

1963

# State of Utah v. Bryant S. Jacobs et al : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE  
STATE OF UTAH

APR 16 1964

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STATE OF UTAH, by and  
through its Road Commission,  
*Plaintiff-Respondent,*

v.

BRIANT S. JACOBS and  
BARBARA T. JACOBS, his wife;  
DARRELL G. HAFEN and  
RAQUEL E HAFEN, his wife;  
B.Y.U. EMPLOYEE FEDERAL  
CREDIT UNION; and ROAD  
RUNNER INN, INC., a  
corporation,  
*Defendants-Appellants,*

FILED

OCT 25 1963

Clerk, Supreme Court, Utah

Case No.  
9949

BRIEF OF APPELLANTS

APPEAL FROM THE JUDGMENT OF THE 5TH DISTRICT  
COURT FOR WASHINGTON COUNTY, HONORABLE C. NEL-  
SON DAY, JUDGE.

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH, by and  
through its Road Commission,  
*Plaintiff-Respondent,*  
v.

BRIANT S. JACOBS and  
BARBARA T. JACOBS, his wife;  
DARRELL G. HAFEN and  
RAQUEL E HAFEN, his wife;  
B.Y.U. EMPLOYEE FEDERAL  
CREDIT UNION; and ROAD  
RUNNER INN, INC., a  
corporation,  
*Defendants-Appellants,*

Case No.  
9949

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## BRIEF OF APPELLANTS

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### STATEMENT OF THE KIND OF CASE

This is an action in Eminent Domain to condemn 33.33 acres of real property and 0.14 acres for an irrigation easement, used in the construction of the interstate highway through Washington County near the city of Washington, Utah.

### DISPOSITION IN LOWER COURT

The case was tried to a jury which brought in a verdict in favor of the property owners of \$16,000.00 from which verdict and judgment defendants appeal.

## RELIEF SOUGHT ON APPEAL

Defendants seek a new trial.

## STATEMENT OF FACTS

(Note: There appears to be at least 3 volumes of record each containing pages beginning with 1 etc. We have therefore taken the liberty to designate the volumes A, B, and C, and will refer to pages in the designated volumn. Where we refer to the record Tr. it will refer to Volumn I and II of transcript of testimony, also designated C. Volumn A comprises the pleadings, etc. as shown by the index. We have not designated the transcript on the pre-trial.)

The property so condemned was a part of a 40-acre tract conveyed by warranty deed by the former owners, Israel Neilson and Caddie Neilson, to Briant S. Jacobs and Barbara T. Jacobs, his wife (R. 15B). The 40-acre tract was a part of a tract comprising 185.09 acres optioned at a price of \$100,000, by said Neilsons to Darrell G. Hafen and his wife who assigned their interest (R 44-45B) (R 124C), after having exercised the option to purchase the property (R 6B), to said Jacobs, who held title to the whole of said property in trust for Road Runner Inn, Inc. (R 84B), which company acquired the properties for the purpose of constructing and developing a golf course, and other construction which would improve economically the surrounding area of Washington, Utah, (Ex. D-1) (R 15B).

The option by which the Road Runner Inn group acquired the interest in the 185.09 acres was dated June 30th, 1960. There was an amendment thereto in writing bearing date September 10th 1960, (Ex. D-2) giving and granting to Hafen, the optionee, the right, upon payment of \$30,000 cash and \$10,000 in stock of Road Runner Inn Corporation to select 40 acres of the property in one piece. To raise the \$30,000 cash with which to pay off Mr. Neilsen, Mr. Jacobs mortgaged the 40-acre tract to BYU Employees Credit Union which mortgagee advanced \$33,000 and took the mortgage on that 40-acre tract of which the state took 33.03 acres for the Highway, (R 58-59B) which money was to be paid back to the Credit Union from that realized out of this acreage (R 60B). This acreage was the best property in the whole piece (R 62B) (R 65B). The mortgage to the Credit Union covered the 33.03 acres taken by the state and an additional tract of 6.37 acres. At the time of the entering into the option by Hafen on June 30, 1960 and the amendment of September 10, 1960 Hafen did not know where the right-of-way was to be located precisely (R 67B).

Defendants' witness Werner Kiepe placed a value on that property taken by the state at the time of taking of \$67,000 or approximately \$2,000 an acre. The State's witness Edmond D. Cook placed a value on the property at \$400 per acre or a total of \$13,332 on the tract taken and \$56 on that property taken for the easement. State's witness, C. Francis Solomon, testified to a value of \$16,000 total, basing



his value on the highest and best use of the property as agriculture and grazing (R 376C).

A portion of the property taken for highway purposes, as is shown on the map attached to plaintiff's complaint, is situated within the town or city of Washington, Utah which had no zoning ordinance. That property taken by the state without said city is zoned agriculture and grazing, the grazing zoning permits the construction of golf courses. The trial court in its instructions to the jury instructed that the property was on the 20th day of September, 1962 zoned by Washington County for grazing and agricultural usage and the trial court further instructed the jury that the usage of the property for residential subdivision and commercial enterprises or either of them was prohibited by the County Ordinance.

The court refused to permit defendant-appellant, Road Runner Inn to show the amount it had contracted to pay for the property. The trial court also refused to permit counsel for appellants to refer to that testimony of state's witness C. Francis Solomon pertaining to the "unusual circumstances" of Jacobs mortgaging the 40-acre tract to which he received a deed from Neilson to BYU Employees Federal Credit Union, to the jury. (R 403C) The Court also refused to permit appellants to introduce the articles of incorporation of Road Runner Inn, Inc. which would show the purpose for which that corporation was organized.

## ARGUMENT

## Point I.

THE COURT ERRED IN DENYING APPELLANTS' MOTION FOR A NEW TRIAL WHEN IT APPEARED THAT AN ATTORNEY-CLIENT RELATIONSHIP DEVELOPED DURING THE TRIAL OF THE CASE BETWEEN ONE OF THE JURORS AND ONE OF COUNSEL FOR PLAINTIFF.

Charles M. Pickett, Esq. who was not associated as counsel for the state until the commencement of the trial has, since his admission to the bar, lived in the city of St. George and has practiced law in the county of Washington, Utah, ever since his admission, which covers a period of many years. Mr. Pickett is and has been prominent in civic and political affairs in the county of Washington, and has held the office of County Attorney, and at the time of the trial of this case held the office of District Attorney. Appellants had moved, prior to the association of Mr. Pickett as counsel for the state, for a change of place of trial, which motion was denied. Upon Mr. Pickett becoming associated as counsel for plaintiff, each of the appellants again renewed their motions for change of place of trial, which motions were again denied.

While the attorney-client relationship did not exist between Mr. Pickett and juror, Clifton Wilson, at the commencement of the trial, it developed dur-

ing the trial. The association of Mr. Pickett with the case being tried at St. George, Washington County, Utah, was highly prejudicial to appellants and their motion for new trial should have been granted. It was admitted by Mr. Pickett that during the trial of the case, Juror Wilson did consult with Mr. Pickett on a legal matter the nature of which most certainly constituted an attorney-client relationship.

### Point II.

### THE COURT ERRED IN INSTRUCTING THE JURY THAT THE AMOUNT WHICH WAS PAID FOR THE PROPERTY IS IMMATERIAL.

During the direct examination of witness Hafen he testified as follows:

Q. Mr. Hafen, at the present time well, withdraw that. Now, pursuant to payments that have been made, has Israel Neilson actually deeded all or part of the property—

A. He deeded part of the property, 40 acres.

Q. Part of it is deeded from him at the present time?

A. Yes, we paid him \$40,000.00.

### MR. CAMPBELL:

Now, wait a minute. Your Honor. I realize that the objection — he isn't being responsive and I think this witness is volunteering information and attempting to put it before this Court by way of his own speech things that counsel is not asking; and I ask the Court to

instruct the witness to only answer those questions which are submitted to him by his attorney.

### THE COURT:

All right, Mr. Hafen you heard Mr. Campbell's statement; and I will put it to you this way: Just answer counsel's questions and not volunteer information. I have already sustained the objection to the amount of money that was paid in this matter. Now I instruct you gentlemen to put out of your minds, entirely disregard Mr. Hafen's last statement which was volunteered. The fact that he paid \$1 or \$40,000 or any amount in between is immaterial in this case. What he's paid on this is entirely immaterial. If he paid \$10, we certainly wouldn't put that as a valuation of this property. If he paid \$90,000, we wouldn't put that as a valuation, so the amount he has paid is immaterial. You are instructed to disregard it, and you, Mr. Hafen, don't volunteer, just answer counsel's questions. (Tr. 121)

Counsel did not move to strike the answer given by the witness.

While counsel for defendants stated that none of the questions relative to partial payment were designed to establish any price. Still the fact that the court instructed the jury as it did was highly prejudicial and the instruction was against the law.

In 7 ALR 2d 774 the law is stated as follows:

Evidence of the price paid by the owner of property sought to be condemned is admissible

as bearing on its market value, unless the sale was too remote in point of time from the condemnation proceedings to afford a fair criterion of present value.

It was apparent that the acquisition of the property was not too remote in time .

The Utah Courts followed the law as announced in 7 ALR 2d 774 in *Weber Basin v. Ward*, 10 U2d 29, 347 P2d 862.

### Point III.

THE COURT ERRED IN ITS REFUSING TO PERMIT APPELLANTS TO SHOW THE PLANS WHICH HAD BEEN MADE FOR THE DEVELOPMENT OF THE PROPERTY TAKEN BY PLAINTIFF.

Appellants had staked out a golf course taking in that property condemned, they had also procured architects plans for other development including some residences. One of the exhibits attached to plaintiff's complaint shows a part of the property taken as being within a dedicated subdivision and still the trial court refused to permit appellants to testify to their plans, but confined appellants' witnesses testimony to only a part of that development actually made on the land itself. A part of the testimony of witness Hafen and the rulings made by the court are as follows:

Q. And for what purposes were expenditures of funds made by the Roadrunner Inn toward development of that area prior to this date. September 20, 1962?

MR. CAMPBELL:

If the Court please, I am going to object to that on the ground and for the reason there's no foundation laid to show that whatever intended use was made, was going to be made of this property, or had any connection or association with the property that the State seeks to acquire in the case. Until that foundation is laid and properly laid, this testimony would be completely immaterial and irrelevant in determining what the willing buyer would pay for property and the willing seller would dispose of the property for as of that date.

THE COURT:

Well, the objection is approved, Mr. Fuller. It occurs to me if some steps were made to develop the property and something was done on the property, I want to hear about that; but if they went over some place and took some steps not concerned with that —

MR. FULLER:

Our line of questionig goes to the steps pertaining to the property itself.

THE COURT:

I know, pertaining to the property; but was it on the property?

THE COURT:

Mr. Hafen, let me ask you some questions. Did you make any improvements to the 185 acres prior to September 20, 1962?



**THE WITNESS:**

Well, we dug some foundation holes for the buildings and staked out a golf course and whether or not it includes our architectural plans or things of that —

**THE COURT:**

Architectural pans are not work on the ground, are they? I'm asking you what work was done on the real estate itself?

The record shows further questions propounded by the court with the folowing result:

**THE COURT:**

All right. With regard to your question Mr. Fuller, I must sustain the objection to it other than as he's now answered. He's told us the steps that he has taken to develop the 185 acres on the land.

**MR. FULLER:**

You are referring to the physical activities on the ground?

**THE COURT:**

Physical activities.

**MR. FULLER:**

You are limiting it to that?

**THE COURT:**

Right. (Tr. 149-153)

In Nichols on Eminent Domain, Vol. 5, at page 157 it is said:

Evidence of the value of property for any use to which it is reasonably adapted is admissible, but such evidence must be limited to a

bare statement why the property is so adapted for a particular purpose and to testimony of its value for such purpose, its uses and its particular fitness for such uses.

Generally a witness may give his opinion of the value of such property based on such uses and the value thereof, when it has been shown that he has some knowledge of such uses beyond that of the jurors. Thus evidence of the market value of the property for the best and most profitable use to which it may be devoted in the reasonably near future is admissible.

As bearing upon these issues the owner may offer a plan showing a possible scheme of development for the purpose for which it is most available provided it appears that the likelihood of demand for the property for that purpose is such as to affect market value.

If the adaptability for such potential use is such as to have a positive influence upon present market value it has been held competent for a witness to express an opinion as to the adaptability of the property for such purposes. A map or plan which graphically illustrates the potential use is equally admissible.

The Utah Court stated in *Kennecott Copper Corp. v. S. L. County*, 250 P2d 938 at 940 as follows:

The adaptability of the land sought to be taken in eminent domain for a special purpose or use may be considered as an element of value. If the land possesses a special value to the owner which can be measured in money, he has the right to have that value considered in the estimate of compensation and damages.



From the necessity of the case the value must be arrived at from the opinions of well-informed persons based upon the purposes for which the property is suitable. This is not taking the "value in use" to the owner as contradistinguished from the market value. What is done is merely to take into consideration the purposes for which the property is suitable as a means of ascertaining what reasonable purchasers would in all probability be willing to give for it, which in a general sense may be said to be the market value. In order that this rule be applicable, it must appear, not that the property is peculiar, but that the relationship of the owner thereto is peculiar, its advantages to him more or less exclusive — that is, that it is property having value peculiar to the owner only, and without possible like value to others who may acquire it.

And again in the case of Salt Lake County Cottonwood Sanitary District v. Toone, (1960), 11 U2d 232, 357 P2d 486, this Court in speaking through Mr. Justice Crockett said at page 488:

We have no disposition to disagree with the defendants' argument that evidence of plans for a particular use of property may be material and relevant where it is offered as having some bearing upon its value under the rule stated above. But the defendants did not propose to proceed upon that premise.

In the instant case appellants did propose to show the plans which had been made for the particular development of the property and the court was so advised not only once but on several occasions.

## Point IV.

THE COURT ERRED IN RESTRICTING DEFENDANTS' EVIDENCE TO ONLY THOSE USES PERMITTED UNDER EXISTING ZONING LAWS IN WASHINGTON COUNTY.

It is recognized procedure and law in a condemnation case that a property owner is entitled to receive a price for his property according to its fair market value for its highest and best use to which it was adaptable on the date of taking. In fact, without first establishing what the highest and best use of the property was at that time, it is, of course, a very difficult matter to even attempt to place a price upon the land. Defendants submit that in this case they were absolutely prohibited at every point in the case from developing evidence before the jury as to the highest and best use of the property.

Before the trial commenced Counsel for Defendants stated:

... And so that the Court is clearly aware of our position, let me say this: That we are going to proceed under the logical theory of the highest and best use of the property. We will not depart from that theory. Furthermore, we are not going to claim any highest and best use or special use that might be applicable merely to these owners. In short, what we will claim is that this property has certain value for certain uses.

It will be our contention that this value would apply to any other purchaser or group of pur-

chasers similarly situated who have knowledge of the adaptability of this property for various uses. And our contention is in this respect, Your Honor: that the property had a dual type of usage. Our evidence will go to the usage being a combination residential, commercial, and recreational area; and that that represented at the time of the taking the highest and best use of the property. (TR. 26)

Proceeding upon that basis defendants immediately met opposition from plaintiff before the trial commenced which, for the purpose of this portion of the Brief, were addressed primarily to the fact that the contemplated highest and best uses of the property were not actually permitted under the zoning regulations of Washington County at the time of taking. The plaintiff's position was stated as follows:

MR. CAMPBELL:

... it is our position, your Honor, and we will ask the Court to instruct the Jury that as of the date of service of summons in this case, September 20, 1962, this property was zoned partially grazing, partially agricultural by the County Commission of Washington County and that the zoning ordinance is determinative as to the use to which this property can be put at that date.

We feel that it is purely speculative and conjectural to receive evidence with respect to whether or not the County Zoning Commission and the County Commissioners themselves may at some time in the future rezone the property ... (Tr. 50)

**THE COURT:**

. . . I don't think that you people can present evidence here, and I am going to stop you, which will show an illegal or improper use of these premises under the law. I don't think we can speculate as to what a county commissioner might do if his wife persuades him sufficiently.

I think that it is speculative. I will read your cases, but my offhand thinking is that it is speculative and remote, too distant to warrant the Jury speculating on it. (Tr. 63)

The actual facts were that in 1958 Washington County, for the first time in its history, adopted a Zoning Resolution. The resolution is set forth as Exhibit P-8, and also contains a map of the various areas of Washington County coming within the various zoned areas. It excluded from its operation the incorporated areas of the county. In fact the town of Washington which was contiguous to the subject property and which had a portion of it within its limits (exhibit attached to complaint), did not have zoning regulations of any type. Furthermore, in drawing up the boundaries of the various zoned areas there was no attempt to set forth any legal descriptions separating the areas. As to the property in question, part of it lay within an agricultural area and part of it lay in a grazing area, with the line dividing the two indicated only upon the map prepared by the county officials. The Zoning Regulation, being very new in the county, contained areas of inconsistency, as, for instance, golf courses were

permitted in both residential and grazing areas, but were omitted from permitted uses in agricultural areas.

Proceeding upon the basis that a well-informed purchaser would consider the likelihood that zoning regulations would be altered or changed if the contemplated usages of an area were such as to appear reasonably likely of approval by the proper officials, plaintiffs objected to the opening statement made by defendants:

MR. CAMPBELL:

. . . but let it be well known it is the position of the State of Utah in this case that any proposed testimony or any statement relative to any other use than the — that was recognized and permitted under the zoning ordinance at the time of condemnation are inadmissible and I object to Mr. Fuller's statement. (Tr. 103-104)

Mr. Darrell Hafen, the first witness called by defendants, was prohibited from giving evidence of the highest and best use of the subject property other than for those uses permitted under the zoning ordinances:

THE COURT:

Mr. Fuller, my thinking on this is that unless the highest and best use contemplated by the witness, Mr. Hafen, is within the purview of the County Ordinance, that is, the property was zoned, that his statement would be irrelevant and immaterial. That is the way I intend to rule on it. (Tr. 131)

Defendants attempted to prove through Mr. Hafen and through other witnesses that proceedings were had with Washington City for a considerable length of time prior to the condemnation action whereby the subject properties would have been annexed to Washington City, which had no zoning ordinances or regulations of any kind. This annexation would have automatically worked to eliminate the county regulations governing use of the subject properties under the peculiar arrangement then existing in the St. George area. In fact, within 60 days after the actual condemnation the city council of Washington City actually approved the annexation.

The following excerpts are taken from the transcript bearing upon the material rulings of the Court on all offers relating to the probability of rezoning which existed at the time of taking:

**THE COURT:**

Well, supposing that as a matter of fact, Mr. Fuller, Washington City did something the following day, but supposing that they didn't do anything for 100 years later? The fact of the matter is on September 20, which is the date we are concerned with, nothing had happened. It was not annexed to Washington City; and my thinking on that is it is irrelevant.

**MR. FULLER:**

Then you would make—

**THE COURT:**

I so rule.



MR. FULLER:

We have an exception to the rule.

THE COURT:

All right. (Tr. 133)

Q. (By MR. FULLER):

Mr. Hafen, with respect to this property at the time it was acquired by the State, were any proceedings being had towards annexation of it to Washington City?

MR. CAMPBELL:

If the Court please, we object to that on the ground and for the reason that it is purely speculative and hypothetical and conjectural.

MR. FULLER:

I am asking him as to a fact, your Honor. (Tr. 131-132)

MR. FULLER:

At this time, your Honor, with respect to the Court's rulings or series of rulings on two points that have been made during the course of direct examination of Mr. Darrell Hafen, we would like to make a proffer of proof as to what evidence would be elicited through Mr. Hafen and have it put on the record. I will proceed on that basis. As to the first point, concerning the possibility of a rezoning of the subject property from agricultural to residential, we would have elicited from Darrell Hafen and also from Mr. Tobler, who is the Clerk of Washington City Council, the Recorder — Glen Tobler, the following facts:

First, that the subject property is contiguous to Washington City and that Washington City

as such does not have zoning ordinances regulating the building and usage of structures or other matters of any kind, typically found under zoning ordinances. That there had been for sometime discussions with the City Council by Mr. Darrell Hafen and others on behalf of Roadrunner Inn relative to an annexation of this 185 acres plus some other grounds retained by Mr. Nielson into Washington City—

MR. CAMPBELL:

It was just a discussion, Mr. Fuller, just so we will know.

MR. FULLER:

—immediately prior to September 20, 1962 and over a period of at least a year before that; that on November 26, 1962, we quote an excerpt—

THE COURT:

November 26th?

MR. FULLER:

Yes, of 1962. I will read in evidence an excerpt from the Minutes of Washington City Council as follows: "November 26, 1962, Minutes of Washington City Council Meeting held at the home of Councilman Ben Joley, Mayor Quenton Nisson presiding and conducting the meeting. Opening prayer by Councilman Rhaldo Turner. Those present were Mayor Q. Nisson, Glen Tobler, Ervin Hall and Councilmen Rhaldo Turner, Ike Robinson, Ernest Tanner, Ben Jolley and Hugh Gibson excused (out of town).

"Also present were Darrell Hafen Bruce Stucki, Steve Kirkland. Darrell Hafen asked



to have the land owned by the Roadrunner Inn to be annexed into Washington City limits. Ben made the motion to accept the 240 acres into the city limits, and Rhaldo seconded it. All voted unanimously on the motion. I certify this is the true and correct copy of the above matter of the City Council meeting as above dated and recorded. Glen Tobler."

Now, we would introduce this evidence both through Mr. Hafen and the City Recorder of Washington City. Now, with respect to the matter and in support of our rule that the Court permit all relevant evidence pertaining to a possible rezoning of the subject property, we would further establish the following facts through Mr. Hafen and through our witnesses. First, that the subject property is contiguous to Washington City. Secondly, that the zoning ordinances applicable to this property of Washington County were adopted in 1958 and that zoning is a very new matter in Washington County; that it has been spot-zoned and certified for residential or commercial area since the zoning without any appreciable difficulty being encountered and that such a zoning for residential purposes was fairly recently enacted in Middleton. We would also establish generally through the evidence of this witness and through our witnesses, that the growth pattern of Washington County and the needs of the community and those coming into the area are such that this would be a very logical residential zoning within the very near foreseeable future under all the facts and circumstances that have been brought out by this case and that could be brought out along the lines indicated.

We would further show that the general trend of the community is such that development of this type have been welcomed and that there would not reasonably be expected to be opposition to such a movement. (Tr. 162, 163, 164)

There are a multitude of cases all standing for the proposition that a possibility or probability of re-zoning should be taken into account in fixing the value of condemned properties. And the Courts generally hold without exception that it is not necessary even to go to the point of having members of a city counsel state what they would probably do about re-zoning if no condemnation were involved (which defendants here actually purported to do had they been permitted). Pertinent excerpts from some of the cases, together with numerous other authorities, follow:

People v. Donovan (California, 1962), 369 P. 2d 1:

There was evidence that the city authorities had considered re-zoning the area in which defendant's lot was located, but had rejected the changes, at least to show that the zoning authorities were contemplating changes in zoning restrictions. The reasonable probability of a zoning change may be shown by a variety of factors, including neighborhood changes and general changes in land use.

Washington v. Motor Freight Terminals, Inc. (Washington, 1960), 357 P 2d 861:

There is, however, an exception to that rule, i.e., when a particular use of the property, to

which it is adapted, is prohibited or restricted by law, but there is a reasonable probability that the prohibition or restriction will be modified or removed in the near future, the effect of such probability upon the value of the property may be taken into consideration . . . it is true that the members of the city council did not testify as to what they would "probably" do about a re-zoning, if there were no "free-way" involved. But it is not true, as the state seems to believe, that such evidence is necessary to prove that there is a reasonable probability that property would be re-zoned in the near future (absent the Improvement for which the property is being condemned).

Commissioners v. Tallahassee, (Florida, 1959),  
116 S. 2d 762:

We find no fault with the first District Court of Appeals in adopting the so-called Texas rule, viz. That even though an existing municipal zoning ordinance may prohibit the use of the property for stated purposes at the time of condemnation, nevertheless, if there is a reasonable probability that the ordinance may be changed or an exception made in the foreseeable future, then the value for such use as may be included in the amendment or exception may be considered.

Arizona v. McMinn (Arizona, 1960) 355 P. 2d  
900:

Compensation awarded when land is taken by eminent domain is the market value of the land for any use to which it is adapted and for which it is available. If, therefore, the land

is not presently available for a particular use by reason of a zoning ordinance or other restrictions imposed by law, but if you find from the evidence that there was a reasonable probability of a change in the near future in the zoning ordinance, or other restrictions, then the effect of such probability of the minds of purchasers generally should be taken into consideration in fixing the present market value of it.

**Park Commission of Wichita v. Fitch (Kansas, 1959), 337 P 2d 1034**

Mr. Fitch owned a 29 acre tract near the city of Wichita upon which there were two lakes, comprising about 15 acres and a sandy beach. He testified that this property was ideal for recreational purposes and that he had applied to the city to have it rezoned so that it could be used for recreational purposes when the city extended its limits to include the property. He testified that the property was worth \$60,000.00 to \$70,000.00 and then put on two witnesses who were conversant with the recreational business and who testified to the value of the property solely from the point of view of its recreational value. Mr. Fitch was awarded \$50,000.00 The Board of Park Commissioners appealed, one of the grounds being, that the entire testimony was speculative in that it assumed recreational purposes, when, in fact at the time of the taking it was so zoned that it could not be used for recreational purposes. The Supreme Court ruled against this argument and in favor of Mr. Fitch. It said that the Park Commissioners had over-

looked the fact that the land owner is entitled to show the value of the land for its most advantageous use.

Other cases clearly supporting the foregoing proposition of very recent vintage, are as follows:

Regnier Builders v. Linwood School District (Kansas, 1962), 369 P 2d 316.

Rapid Transit Company v. U. S. (Tenth Circuit, 1961) 295, F. 2 d 465.

Mackie's Petition (Michigan, 1961), 108 N. W. 2d 755.

Brubaker v. State (New York, 1963), 236 N.Y.S. 2d 395.

The cases handed down on the point in recent years are numerous, and examination of the cases by counsel for defendants has not revealed a single jurisdiction contrary to the position that an appraiser or a potential purchaser should be able to place a value upon property according to its highest and best use, even though the contemplated usage is prohibited by an existing zoning ordinance, if there is a reasonable likelihood that the restriction will be removed. It is submitted that the Court was clearly in error in its rulings prohibiting the introduction of evidence along the indicated lines.

The remainder of Mr. Hafen's interrogation followed the same lines:



**THE COURT:**

O. K. Let the record show I have considered your second matter of the plans for improvement and my ruling will hold with regard to your proffer on the possibility of rezoning. It will still stand. (Tr. 166)

**MR. CAMPBELL:**

Object to that statement and to any of this property or any part of this being used for commercial utilization. As the Court has instructed the witness, and the testimony heretofore indicated, this property was not zoned for that purpose; and it would be illegal as of the date of condemnation, September 20, 1962. So I therefore ask the Court to strike that statement from the record and also the statement with respect to residential subdivision development, apart from property tracts being built in connection with farm utilization.

**THE COURT:**

The Jury instructed to strike from their mind and memory Mr. Hafen's statement as outlined by Mr. Campbell. (Tr. 172)

**THE WITNESS (Mr. Hafen):**

. . . We started a market analysis that we have run three or four years ago that the Mayor was willing to supply us with water, even supplied us with the rate at which the water — that the City then had in effect in supplying us with water. So that's a matter of record in the analysis which hadn't occurred to me until just now. I don't see where zoning is a problem, if you don't want—

MR. CAMPBELL:

Mr. Hafen, wait a minute.

THE COURT:

Just stop. Do you have your objection, Mr. Campbell? (Tr. 178)

Counsel for defendants next called Mr. William F. Bell, an eminent golf course architect, who was brought from Pasadena, California, for the purpose of testifying as to the suitability of part of the subject lands for the purpose of installing a golf course as part of the defendants' plans for development of the area. It was defendants' purpose, through Mr. Bell, to point out that there was a definite immediate need for a golf course in the St. George area, that this was practically the only course site available for such purpose, that it was ideally located, and that any potential purchaser of the subject property would consider this site to be adaptable for a golf course and that the time was ripe for the construction for such a facility. Once again the same objections were raised concerning the zoning regulation in force, even though it was developed that the grazing portion of the lands would actually be permitted under the zoning ordinances for golf course purposes, and Mr. Bell was prevented from giving any testimony other than introductory material of a limited nature:

Q. (of Mr. Bell) : And did you go on that property to make an inspection of it to determine whether all or any portion of it was suitable for golf course purposes?

A. (Mr. Bell) : Well, I studied it as to its desirability and what kind of layout could be prepared upon it; and that was — I did make a preliminary study. I studied the way as to a standard nine hole golf course, and it was standard. It was not substandard.

Q. And what factors did you consider as to the feasibility of all or part of this property for that purpose?

A. Well, generally—

MR. CAMPBELL:

If the Court please, I object to that question on the ground it has no relationship to the subject property at the time we are talking about and at the time we are assessing compensation. It is completely foreign to us to which this property was devoted and couldn't be devoted at September 20, 1962; and while I'm sure this testimony would be interesting and I would like to hear it, I think in the interest of time it is completely irrelevant and has no — is not germane to the issues in the case whatsoever.

THE COURT:

You want to be heard, Mr. Fuller?

MR. FULLER:

Yes, we submit, your Honor, that we will tie the witness's answers to the date of taking and the conditions that existed at that time; and we say it is highly material to the issues on this case as to the issue of highest and best use of the property at the time of taking, or at least a substantial portion of it.



THE COURT:

Would you two gentlemen come up here please?

(Discussion between Court and counsel at the bench, not reported.)

THE COURT:

The record should show with regard to Mr. Campbell's objection, and I take it that his objection runs to the entire line of questions and not just merely the last question. I'm inclined to agree with him, Mr. Fuller; and therefore the objection is sustained.

MR. FULLER:

Then, your Honor, to further develop this witness along the lines I have indicated, the ruling would be the same to the entire line of questions?

THE COURT:

Correct.

MR. FULLER:

So, upon that basis, we have no further questions of Mr. Bell. (Tr. 199, 200)

Defendants next called Mr. Werner Kiepe, one of the most qualified and recognized appraisers in the Intermountain area, for the purpose of having him determine the highest and best use to which the subject properties were adaptable at the time of taking, and to thereupon place a value upon the properties according to such highest and best use. The same line of objections were once again raised, and Mr. Kiepe was cut rather short in his appraisal of the property:

THE WITNESS (Mr. Kiepe):

Well, your Honor, the property is subject to changes; and there is a Planning and Variance Committee that has the authority to change this zoning. So I should say in connection with the zoning, a buyer would recognize the zoning which is in existence and also recognize the fact that there is a body that has the power to change it; and this I took into consideration.

THE COURT:

I see. It is somewhat similar to the fact that we have a legislature that meets every two years, and sometimes they repeal and sometimes they add and sometimes they modify. You are saying that there is a body that has the power to change and modify and add to or subtract from the zoning.

THE WITNESS (Mr. Kiepe):

Your Honor, I also have the experience of many years in seeing what such bodies do.

THE COURT:

I think there is merit in Mr. Campbell's objection, Mr. Fuller. It seems to me that where we have a legal classification of property that we are concerned with the time of September 20, 1962, the fact that it may possibly be changed in the future — it's true it may be changed, but it wasn't changed and it seems to me we are bound by what the situation was at the time of the State's taking. Mr. Kiepe made his appraisal after that date in November of 1962, 30 to 60 days later — possibly 90 days later. It seems to me that we are bound by that appraiser — by that situation in

September of 1962; and therefore I'm going to sustain Mr. Campbell's objection. (Tr. 213, 214)

It is standard law, and recent cases support the proposition, that an appraiser should always consider the likelihood that a given piece of property would be re-zoned for reasonably probable potential uses: *O'Neill v. State Department of Roads* (Nebraska, 1963), 118 N. W. 2d 616:

Specifically, he (appraiser) based his opinion on comparable sales, that at some time it could be re-zoned, its reasonable probable potential uses, and re-zoning at the time bearing in mind recognition of probable imminence of re-zoning, plus knowledge of real estate. All of the elements mentioned here as the foundation on which the opinion of the witness was given were proper to be considered by him in the giving of his testimony. In addition to a consideration of the elements mentioned the witness gave testimony as to need for putting the area in condition for residential and industrial use and considered all of these things in his opinion as to the value at the time of condemnation. It is of course true that involved was an entry into the realm of speculation, but it is one which is not condemned.

Being restricted to the point where defendants were only able to develop a shell of a case based upon a value for possible limited housing development of a small-farm basis permitted under the agricultural zoning, the restriction against developing evidence of a probable re-zoning continued when counsel for de-

fendants attempted to cross-examine the witnesses for plaintiff. Illustrations concerning this impossible situation occurred upon the cross examination of plaintiff's witness, Mr. Solomon:

Q. I see. Mr. Solomon, you stated in your qualifications that you have actually been a subdivider yourself.

A. Yes, Sir.

Q. And was some of this land zoned agricultural when you purchased it with ultimate subdivision ideas in mind?

MR. CAMPBELL:

Now, if the Court please, we will object to that on the ground and for the reason that it is an attempt to do what counsel has been prohibited from doing during this entire trial; and that is to provide — require a witness to testify as to the illegal and prohibited use, and we object to the question and form of it.

THE COURT:

The objection is sustained, Mr. Fuller. (Tr. 394)

And the same ruling was received when defendants' counsel cross-examined Mr. Iverson:

Q. I see. Do you have occasional requests for rezoning in the county?

MR. CAMPBELL:

If the Court please, we'll object to that on the ground that it is irrelevant and calls for an answer that would lead us into speculative and conjectural areas.

THE COURT:

I'm sure the answer to the question is yes, Mr. Fuller, that they do have occasional requests for rezoning; but I can't see that it is material in this case.

MR. FULLER:

We would explore the subject, with the Court's permission; and I take it the ruling would be adverse to that.

THE COURT:

The Court isn't going to grant you permission.  
(Tr. 430)

As a final and complete blow to defendants' case the Court appeared to be considerably influenced by a statement made by attorney Campbell to the effect that Judge Thornley Swan had made a similar ruling concerning zoning in a Davis County case which was then on appeal to the Utah Supreme Court, and which had been initially tried by attorney Campbell. (Tr. 52) Mr. Campbell stated there that Judge Swan rejected a proffer of proof as a matter of law upon the basis that "... the highest and best use of the property must be determined as it was situated at the date of condemnation; ..."

Based upon Mr. Campbell's statement concerning the Davis County case, Judge Day stated:

... and I am inclined to agree with Mr. Campbell's statement with regard to Judge Swan.  
(Tr. 63)

Being unable to believe that Judge Swan had made as sweeping a rule as was presented to the

Court at the trial, counsel for defendants immediately following the trial went to the office of the Supreme Court and secured the trial brief of the State of Utah in the Davis County matter involving Judge Swan. As suspected, Judge Swan ruled on a related matter where there was a non-conforming usage which had been abandoned, and subsequent attempts to re-zone which were rejected. The significant portion of the brief contained an *absolute admission* on the part of the State of Utah that a probability of re-zoning clearly states the law. We quote from the State's brief in the matter:

However, where the enactment of the zoning restrictions is not predicated upon the inherent evil of the proscribed use — in other words, where the forbidden use is *malum prohibitum* rather than *malum in se* — and there is a possibility or probability that the zoning restriction may in the near future be repealed or amended so as to permit the use in question, such likelihood may be considered if the prospect of such repeal or amendment is sufficiently likely as to have appreciable influence upon present market value though such possible change in the zoning regulations must not be speculative. (4 Nichols on Eminent Domain, 12.322.)

See State of Utah, by and Through its Road Commission v. Holt (Case No. 9763).

When the same case was decided by the Utah Supreme Court (381 P 2d 724 — May 27, 1963) it became clear that the issue was different from that involved in this case in that the Davis County case



involved discontinuance of non-conforming uses and because in that case the property owner did not give "... proof or proffer of proof that there was a probability of a zoning change or variance in the near future to commercial."

In view of what appears to be a complete misrepresentation of the Davis County case, whether the misrepresentation was intentional or not, it undoubtedly served to cause the Court to so restrict the defendants' case as to make it impossible to present evidence supporting a higher and better usage for the subject property other than for agricultural and grazing uses.

At the conclusion of the trial the Court instructed the Jury as follows:

#### INSTRUCTION NO. 16

You are instructed that the subject property to be acquired by the State of Utah herein was, on the 20th day of September, 1962, zoned by Washington County for grazing and agricultural usage.

In that connection, you are further instructed that the usage of the subject property for residential subdivision and commercial enterprises, or either of them, was prohibited by County Ordinance. (R. 95)

#### CONCLUSION

Based upon the rulings and the instruction given it is not surprising that the jury returned a ver-

dict of \$16,000.00, which represented the highest appraisal placed upon the property for solely agricultural and grazing uses as was testified to by the appraiser for the plaintiff who placed the highest value on the property for such uses. It is submitted that the Court was clearly in error and that the interests of justice can only be served by granting a new trial which will at least permit defendants to place in evidence their theory of the highest and best use to which the property was adaptable at the time of the taking, and where the existing zoning regulation will be given such weight concerning other than proscribed uses as it is entitled to receive.

Respectfully submitted,

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