the Utah cases provide that if the replacement doctrine is relevant, the cost of acquiring the substitute land is the measure of severance damage. Request No. 15 of Plaintiff, in directing that the cost of purchase shall be deducted from the before and after values of the remainder, charges the property owner with the expense of acquiring the same. In other words, the owner, when faced with a partial-taking of his ground, should pay from his own pocket without reimbursement, the purchase price necessary to obtain replacement land. Nearly 2 acres of Style-Crete land was condemned but the State contends that the 10 acres of replacement land should be purchased by Style-Crete. If the 1.99 acre were reasonably worth

$5,000.00 and the cost of the ten acres had been $30,000.00, Instruction No. 15 would require that the $30,000.00 *be deducted from the severance damage award.* Not even the wildest stretch of the replacement rule under *Carlson* and *Co-op Security* would permit such a grotesque result. It offends not only the time honored rules of just compensation, but due process of law as well. It is not surprising that Appellant fails to cite one case in support of Request No. 15.

Requested Instruction 15 would further advise the jury that the replacement land should be "substituted for the land taken or *severed*". Such is inconsistent with the remainder of the instruction with respect to the assessment of the value of the remaining property, before and after condemnation, since the before and after values, under the State's theory of replacement, would be one and the same.

Request No. 15, which is the net result of the State's Appeal, is incongruous, ambiguous and almost incomprehensible. It is impossible of practical application, much the less consistent in theory.

POINT IV.

PLAINTIFF'S CONCEPT OF SEVERANCE DAMAGES IN EMINENT DOMAIN IS ERRONEOUSLY CONCEIVED.

The synthesis of Plaintiff's argument on severance damages is set out in pages 23 and 39, paragraph 1, of its Brief. It is urged therein that with respect to severance damage, "the owner is entitled only to an amount repre-

senting the *damage actually done* to the land * * * and suffered." And that there is "a substantial distinction between compensation for land taken and damages to property not taken". Conceivably, Plaintiff contends that there must be a physical invasion or eroding-away of the remaining property, and that severance damage is of an inferior rank to compensation payable for land taken.

Such argument, while popular some 200 years ago, has long gone by the board, particularly under the Constitution, Statutes, and case decisions in Utah. Art. I Sec. 22 in providing that "private property shall not be taken or damaged without just compensation", makes no distinction between the quality of recovery for severance damage, vis-a-vis, a taking. Neither is 78-34-10, U. C. A. 1953 discriminatory in favor of a taking and against severance damage. And this Court in a host of decisions, has used the same test for severance damage as it has for a taking, i.e., market value. *State Road Comm.* v. *Hansen,* 14 U. 2d 305, 383 P. 2d 917 (1963); *Southern Pacific* v. *Arthur,* 10 U. 2d 306, 352 P. 2d 693 (1960); *State Road Comm.* v. *Co-op Security Corp., supra; San Pedro A. L. & S. L. R. Co.* v. *Salt Lake City Board of Education,* 35 Utah 13, 99 Pac. 263 (1909).

While there may be a contest as to whether a paticular element of severance damage is compensable, once the issue is resolved in favor of compensability, the standard of compensation is market value. *Weber Basin Conserv. Dist.,* v. *Nelson,* 11 U. 2d 253, 358 P. 2d 81 (1960).

The State claims that an owner must mitigate his damage in eminent domain. But the replacement theory which

the State urges herein would not mitigate Style-Crete's severance damages. It does not, because those damages could not be cured or mitigated, as a matter of law, by the purchase of neighboring land. Adherence to the State's theory would only amplify that damage by requiring the landowner to purchase ten acres of other property at a cost of $30,000.00, which cost Style-Crete would bear. The State's entire approach to the severance damage issue is groundless.

POINT V.

THE INSTRUCTIONS OF THE TRIAL COURT PROPERLY AND FULLY CHARGED THE JURY ON THE APPLICABLE LAW.

Under Point III of Appellant's Brief, it is argued that the trial Court erred prejudicially in its charge to the jury under Instructions 4, 8, 10, 11, 12, 19, 20 and 21. The State fails to set out the entire instruction in any instance but attempts to rely on error relating to capitalization, punctuation and phrases which counsel has severed from the context. No claim of error runs to any genuine issue of substantive law and in no instance did the State request a difference charge, other than Instruction No. 15. Furthermore, while the State devotes considerable time to argument on Nos. 4, 12 and 20, it took no exception to either of those instructions at trial, (R. 937-938), so it is foreclosed of opportunity to make an initial complaint in this Court. *Pettingill* v. *Perkins,* 2 U. 2d 266, 272 P. 2d 185 (1954).

Instruction No. 4 (R. 19): Although no exception was taken to No. 4, the State's objection is typical of its failure

to recognize in this case the constitutional mandate and statutory method for assessment of damages in eminent domain. The instruction, (used time and again in the Districts of Utah, including Federal actions) charges the jury on the fundamental ordinances upon which this case rests, the Constitution. The objections of the State, i.e., that No. 4 is better reserved for a "civic's class since it directs the jury's attention away from the issues being tried," disputes the law itself as enunciated by this Court in *State Road Comm.* v. *Noble*, 6 U. 2d 40, 305 P. 2d 495 (1957):

> "Just compensation means that the owners must be put in as good a position money wise as they would have occupied had their property not been taken."

The State's theory runs aground the same view expressed by the United States Supreme Court in *U. S.* v. *Miller*, 317 U. S. 369, 87 L. Ed. 336 (1942).

Instruction No. 8 (R. 23): The State claims that this Instruction is a commentary of the Court upon the weight and effect of the evidence. In no sense is it that. The purpose of the Instruction was twofold; one, it defined clearly the factors under the evidence that could be taken into consideration in determining severance damage, and two, it presented, without comment, the theory of the landowner on severance damage. Both functions are properly the exercise of the trial Court in Utah. *Anderson* v. *Nixon*, 104 Utah 262, 139 P. 2d 216 (1943); *Morrison* v. *Perry*, 104 Utah 151, 140 P. 2d 772 (1943); *Beckstrom* v. *Williams*, 3 U. 2d 210, 282 P. 2d 309 (1955). Charge No. 8 did not suggest, expressly or impliedly, the feelings, of the trial judge,

as Instruction No. 1, had already told the jury that the court "neither forms, has or expresses any opinion or judgment" as to the issues of fact. Nor did the Instruction direct the jury to consider the factors of severance damage, the phrase, "you *may* take into account" having been used. This Court has held that each party to a law suit is entitled to have his theory submitted to the jury by an appropriate instruction if there is evidence to support it. *Webb* v. *Snow,* 102 Utah 435, 132 P. 2d 114 (1942).

Instruction No. 10 (R. 25) : Charges that the value of the remaining property of Style-Crete after the condemnation acquisition, should be considered as one property although in three separate parts. Plaintiff claims that it cannot find "any support in the cases for the proposition". If *State of Utah* v. *Tedesco,* 4 U. 2d 248, 291 P. 2d 1028 (1956) is not sufficient support, *State of Utah* v. *Peek,* 1 U. 2d 263, 265 P. 2d 630 (1953), *State Road Comm.* v. *Noble,* 8 U. 2d 405, 335 P. 2d 831 (1959) and *State Road Comm.* v. *Hansen,* 14 U. 2d 305, 383 P. 2d 917 (1963) should be. They all state that the property is to be evaluated in its then existent condition with the test being what one buyer would pay to one seller, and not what three or more buyers may pay to one seller. The test is as applicable to the *after* value as it is to the *before* value and the decisions have never carved out a distinction between the two in the approach to value. The State's plea that Instruction No. 10 could result in an owner realizing a "profit" on the sale of the remaining property is unworthy of comment. The Instruction properly states the law of the case.

Instruction No. 11 (R. 26), defines a comparable sale, in the legal sense, under the decisions of this Court in *State* v. *Peek, supra, Southern Pacific* v. *Arthur, supra, Weber Basin Conserv. Dist.* v. *Ward,* 10 U. 2d 29, 347 P. 2d 862 (1959) and *State Road Comm.* v. *Peterson, supra.* It is an instruction originally drafted by the Office of the Attorney General in 1959, it has been used by the Road Commission and landowners alike in the bulk of condemnation litigation in the last eight years, and it is now considered a stock instruction by most trial judges in this State. It does not at all charge the jury to weigh any particular sale or one sale against another. Instead, it defines the rudiments of a comparable transaction of which the trial Court has the responsibility. It is of no difference than charging the jury on the elements of the "reasonable prudent man" in a negligence suit.

Instruction No. 12 (R. 27): The single exception of the State is to the use of the words "fairly and reasonably" in the Instruction. There is no merit to the objection. Having taken no exception at all to the Instruction in the trial Court, the State may not be heard on the objection for the first time on appeal. *Patton* v. *Evans,* 92 Utah 524, 69 P. 2d 969 (1937).

Instruction No. 19 (R. 34), of which the State "laments", is of stock variety and has been used over again in eminent domain trials in this State. It charges that an owner may not stand in the way of a Government improvement by refusing to sell his property. That is a correct statement of the law. *Barnes* v. *Wade,* 90 Utah 1, 58 P. 2d 297 (1936). The statement that the owner is to

be paid "justly and fairly" for the condemned property needs no citation. The best that State's counsel can do with this charge is to say that it was "inflammatory, loaded" and contained unnecessary capitalization of words. The objection is against this Court's definition of just compensation and is unworthy of belief. Significantly, Plaintiff does not refer the Court to a case in point that would justify a finding of prejudicial error.

Instruction No. 21 (R. 36): This Instruction advised the jury that its verdict may be within the range of the testimony submitted by the parties as the weight of the evidence fairly reflects. State counsel argues that while the charge "is not particularly harmful", this Court should nevertheless reverse and declare that in an eminent domain case, a verdict may exceed or be less than the testimony of the parties on land value and damages, all dependent upon the whims of the jury. Such contention ignores the rule of this Court announced in *Weber Basin Conserv. Dist.* v. *Moore,* 2 U. 2d 254, 272 P. 2d 176 (1954), *Weber Basin Conserv. Dist.* v. *Skeen,* 8 U. 2d 79, 328 P. 2d 730 (1958) and *Porcupine Reservoir Co.* v. *Keller Corp.,* 15 U. 2d 318, 392 P. 2d 620 (1964). In *Skeen,* the Court remitted a jury verdict on severance damages which exceeded the expert testimony of the landowner. Under the theory of State's counsel herein, the *Skeen* case was decided improperly by this Court. Instruction No. 21 accurately presents the rule of the case.

POINT VI.

THE TRIAL COURT WAS NOT IN ERROR IN EXCLUDING THE WRITTEN APPRAISAL REPORT OF THE STATE'S VALUE WITNESS, SOLOMON.

The claim of the State in Point IV of its Brief, page 37, that the trial Court erroneously excluded an offer of the written appraisal report of the State value witness, Mr. Solomon, is ludicrous. It is elementary trial practice in this jurisdiction that a written report of an appraisal witness is not evidence of the facts in issue and while the report may be referred to by the witness to refresh his memory, it may not be admitted in evidence. Such is the general evidentiary rule, *U. S.* v. *Rappy*, 157 F. 2d 964 (2d Cir. 1946); 5 *Nichols on Eminent Domain*, 129 Sec. 18.1(1). The State suggests that because counsel for Style-Crete on cross examination, requested to see the *notes* of the State appraiser and thereafter proceeded with cross examination as to the witness' opinion given on direct, that the door is thus opened for the admissibility of an entire written appraisal report on redirect examination. If that were the rule, it would be difficult if not impossible to conduct a cross examination of an appraiser without having his written report (prepared outside of the courtroom and containing all sorts of inadmissible statements and conclusions) received in evidence on redirect.

State's counsel on redirect examination of Mr. Solomon, offered his entire appraisal report as Exhibit P-33, although cross examination had only touched upon a frac-

tion of its contents. The objection was made that the report was not the best evidence of the witness' opinion, that the proffer constituted an emphasis of a particular part of the witness' testimony, that the State had already submitted a large written sheet showing the computations and value conclusions of the witness and that Defendant's counsel had not, by requesting to see the notes of the witness on cross examination, placed in issue the evidential significance of the notes (R. 845-846). The objection was properly sustained by the trial judge.

POINT VII.

THE POSITION OF THE STATE ON APPEAL AND AT TRIAL IS INCONSISTENT WITH ITS OWN TESTIMONY BY WHICH IT IS BOUND.

The State has not challenged the sufficiency of the evidence to support the verdict. The verdict and judgment are substantially supported by the predominate weight of the evidence. In fact, much of the State's testimony corroborated that of Style-Crete.

Part of the State's difficulty at trial lay in its misinterpretation of Style-Crete's proof of damages. With respect to the vibration testimony, for example, Style-Crete introduced evidence as to the probable effects upon the building from the vibration of high speed trains. The purpose of that evidence was not to show the existence of actual vibration in connection with a business loss, but to show an important condition probably resulting from condemnation which would affect the thinking of the buyer and

seller as to the market value of the remaining property. Yet from the approach of the State to Style-Crete's vibration testimony and, indeed from the Commission's own evidence, it is apparent that the State thought it was trying a damage vibration case against a railroad and that the triable issue was whether there was, in fact, actual and sustained vibration damage. The State's approach overlooked the fact that market value and not vibration was the ultimate and triable issue.

Further, Mr. Solomon, the State's only value witness, stated unequivocally that the remaining property and building would be depreciated in value due to the (a) location of the nine foot railroad and highway fill in front and along side of the building, (b) the trapping of normal run off water by the fill, (c) taking of the septic tank drainage field, (d) loss of parking space, (e) loss of visibility, (f) impairment of access and (g) loss of special features of the plant itself (R. 726-729). He further testified that in his opinion, the vibration from the railroad would likely have a detrimental effect on the value of the remaining property so that it could no longer be used for cast stone or close tolerance manufacturing. The State thereafter, attempted to impeach Mr. Solomon's testimony through the use of two other witnesses, Messrs. Pickett and Wilde. Pickett had experience only in massive concrete structures such as bridges, and none in cast stone (R. 863-864). Wilde admitted that after cast stone once has set up, vibration thereafter would weaken the product (R. 855).

In closing argument to the jury, counsel for the State argued in substance that:

> "Mr. Solomon did a conscientious job and he tried to be very fair to the defendant, but in view of the fact that he based his opinion of after value on some assumptions as to vibrations which are not correct, even his appraisal of the value of the property after the taking was too low. I believe you would be justified in disregarding his erroneous assumptions which were favorable to the defendant and find that the value of the property after the taking was considerably greater than what he considered it to be, and that the damages suffered by the defendant were substantially less than the figure stated in the opinion given by Mr. Solomon."

(R. 920-923).[6]

It seems rather ironic that the State would call as its only expert on value, a witness who followed the State's instructions to appraise the property under the "before and after rule" only to have State's counsel impeach and discredit his testimony on closing argument. Certainly it is inconsistent with what this Court said in *Weber Basin Conserv. Dist.* v. *Skeen,* 8 U. 2d 79, 328 P. 2d 730 (1958) :

> "A party cannot call a witness to testify and then select only that testimony favorable to his cause, ignoring that which is unfavorable."

The verdict and judgment stand fully supported by the evidence.

CONCLUSION

While the facts in this case presented serious issues of substantial dispute, the questions of law were relatively un-

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[6]At the hearing on the State's motion for new trial, the undisputed affidavit set forth above was stricken, but the affidavit should be considered in weighing the merits of the State's Appeal herein.

complicated for an eminent domain suit, until the State raised the replcement land theory of severance damage. There is no room for that theory under the facts of this case and to hold otherwise, would be to upset the precedent developed in this jurisdiction of the last thirty years or more. The ruling of the trial Court rejecting the replacement theory of severance damage should be upheld by this Court. The general rule of the *before* and *after* is the only principle which fits the facts of this case.

The objections of the State to the trial Court's charge to the jury are unwarranted and contrary to the decisions of this Court. The trial Court gave all of the State's Requests for instructions except No. 15 on the irrelevant theory of "replacement land".

A just and fair verdict was returned after eight days of trial fully supported by the evidence. The judgment of just compensation entered on the verdict should be affirmed and the Plaintiff's motion for a new trial should be denied.

Respectfully submitted,

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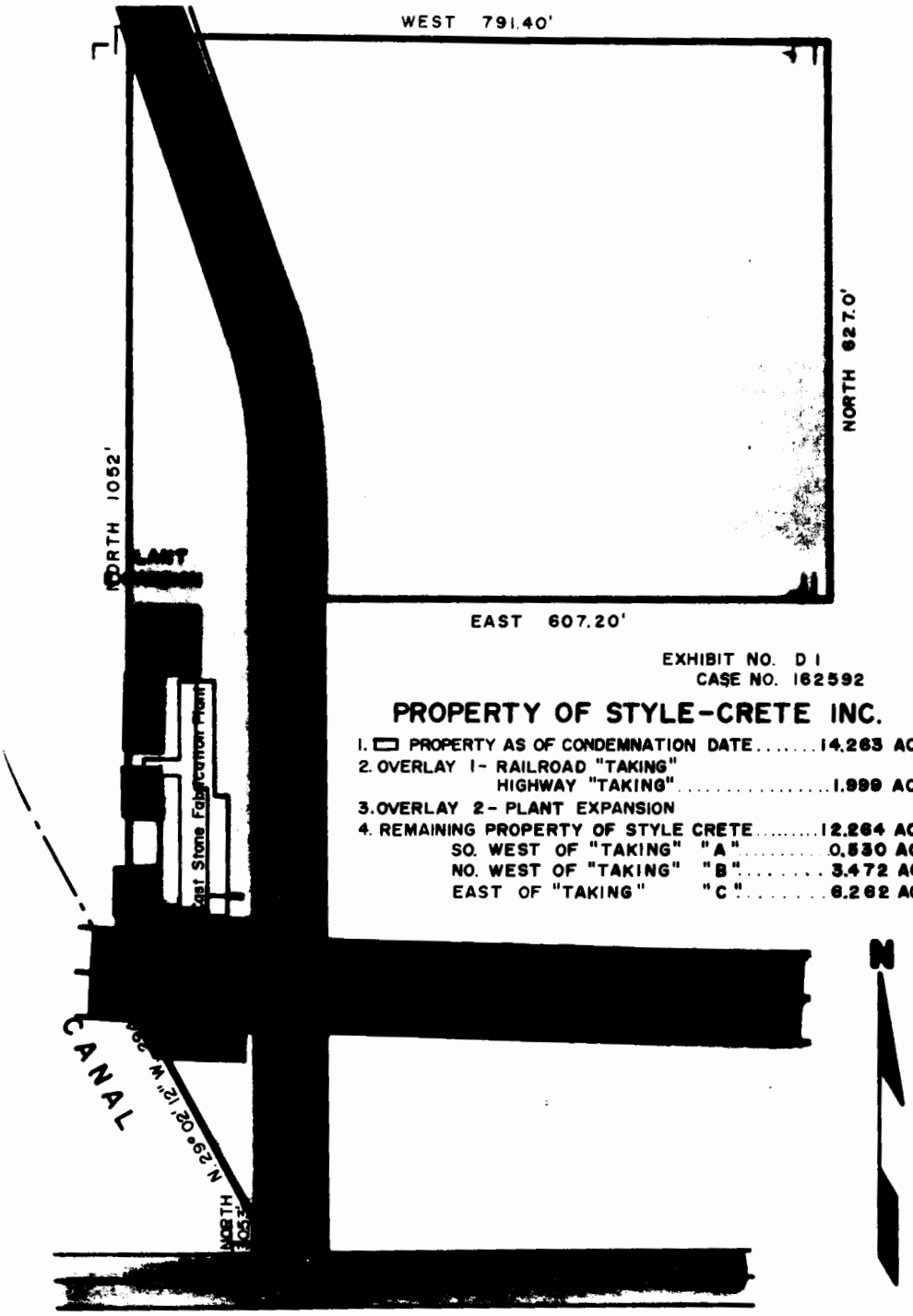
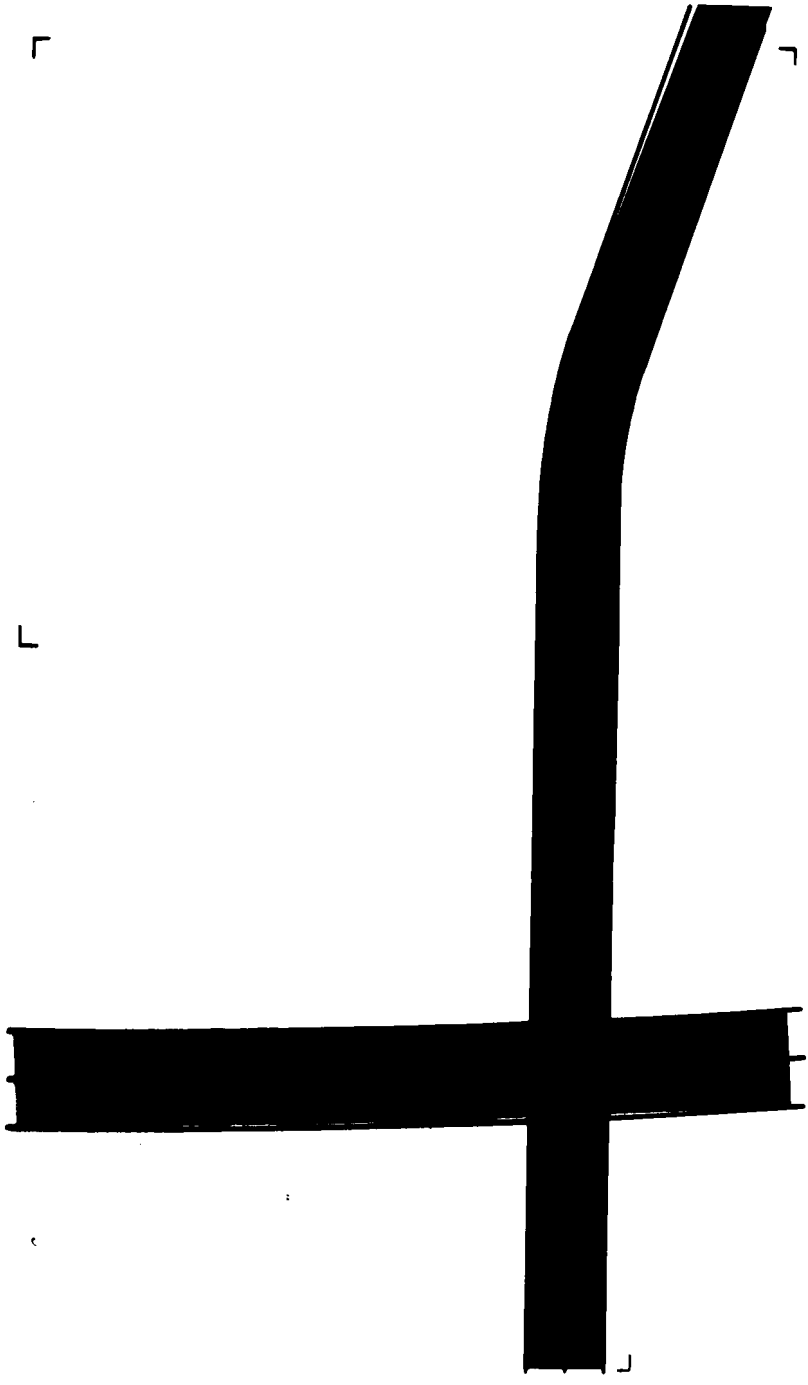
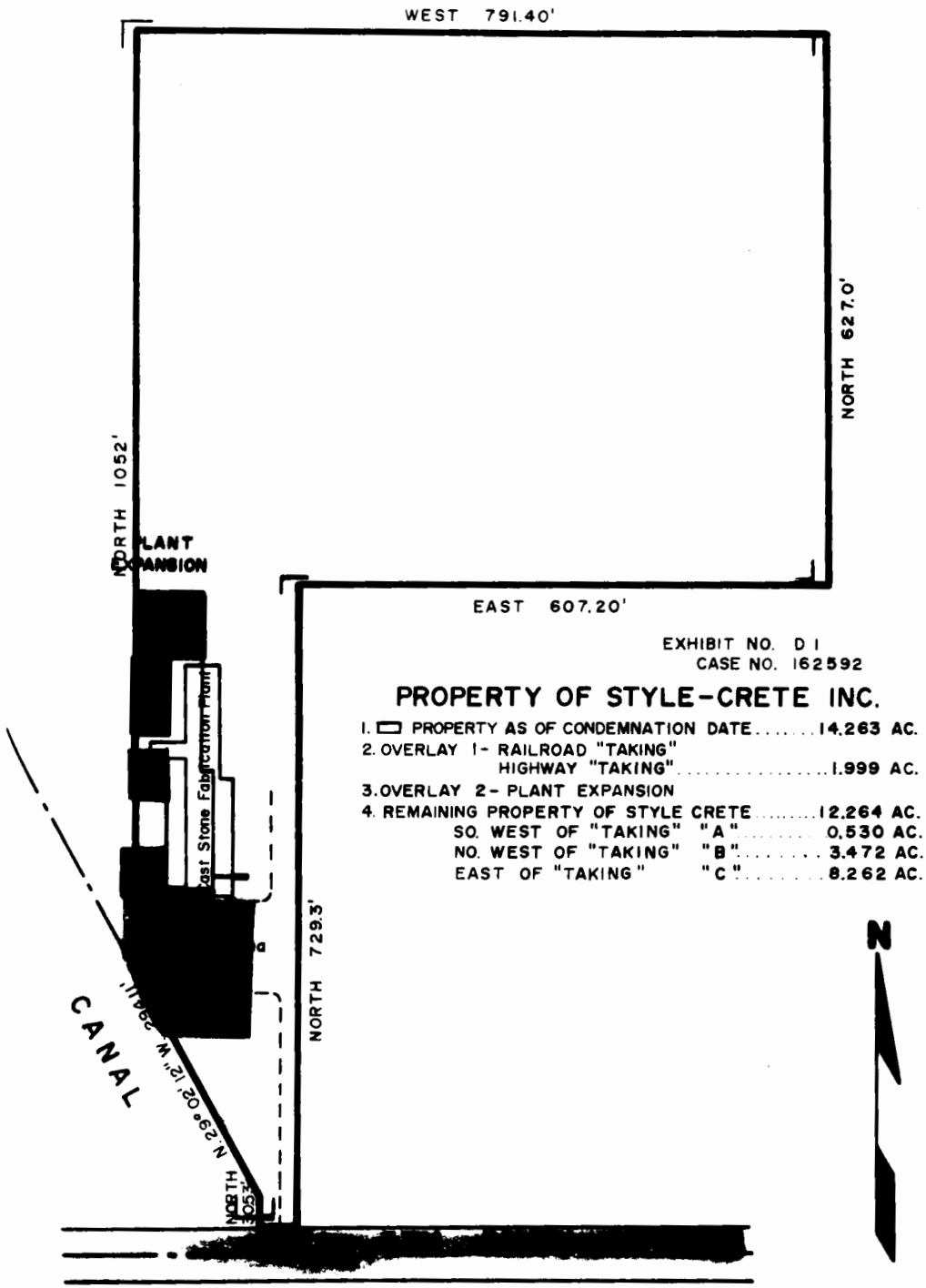


EXHIBIT NO. D 1
CASE NO. 162592

PROPERTY OF STYLE-CRETE INC.

1. ▭ PROPERTY AS OF CONDEMNATION DATE	14.263 AC.
2. OVERLAY 1- RAILROAD "TAKING"	
HIGHWAY "TAKING"	1.999 AC.
3. OVERLAY 2- PLANT EXPANSION	
4. REMAINING PROPERTY OF STYLE CRETE	12.264 AC.
SO. WEST OF "TAKING" "A"	0.530 AC.
NO. WEST OF "TAKING" "B"	3.472 AC.
EAST OF "TAKING" "C"	6.262 AC.





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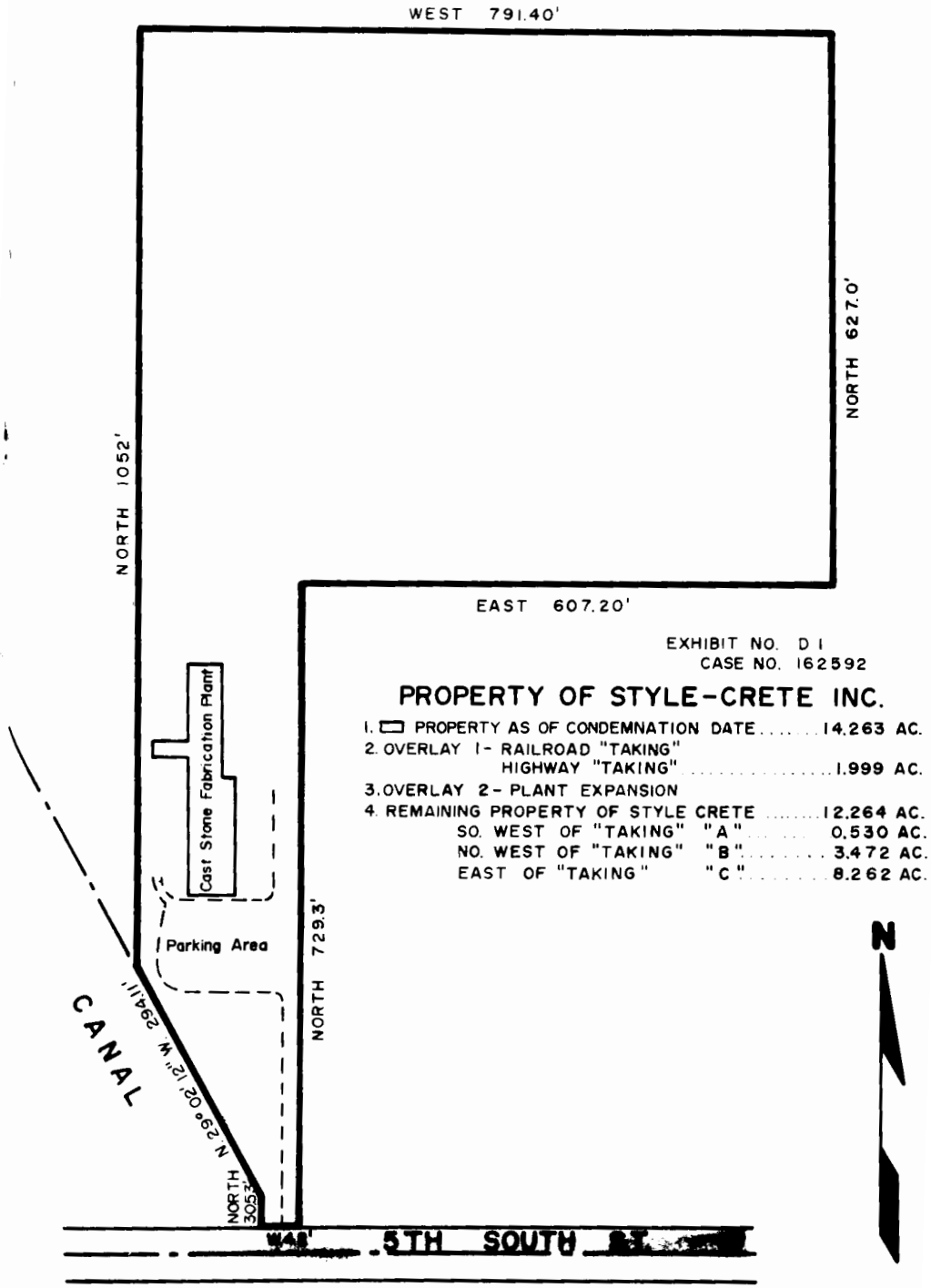
PLANT
EXPANSION



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