

1963

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

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

FILED
29 1963

STATE OF UTAH, by and through its
ROAD COMMISSION,

Plaintiff-Respondent,

vs.

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

Supreme Court, Utah

Case No.

9949

BRIEF OF RESPONDENT

Appeal from Judgment of the Fifth Judicial District Court
in and for Washington County,
Honorable C. Nelson Day, Judge

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TABLE OF CONTENTS

	Page
NATURE OF THE CASE	1
DISPOSITION OF CASE IN LOWER COURT	2
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT	9
POINT I. THE TRIAL COURT DID NOT IN- STRUCT THE JURY THAT THE PURCHASE PRICE OF THE NEILSON PROPERTY WAS IMMATERIAL	9
(A) The sale price for the 185.09 acres was re- ceived	9
(B) Appellants' attempt to say that the partial payment approximating \$40,000.00 was, it- self, a sale is not legitimate	9
POINT II. THE COURT DID NOT ERR IN DENY- ING ADMISSION OF FUTURE PLANS AND SCHEMES OF APPELLANTS	13
(A) Said plans are speculative, conjectural and personal, and bear no relationship to mar- ket value	13
POINT III. THE LOWER COURT DID NOT ERR IN EXCLUDING EVIDENCE WITHOUT THE PEREPHERY OF THE USES TO WHICH THE PROPERTY MIGHT HAVE BEEN APPLIED AT THE DATE OF CONDEMNATION	18
(A) Acceleration in land value estimates cannot, at law, be founded upon an unauthorized use	23
(B) Appellants' case was fully submitted on the basis that highest and best use was limited residential-small farm acreages	24

TABLE OF CONTENTS—Continued

	Page
POINT IV. THE VERDICT AND JUDGMENT OF THE LOWER COURT IS SUPPORTED BY THE GREAT WEIGHT OF EVIDENCE	26
(A) Appellants did not meet their Burden of Proof and Persuasion on Matters of Eval- uation	26
CONCLUSION	28

AUTHORITIES CITED

18 Am. Jur. 885, Eminent Domain, Sec. 247	16
32 C. J. S., 1104, Evidence, Sec. 1040	26
61 Harv. L. Rev. 707 (1947)	19
Nichols on Eminent Domain (3rd Ed.)	24
Nichols on Eminent Domain, Vol. 4, p. 152, Sec. 12.314	15
Nichols on Eminent Domain, Vol. 5, Sec. 21.3 p. 417	10
Orgel, Valuation Under Eminent Domain, Vol. 1, p. 152, Sec. 31	15

CASES CITED

City of Seattle v. Byers, 54 Wash. 518, 103 Pac. 791	21
Cottonwood Sanitary District v. Toone, 11 U. 2d 232, 357 P. 2d 486 (1960)	17
Hewitt v. New York, 118 A. D. 2d 1128, 239 N. Y. S. 2d 522 (1963)	15
Kennecott Corporation v. Salt Lake County, 112 Utah 418, 215 P. 2d 938 (1952)	16
Long Beach City High School District v. Stewart, 30 Cal. 2d 763, 185 P. 2d 585, 173 A. L. R. 249 (1947)	19, 21

TABLE OF CONTENTS—Continued

	Page
Louisiana State Highway Commission v. Israel, 205 La. 669, 17 So. 2d 914 (1944)	16
Mackie, State Highway Comm. v. Eilender, 362 Mich. 697, 108 N. W. 2d 755 (1961)	22, 23
Maynard v. City of Northhampton, 157 Mass. 218, 31 N. E. 1062	23
McCollum v. Clothier, 121 Utah 311, 241 P. 2d 468	27
Olsen v. U. S., 292 U. S. 246, 54 S. Ct. 704, 78 L. Ed. 1236	14, 15
People v. Donovan, 396 P. 2d 1 (Cal. 1962)	22
Port of New York Authority v. Howell, 157 A. 2d 731 (N. J. 1960)	21
Ray v. Consolidated Freightways, 4 U. 2d 137, 289 P. 2d 196 (1955)	26
Redondo Beach School District of Los Angeles County v. Flodine, 314 P. 2d 581 (Cal. 1957)	17
Redwood City Elementary School District v. Gregorie, 276 P. 2d 78 (Cal. 1954)	18
Reindollar v. Caizer, 195 Md. 314, 73 A. 2d 493 (1950)	21
Robinson v. Comm. of Massachusetts, 141 N. E. 2d 727 (Mass. 1956)	19
Romero v. Turnell, 68 N. M. 362, 362 P. 2d 515 (1961)	27
Seybold v. Union Pac. R. Co., 121 Utah 61, 239 P. 2d 174	27
Shoemaker v. United States, 147 U. S. 282, 13 S. Ct. 361, 37 L. Ed. 170	18
Shurtleff v. Salt Lake City, 96 Utah 21, 82 P. 2d 561..	14
Southern Pacific Company v. Arthur, 10 U. 2d 306, 352 P. 2d 693 (1960)	10, 15

TABLE OF CONTENTS—Continued

	Page
State v. Holt, 14 U. 2d 235, 381 P. 2d 724 (1963)	23
State v. McMinn, 88 Ariz. 261, 355 P. 2d 900 (1960) ..	24
State v. Noble, 8 U. 2d 405, 335 P. 2d 831 (1959)	15
State v. Peek, 1 U. 2d 263, 265 P. 2d 630 (1953)	10
State v. Peterson, 12 U. 2d 317, 366 P. 2d 76 (1961) ..	26
State v. Romer and Peterson, 12 U. 2d 317, 366 P. 2d 76 (1961)	10
State v. Tedesco, 4 U. 2d 248, 291 P. 2d 1028	27
State v. Valentine, 10 U. 2d 132, 349 P. 2d 321 (1960)	14
Tigar v. Mystic River Bridge Authority, 329 Mass. 514, 109 N. E. 2d 148	15
Utah Road Commission v. Hansen, 14 U. 2d 305, 383 P. 2d 917 (1963)	18
Washington v. Motor Freight Terminals, Inc., 357 P. 2d 861 (Wash. 1960)	22
Weber Basin Conservancy District v. Ward, 10 U. 2d 29, 347 P. 2d 862 (1959)	10, 14
Williams v. City and County of Denver, 363 P. 2d 171 (Colo. 1961)	21

STATUTES CITED

10-3-1, Utah Code Annotated 1953	20
78-34-11, Utah Code Annotated 1953	14, 20

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STATE OF UTAH, by and through its
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Case No.
9949

BRIEF OF RESPONDENT

NATURE OF THE CASE

The respondent, in September, 1962, commenced an action in the District Court of Washington County to expropriate, under the laws of eminent domain, property as to which the appellants owned or claimed an interest. Upon responsive pleadings being filed by appellants and stipulations received acknowledging the right of the respondent to condemn, public necessity as well as proper design of the public improvement, a trial was had with respect to:

- (a) Determination of legal interests of the appellants, respectively, in the condemned acreage; and
- (b) Evaluation of the condemned tract and compensation to be paid for the acquisition.

DISPOSITION OF CASE IN LOWER COURT

The interests of the appellants having been adjudicated and the jury empaneled having returned to Court its special verdict, the Honorable C. Nelson Day, District Judge, on the 22nd day of April, 1963, entered judgment in favor of the appellants and against the respondent for the sum of \$16,000.00, together with interest and costs. The appellants prosecute this appeal from that judgment.

RELIEF SOUGHT ON APPEAL

The respondent, State of Utah, submits that the judgment and determination of the lower court should be sustained.

STATEMENT OF FACTS

Appellants' account of the record and facts in the lower Court is distorted and disjointed; in more than one instance, it has been made to appear that testimony, statements of counsel, and evidentiary rulings were unbroken when, in point of fact, each circumstance was foreign to the other in time and subject matter (see app. Brief, pp. 14 and 15, 17, 18, 19, 20, and 21; and pp. 25, 26, 31, and 32). This "scissors and paste" job leaves such a breach in a full presentment of the proceedings that respondent deems it necessary to capsulize the testimony and evidence bearing

upon the issues on appeal, disregarding the statement of appellants.

Incident to the construction and development of the Interstate Highway System, the State of Utah, in September, 1962, filed a complaint in the District Court to condemn farm property located in Washington County between the towns of Middleton and Washington (R. 1-7), the land described in the complaint as Parcel No. 162A being a fraction of the Israel Neilson farm as originally constituted. The condemned tract comprised 33.33 acres and was wholly situate within an agricultural and grazing zone of Washington County (Ex. P-8, Tr. 376 Vol. C) and had so been for years prior thereto (Ex. P-8, Tr. 163 Vol. B); the acquisition by the public transgressed the larger Neilson parcel in a direction approximating northeast to southwest, the physical characteristics of the entire tract, prior to the taking, being displayed by the aerial photograph introduced at the trial (Ex. P-3 and maps, R. 7-8).

The design of the improvement called for the establishment of two 12' arterial traffic lanes in each direction (Tr. 76); in addition, a freeway-interchange was to be constructed on Parcel No. 162A providing for an ancillary network of exit and feeder "ramp" roads to and from the main channels of traffic, said interchange providing access to a frontage road to the north of the freeway proper and to "present" Highway 91 at the south (Tr. 75, 77-81, see aerial photo, Ex. P-3). Upon completion of the highway facility, the Neilson property will surround the interchange area at all points (Exs. 2 and 3).

Preliminarily to trial on issues of value, damages and compensation, interlocutory questions of title to residual lands and that under appropriation were determined (Tr. 1-97, Vol. B). It was evidenced that:

1. with respect to the total tract, Darrell Hafen, in June, 1960, entered into an option to purchase the same from Neilsen, et ux. (185.09 acres and water rights) for \$100,000.00 payable \$30,000.00 cash and \$10,000.00 corporate stock down payment and the balance of \$60,000.00 under contract (Exs. D-1, D-2, Tr. 5, 27, 28, 29, Vol. B);
2. it was agreed that upon exercise of the option, Hafen could select 40 of the 185.09 acres as to which title would be transferred upon advancement of the down payment (Tr. 6, 15, Vol. B, Exs. D-1 and D-2);
3. at the time the option was executed, both Hafen and Neilson were aware of the then contemplated highway program, and that the same would necessitate the purchase of a substantial portion of the 185.09 acres (Tr. 32, 33, 67, Vol. B);
4. in June, 1962, Hafen exercised the option by payment of \$29,000.00 cash, a post-dated check of \$1,000.00 and escrowed stock (Tr. 29, 37, Vol. B);
5. Hafen selected 40 acres to be conveyed and on June 25, 1962 (barely 90 days before the condemnation action was instituted), Neilson, et ux., executed a warranty deed running to Bryant S. Jacobs, one of Hafen's associates (Ex. P-1 p. 34, Tr. 29, 30);

6. of the 40 acres under the deed, 33.33 acres was a precise replica which the State of Utah, within 90 days thereafter, was to condemn (Tr. 57, Vol. B, R. 3, Ex. P-1 p. 34, 35, and 36);
7. the description which Hafen utilized for the Neilson to Jacobs conveyance was secured from the Property Acquisition Division of the State Highway Department (Tr. 55, 56);
8. Both Neilson and Hafen knew that the 40 acre conveyance was inclusive of the public right of way description (Tr. 32, 33, 94);
9. the legal description of Parcel No. 162A and the Neilson-Jacobs deed is unique insomuch that it cuts angularly across section lines and requires that the tie be made at the center line of "present" Highway 91 (Tr. 63, Vol. B, R. 3).

Upon the evidence, the Court found that the option to purchase the 185.09 acres for \$100,000.00 had been exercised in June, 1962, that a down payment had been made thereon approximating \$30,000.00 to \$40,000.00, and that Hafen, Jacobs and associates, at the date of condemnation, owned Parcel No. 162A with the residue under contract (R. 51-54, and supp. letter, R. 54-55).

Subsequently at the trial on matters relating to evaluation, the appellants proposed to show contemplated and special plans for the use of the total tract including the condemned acreage, the proffer ranging from motel and subdivision sites to golf courses (Tr. 149, 150, 165, 196, Vol.

C). The Court, upon objection, denied the proffers (Tr. 62, 151, 166, 198, Vol. C). As an ancillary feature, appellants attempted to prove a use of the subject property, at the date of condemnation, foreign and collateral to actual usage or the legally permissible uses under the zoning ordinances then in effect in Washington County (Tr. 129, 136); also, a proffer was made of alleged probable annexation of the subject property by the Town of Washington (Tr. 162, 163, Vol. C); the same was denied admission by the Court (Tr. 131, Vol. C).

Appellants based their approach to value, thereafter, upon use of the condemned acreage for residential-farm purposes (Tr. 219, Vol. C, l. 16-28). Their sole evaluation witness, Keipe, opinionated that the value of the expropriated area, at the control date, was \$67,000.00, or \$2,000.00 per acre (Tr. 209, Vol. C); the witness concluded that although a partial taking was present, the residuary or remaining land had not been prejudiced by the acquisition of the 33.33 acres, since the benefits flowing from the construction of the public improvement more than offset any depreciating affect (Tr. 216-217, Vol. C). Neither Mr. Keipe nor the appellants, during their case in chief, elicited the sale of any properties deemed comparable to the subject acreage (Tr. 112-246, Vol. C).

At the conclusion of appellants' case in chief, the State of Utah called as its first witness Mr. Higginson of the State Engineer's Office who testified concerning the spring sources of water appurtenant to the Neilson total tract

(Tr. 252, Vol. C) and the places and purposes of use of said water under the Virgin River Decree of 1926 (Tr. 256, 257, 258, Vol. C, Ex. D-6, Ent. 177, 178, 179). In addition, Mr. Higginson testified as to the point of diversion and availability of water from Sand Hollow Creek on the condemned property (Tr. 258, Vol. C). As to the former, it was evidenced that the property under condemnation had available to it .69 c.f.s. of spring water for agricultural usage only; as to the latter, the subject property was devoid of all sources of water from Sand Hollow Creek.

Employees of the State Department of Health subsequently testified that a qualitative analysis had been made by that Department of the spring water appurtenant to the condemned acreage (Tr. 284, Vol. C) pursuant to the standards of the U. S. Public Health Service (Tr. 303, Vol. C); their findings revealed arsenic, chloride and sulfate contents to such an extent that the water was not suitable for culinary purposes (Tr. 303, Vol. C).

Finally, State of Utah called three evaluation witnesses, C. Francis Solomon, Jr., Edmund D. Cook and Wallace Iverson; their opinions were uniform, that highest and best use of the subject property at the date of condemnation was for agricultural and related purposes (Tr. 368, 313). Each witness testified as to comparable sales of neighboring property which they considered in gauging the fair market value of the property being acquired by the public authority (Tr. 314-319, 379, Vol. C). Respectively, their estimates of value were:

a. Solomon

1. Value of 33.33 acres -----\$16,000.00
(\$400-\$600 per acre)
2. Severance damage -----None
3. Total opinion -----\$16,000.00
(Tr. 373-379, Vol. C)

b. Cook

1. Value of 33.33 acres -----\$13,332.00
(\$400 per acre)
2. Severance damage -----None
- Total Opinion -----\$13,332.00
(Tr. 312, Vol. C)

c. Iverson

1. Value of 33.33 acres -----\$10,666.00
(\$200-\$400 per acre)
2. Severance damage -----None
3. Total opinion -----\$10,666.00
(Tr. 426-428, Vol. C)

At the close of the evidence and upon motion by the State, the Court ruled that benefits, severance and consequential damage were not an issue and would not be submitted to the jury (Tr. 434, Vol. C). On the 17th day of April, 1963 the panel of eight jurors returned into Court its answer to the special interrogatory by unanimous assent:

"1. What was the fair market value on September 20, 1962 of the tract of land sought to be condemned herein by the State of Utah containing

33 plus acres of land not including any water rights?

“Answer: \$16,000.00.”

ARGUMENT

POINT I.

THE TRIAL COURT DID NOT INSTRUCT THE JURY THAT THE PURCHASE PRICE OF THE NEILSON PROPERTY WAS IMMATERIAL.

- (A) *The sale price for the 185.09 acres was received.*
- (B) *Appellants' attempt to say that the partial payment approximating \$40,000.00 was, itself, a sale is not legitimate.*

A graphic illustration of the good faith which the appellants bring to this appeal is on display in Point II of their Brief (pp. 6-8). It is said that the testimony of Hafen in connection with the down payment of \$40,000.00 and the conveyance of 40 acres upon exercise of the option to purchase the 185.09 acres for \$100,000.00 was, itself, a sale which should have been received on the issue of market value:

“* * * The Court refused to permit defendant-appellant, Roadrunner Inn to show the amount it had contracted to pay for the property.
* * *” (App. Brief p. 4.)

The intent of the appellants to portray the down payment as a sale was further shown by questions relating to down

payment, and the amount remaining due under the contract (pp. 115-121).

This Court has in past times, made its position known relative to the admissibility of prior sales of the property under appraisalment as well as sales of comparable land. *State v. Romer and Peterson*, 12 U. 2d 317, 366 P. 2d 76 (1961); *Weber Basin Conservancy District v. Ward*, 10 U. 2d 29, 347 P. 2d 862 (1959); *Southern Pacific Company v. Arthur*, 10 U. 2d 306, 352 P. 2d 693 (1960); *State of Utah v. Peek*, 1 U. 2d 263, 265 P. 2d 630 (1953). In *Peek*, it was declared that upon a proper foundation being laid, sales of property determined to be comparable were admissible on direct examination as substantive evidence as well as on cross-examination for impeachment purposes. *Southern Pacific Company v. Arthur* again produced this result. In the *Ward* decision, the Court considered a prior sale of the condemned property and in so doing expressed an affirmative vote for the admissibility of the sale so long as it was related in point of time and market. Lastly, the Court, in *State v. Peterson*, held that the weight given to a sale once admitted, was a question for the trier of fact. See also *Nichols on Eminent Domain*, Vol. 5 # 21.3 p. 417. The law of land damage cases is silent in support of the claim that a down payment on the purchase price of a particular tract (a conveyance of a portion thereof being made simultaneously) is in any event a sale warranting consideration as an endice of value.

At one point in the trial, appellants' counsel allowed that, indeed, the alleged payment of \$40,000.00 was but a partial payment:

"MR. FULLER: Your Honor, none of these questions relative to partial payment are designed to establish any price—

"THE COURT: All right.

"MR. FULLER: —or anything that's been conveyed, so you will understand our position.

"THE COURT: Yes."

Set in this light, appellants' Point on appeal is void of efficacy.

There is small doubt that Hafen made an attempt to manufacture a sale, inclusive of the condemned tract, of 40 acres for \$40,000.00. Testimony makes it abundantly clear that the option of 1960 was executed at a time when the parties were aware of the eminency of the highway improvement across the Neilson farm, although unaware of its precise location; that the option (drawn by Hafen) permitted the latter, upon exercise, to select 40 acres for conveyance in consideration of the down payment of \$40,000.00 or its equivalent; that the option was exercised within 90 days prior to the commencement of condemnation proceedings and at a time when the Utah Highway Department was negotiating for the purchase of the 33.33 acres; that upon exercise of the option, the landowner conveyed by deed the 40 acres selected by Hafen, 33.33 acres of which was a carbon copy of the State's right-of-way description; that Hafen obtained said description from the Utah Highway Department. The goal of this conspiracy of facts was the creation of an artificial land value; the effort was unrewarding in product.

The appellants cite a portion of the transcript to buttress the assertion that the lower Court "instructed" the jury that the sale of the subject property was not material to the issues of market value (see App. Brief p. 7); the quotation is placed far from the setting and circumstances under which it was made. A quick glance at the testimony readily reveals that the statement of the Court was to the effect that so long as a contract was entered into for the purchase of the 185.09 acres between Hafen as a willing buyer and Neilson as a willing seller, that fact, alone, was germane to question of value and, therefore, the amount of the initial or down payment on the purchase price was neither material or relevant to the proceedings.

On more than one occasion, the Court recognized the sale of the 185.09 acres. The transcript itself is a witness to this fact:

"MR. FULLER: And who was the proposed seller under that option?

"MR. HAFEN: Israel Neilson and Cattie Neilson were the proposed sellers.

"MR. FULLER: And who was the proposed buyers?

"MR. HAFEN: Myself.

"* * *

"MR. FULLER: Now pursuant to that contract, did you undertake to commence purchasing all or part of the 185 acre tract of land?

"MR. HAFEN: Yes, we did exercise this option.

"MR. FULLER: And up to—according to the contract, what was the total purchase price for the 185 acres?

"MR. HAFEN: \$100,000.00."

(Tr. 114, Vol. C)

And on cross-examination of the State's witness, C. Francis Solomon, Jr.:

"MR. FULLER: And that's what I am getting at. Do people ordinarily incur a purchase of \$100,000.00 worth of property hoping to benefit from a highway that divides their property into three pieces? Has that been your experience?

"MR. SOLOMON: No, but they do option it gambling on the hopes that maybe the highway will come through. And this was an option on a gamble and not binding the purchaser at the time of the option."

The judgment of the lower Court should stand affirmed.

POINT II.

THE COURT DID NOT ERR IN DENYING ADMISSION OF FUTURE PLANS AND SCHEMES OF APPELLANTS.

(A) *Said plans are speculative, conjectural and personal, and bear no relationship to market value.*

Appellants allege as error the failure of the Court to admit in evidence plans and drawings for prospective and future use of the condemned property (App. Brief pp. 8-12). Offered was the testimony of a golf course architect

who had proposed plans for "laying out a nine-hole golf course on the area," plans "for the development of motel units on the property, club house, and administration building" and the establishment of "lakes, a swimming pool and other facilities" (Tr. 166, Vol. C). At the date of evaluation, the subject property was farm ground, had so been for 100 years or more, was zoned by the governing authority for agricultural and grazing utilization and resided within an agricultural and grazing community.

True enough, a portion of the condemned area passed through an acreage previously dedicated in subdivided lots known as the Whitehead Survey (Tr. 328, Vol. B, Ex. P-2); however, the dedication had taken place prior to 1875, and had been totally ignored thereafter. Its fruition as subdivided property, therefore, was not exactly accelerated. It was in this setting that appellants made their proffer to show future plans and schemes.

In this State, all property subject to condemnation, is to be evaluated at the control date, that is, the date of service of Summons. *State Road Commission v. Valentine*, 10 U. 2d 132, 349 P. 2d 321 (1960); 78-34-11, U. C. A. 1953. While actual use of the considered property is not necessarily the only test of highest and best use (*Shurtleff v. Salt Lake City*, 96 Utah 21, 82 P. 2d 561) and the testimony adduced must be within the boundaries of the reasonably foreseeable future (*Weber Basin Conservancy District v. Ward*, 10 U. 2d 29, 347 P. 2d 862 (1959)), market value can not rest upon prospective and speculative developments. *Olsen v. U. S.*, 292 U. S. 246, 54 S. Ct. 704, 78 L.

Ed. 1236; *Hewitt v. New York*, 118 A. D. 2d 1128, 239 N. Y. S. 2d 522 (1963). Orgel in his work on *Valuation Under Eminent Domain*, Vol. 1, p. 152, # 31, makes the following analysis:

“The courts have been at considerable pains to exclude from consideration those mere possibilities which they regard as so remote and unlikely that they could hardly enhance the price at which the property could have been sold *down to the date of the trial.* * * *” (Emphasis ours.)

Pipe dreams and personal schemes of the particular landowner have no association with market value or to that price which the willing and informed buyer and seller would agree upon. *Tigar v. Mystic River Bridge Authority*, 329 Mass. 514, 109 N. E. 2d 148; *Nichols on Eminent Domain*, Vol. 4, p. 152, # 12.314 states the rule:

“Evidence may be adduced showing only the naturally adapted uses of the property in its present condition. *The owner's actual plans or hopes for the future are completely irrelevant.* Such matters are regarded as too remote and speculative to merit consideration. * * *” (Emphasis ours.)

Were the law otherwise, the personal plans and hopes of the owner, himself, would become the test of market value and the land would thereby be appraised for value to that personal landowner. Such test is alien to the universally accepted definition of market value (willing buyer and seller). *Southern Pacific Company v. Arthur*, 10 U. 2d 306, 352 P. 2d 693 (1960); *State v. Noble*, 8 U. 2d 405, 335 P. 2d 831 (1959).

Market value means a sale under ordinary and usual circumstances, *Louisiana State Highway Commission v. Israel*, 205 La. 669, 17 So. 2d 914 (1944), and the proposition of the appellants for motel and related commercial development did not meet this standard. Its scope was speculative, conjectural, and hypothetical in the best form.

Appellants cite to the Court *Kennecott Copper Corporation v. Salt Lake County*, 112 Utah 418, 215 P. 2d 938 (1952) as authority for the argument that "special" plans of the landowner and special use is relevant on land evaluation matters; it is set forth in their Brief (p. 11) that this Court in that decision made a specific statement in connection with "special purposes" being considered. In actuality, the statement was not one from this Court but a phrase taken from 18 *Am. Jur.* 885, Eminent Domain, Sec. 247. What's more, is the fact that the quotation is deceitfully displayed in appellants' Brief in that sentences from the encyclopedia are drawn together out of context and without appropriate asterisk or paragraph designation (app. Brief pp. 11-12). A part of the paragraph which the appellants deleted in their commentary on "special" purposes follows:

"While market value is always the ultimate test, it occasionally happens that the property taken is of *a class not commonly bought and sold*, as a church or a college or a cemetery or the fee of a public street, or some other piece of property which may have an actual value to the owner, but which under *ordinary conditions* he would be unable to sell for an amount even approximating its real value. As market value presupposes a willing buyer, the usual test breaks down in such a case, and hence it is

sometimes said that such property has no market value. In one sense this is true; but it is certain that for that reason it cannot be taken for nothing. 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. * * * The market value, and not the value for such special purpose or the value to the party seeking to condemn it, is the measure of damages. * * *” (Emphasis ours.)

The facts of the Kennecott decision are the distinguishing mark with the case at bar; therein, property, under assessment by the County, had been utilized as a tailings dump and the plaintiff contended that that special use was determinative as to value. The argument was rejected.

This respondent has no quarrel with the holding of this Court in Salt Lake County, *Cottonwood Sanitary District v. Toone*, 11 U. 2d 232, 357 P. 2d 486 (1960), when offered for the express purpose as stated therein, i.e., severance damage.

Prospective and future plans have, generally, been disregarded. In *Redondo Beach School District of Los Angeles County v. Flodine*, 314 P. 2d 581 (Cal. 1957), the landowner attempted to prove future plans to develop the condemned property in a particular fashion. The California Court, in denying permission of the same, commented:

“Coming to appellant’s last contention, apparently appellant attempted to subdivide the property in some way or other and ultimately to subdivide

all of it, but the usual rule in eminent domain proceedings is that a proposed plan for the development of the property proposed to be taken is not material on the issue of market value."

See also *Shoemaker v. United States*, 147 U. S., 282, 13 S. Ct. 361, 37 L. Ed. 170; *Redwood City Elementary School District v. Gregorie*, 276 P. 2d 78 (Cal. 1954). In a recent decision, *Utah Road Commission v. Hansen*, 14 U. 2d 305, 383 P. 2d 917 (1963) this Court said:

"* * * The valuation must be on the basis of what a willing purchaser would pay now and not what a number of purchasers might be induced to pay in the future for the land in small parcels.
* * *

Point III of appellant's Brief has no foundation.

POINT III.

THE LOWER COURT DID NOT ERR IN EXCLUDING EVIDENCE WITHOUT THE PERIPHERY OF THE USES TO WHICH THE PROPERTY MIGHT HAVE BEEN APPLIED AT THE DATE OF CONDEMNATION.

Finally, appellants argue that prejudicial error was committed in rejecting evidence bearing on highest and best use which was agnostic to the actual use or available uses under the zoning ordinances of Washington County. Although their selected quotations appear, again, out of the context and environment in which they arose (contemptuously suggesting the trial Court had stated the position of the State app. Brief 14, 15), it is readily stipu-

lated that the Court was of a view that as to the condemned area, the perimeter of the testimony on highest and best use was governed by actual usage as well as that permissible under the County zoning regulations. In an attempt to introduce plans of commercial and subdivision development, appellants claimed that the zoning ordinances were inconsistent one with the other, that they were not in the public interest and were hence invalid (Tr. 163, Vol. B); further, that subsequent to the date of condemnation and prior to trial, the subject tract had been annexed to the Town of Washington (Tr. 163, Vol. B, app. Brief p. 17); and that a golf course architect was prohibited from projecting plans for the construction of a golf course on the subject properties as well as explaining the urgency of need for "a golf course in the St. George area" (app. Brief p. 26).

As to the first specification above, it is not the landowners' province in a land damage suit to collaterally attack the validity of a zoning ordinance. *Robinson v. Comm. of Massachusetts*, 141 N. E. 2d 727 (Mass. 1956); *Long Beach City High School District v. Stewart*, 30 Cal. 2d 763, 185 P. 2d 585, 173 A. L. R. 249 (1947); 61 *Harv. L. Rev.* 707 (1947). Counsel's statement that the zoning ordinances were not in the public interest because they were "very new in the county" fails all logic, for it is presumed that enacted legislation of recent origin had been considered in the light of recent property development, as opposed to zoning ordinances existent and unchanged over a period of several decades. On the second argument, no proffer

was made to show that any alleged annexation had occurred pursuant to 10-3-1 U. C. A. 1953. Moreover, no portion of the land under condemnation was within or *contiguous* to the Town of Washington at the date of condemnation (Ex. P-1).

As to the third specification, the architect, Bell, was never qualified as a land economist, as a community developer, or as a real estate appraiser, broker or salesman (Tr. 197, 198, Vol. B); rather, Bell's qualifications ran solely to that of a golf course architect. As explained by appellants, the witness's function was to explain the plans of a proposed golf course on the subject property, respondent's answer thereto being covered heretofore in Point II of this Brief.

Section 78-34-11, U. C. A. 1953, keynotes any discussion on the rule of law in this area:

“For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of service of summons, and its *actual value* at that date shall be the measure of compensation for all property to be *actually taken*, and the basis of damages to property not actually taken, but injuriously affected, in all cases where such damages are allowed, as provided in the next preceding section. * * *

The mandate of the statute requires that the property be appraised in the light in which it was found at the date of service of summons, its amenities, advantages and shortcomings to be weighed as of that time. The evaluation proceeding is not the forum for speculative and hypothetical

conditions, unrelated to fact, which may attach to the condemned premises months, years or decades after the date of condemnation. Awards based on speculation are subject to reversal. *Williams v. City and County of Denver*, 363 P. 2d 171 (Colo. 1961).

The great weight of authority sustains the principle that evaluation of property in land damage litigation must be within the circumference of legal and authorized uses. *Reindollar v. Caizer*, 195 Md. 314, 73 A. 2d 493 (1950). In *Long Beach City High School District v. Stewart*, 30 Cal. 2d 763, 185 P. 2d 585, 173 A. L. R. 249 (1947), the California Court said:

“In other words, the general rule is that present market value must ordinarily be determined by consideration only of the uses for which the land is adapted and for which it is available.”

In the early case of *City of Seattle v. Byers*, 54 Wash. 518, 103 Pac. 791, it was held that the landowner could not, as a matter of law, prove that the existence of a “cul-de-sac” would be vacated at some indefinite time in the future; such evidence was regarded as speculative and without the realm of admissibility.

The special commercial and residential uses advanced by appellants were, at the date of assessment, prohibited and unauthorized. Highest and best use in eminent domain is dependent upon a nomistic use of land; as said in *Port of New York Authority v. Howell*, 157 A. 2d 731 (N. J. 1960) :

“The landowner is entitled to receive a fair price for any *permitted* use for which the land has a commercial value of its own in the immediate present or in reasonable anticipation in the near future. This concerns the market value, having a reasonably anticipated, *permitted* use in view. The rule limits the proof to the value of the land as of the control date, i.e., the date of taking, in the condition of the land at that time and *to the uses to which it is naturally adapted and restricted*. It excludes speculative and possible uses if improvements and changes were made. * * *

“Buildings, trees, shrubs, topsoil, etc., underlying stone, sand and gravel are component parts of the land and are not to be valued separately apart from the land, but it may be shown to what extent the land is enhanced in value thereby, *subject, of course, to the use restrictions imposed by valid local zoning regulations; citing authorities * * **” (Emphasis added.)

No Foundation

Appellants would have the instant case fit within an exception to the general rule, such being, that probability of rezoning may be shown. Each case cited by appellants requires a preliminary foundation of probability before the evidence can go to the trier of fact. See for example, *People v. Donovan*, 396 P. 2d 1 (Cal. 1962); *Washington v. Motor Freight Terminals, Inc.*, 357 P. 2d 861 (Wash. 1960). The Michigan Supreme Court, in *Mackie, State Highway Comm. v. Eilender*, 362 Mich. 697, 108 N. W. 2d 755 (1961), cited by appellants, recognized the general rule:

“* * * We look at the value of the condemned land at the time of taking, not as of some future date. If the land is then zoned so as to exclude more lucrative uses, such use is ordinarily immaterial in arriving at just compensation. * * *”

In *Mackie*, a pending zoning change was under consideration by the zoning authority at the date the property was condemned. No such element is associated with the subject property in Washington County. Even were it assumed that this Court would recognize the exception to the general rule as stated herein, appellants wholly failed to lay a preliminary foundation showing the eminency of a zoning change. In *State v. Holt*, 14 U. 2d 235, 381 P. 2d 724 (1963), the Court found that the valuation of the property in question was governed by the zoning ordinance in affect at the date of condemnation and as in the instant situation, no foundation of probability was laid. Appellants' attempt to distinguish that decision from this case is uneventful.

In *Maynard v. City of Northhampton*, 157 Mass. 218, 31 N. E. 1062, the proper basis for assessing compensation in eminent domain was recorded:

“* * * In determining damages in a case of this kind, the jury should consider not only the value of the property taken, but also the affect of the taking upon that which is left; and in estimating the value of that which is taken, they may consider all the uses to which it might *properly* have been applied if it had not been taken.” (Emphasis added.)

- (A) *Acceleration in land value estimates cannot, at law, be founded upon an unauthorized use.*

Appellants assert that the *proscribed* uses involving plans for commercial and subdivision development entitle them to a higher consideration of value than that otherwise found for agricultural purposes; that is to say specifically, that permissible uses under the zoning ordinances or nonconforming use would not underpin a value of \$2,000.00 an acre while prospective and future commercial and residential plans would justify such conclusion. Appellants' own authorities deny them the relief which they seek. *Sackman*, author of *Nichols on Eminent Domain* (3rd Ed.), in a paper delivered before the Southwestern Legal Foundation in April, 1963, said:

"The proposition is, of course, fundamental that, insofar as existing zoning restrictions circumscribe the available uses to which the land may be devoted, they unquestionably affect the market value of the property. *No evidence in support of an enhanced value may be admitted where such value would be the result of a proscribed use.*" (Emphasis added.) *Southwestern Legal Foundation Institute on Eminent Domain*, 1963, Mathew Bender and Co.

To the same affect, see *State of Arizona v. McMinn*, 88 Ariz. 261, 355 P. 2d 900 (1960), a decision cited by appellants. The case made by the appellants at \$2,000.00 an acre was as barren for supporting data as the land under appraisal and would have remained so, even had the speculative special uses been admitted.

(B) *Appellants' case was fully submitted on the basis that highest and best use was limited residential-small farm acreages.*

When Keipe took the witness stand in behalf of the appellants, he was asked on direct examination to base his opinion on highest and best use for limited residential use in connection with small farm acreages (Tr. 219, Vol. B). Thereafter, Keipe testified that the subject property had a market value of \$2,000.00 an acre, as of September 20, 1962 for that use. Appellants now claim on appeal that the condemned parcel could be best used for commercial and subdivision purposes. Appellants' theory is to say that property has more than one highest and best use; that if they are not able to get to the jury on one use, they may adopt a second use and thereafter raise as error on appeal the denial of the first.

Appellants' have had their day in court; upon being advised of the Court's ruling relative to the exclusion of proposed commercial and subdivision evidence, they could have rested their case at that time and taken their appeal. In lieu thereof, appellants chose to have their evaluation witness attach a value to the property, the highest and best use being for a less intensified purpose. Their theory gives them two chances at bat, the first to go to the jury with the value of \$2,000.00 an acre on the basis of limited residential use and second, that if the jury found the evidence against them, to appeal on the basis of a different and inconsistent usage of the property. Their approach is reminiscent of a chameleon—and highest and best use for their purposes has been placated to serve momentary convenience. Appellants submitted their case to the Court and jury on a specific basis. They should not now be heard

to complain because the jury found the weight of evidence contrary to their position. *Ray v. Consolidated Freight Ways*, 4 U. 2d 137, 289 P. 2d 196 (1955). The rule of evidence that a party may not allege as error on appeal testimony which he, himself, fostered is well recognized:

“As a general rule, a party is bound by uncontradicted evidence produced by him to prove a particular fact or facts; and where he introduces a witness to testify on his behalf he ordinarily vouches for the credibility of his witness, and, in the absence of contradictory evidence, is *bound by such testimony*, although the testimony was objected to by the adverse party. In accordance with this rule, a party who has introduced certain evidence cannot subsequently object that it should not have been received, * * *.” 32 C. J. S. 1104, Evidence # 1040; *Romero v. Turnell*, 68 N. M. 362, 362 P. 2d 515 (1961). (Emphasis added.)

POINT IV.

THE VERDICT AND JUDGMENT OF THE LOWER COURT IS SUPPORTED BY THE GREAT WEIGHT OF EVIDENCE.

(A) *Appellants did not meet their Burden of Proof and Persuasion on Matters of Evaluation.*

Although the public agency stands before the Court as the plaintiff, on issues of evaluation and compensation the landowners carry the burden of going forward with the evidence, the burden of proof and the ultimate burden of persuasion. *State Road Comm. v. Peterson*, 12 U. 2d 317, 366 P. 2d 76 (1961). Not only did appellants fall short

of these requirements, but the more believable testimony pointed to the case of the State. The lone evaluation witness of appellants was outmatched by the credibility and soundness that permeated the evidence presented by the trio of witnesses, Solomon, Cook, and Iverson, appearing for the respondent.

It is fair to say that appellants were not penalized by the award of condemnation. Barely 90 days before the date of condemnation, Hafen agreed to purchase from Neilson for \$100,000.00 under long term contract 185.09 acres and water rights appurtenant. Without disturbing the water flow, the judgment requires the State to pay to appellants \$16,000.00 cash for the acquisition of 33.33 acres of the larger unit. That the appellants are not entitled to profit on the condemnation transaction at the expense of the public was settled by this Court in *State of Utah v. Tedesco*, 4 U. 2d 248, 291 P. 2d 1028:

“* * * A condemnee is not entitled to realize a profit on his property. It must go to the condemnor for its fair market value, as is, irrespective of any claimed value based on an aggregate of values of individual lots in a subdivision * * *.”

This Court is not prone to interfere with the finding of the trier of fact unless such is inconsistent with the manifest import of the evidence. *Seybold v. Union Pac. R. Co.*, 121 Utah 61, 239 P. 2d 174; *McCullum v. Clothier*, 121 Utah 311, 241 P. 2d 468. In reaching that verdict, the instructions by the trial Court to the panel were proper

and correct, the strength of this statement resting in the fact that appellants do not raise as error any instruction. Instruction No. 16, as given, was an accurate statement of the law relating to the zoning ordinances of Washington County at the date of assessment.

CONCLUSION

The accompanying drawing is illustrative of the land plottage incident to the trial of the matter. The basic sketch is evidentiary of the Neilson total tract prior to the date of expropriation as affected by "present" Highway 91. The property description (in brown color) on the first overlay represents the 40 acres selected by Hafen under the Neilson option of June, 1962. The second and last overlay (shown in green) displays the State right-of-way description which was incorporated into the condemnation complaint filed in September, 1962.

The trial of this matter resulted in a fair hearing to all parties. Appellants went to the jury with limited residential land use as the theory of their case and value based thereon; this was a decision of their own making, a choice made in litigation which cannot be now abandoned or recanted.

Future plans and schemes for development by the appellants are personal to themselves, and have no place in a proceeding to determine market value. The unanimous opinion of the jury affixing market value met all the requirements of "just compensation."

The judgment of the lower Court should be, by this Court, affirmed.

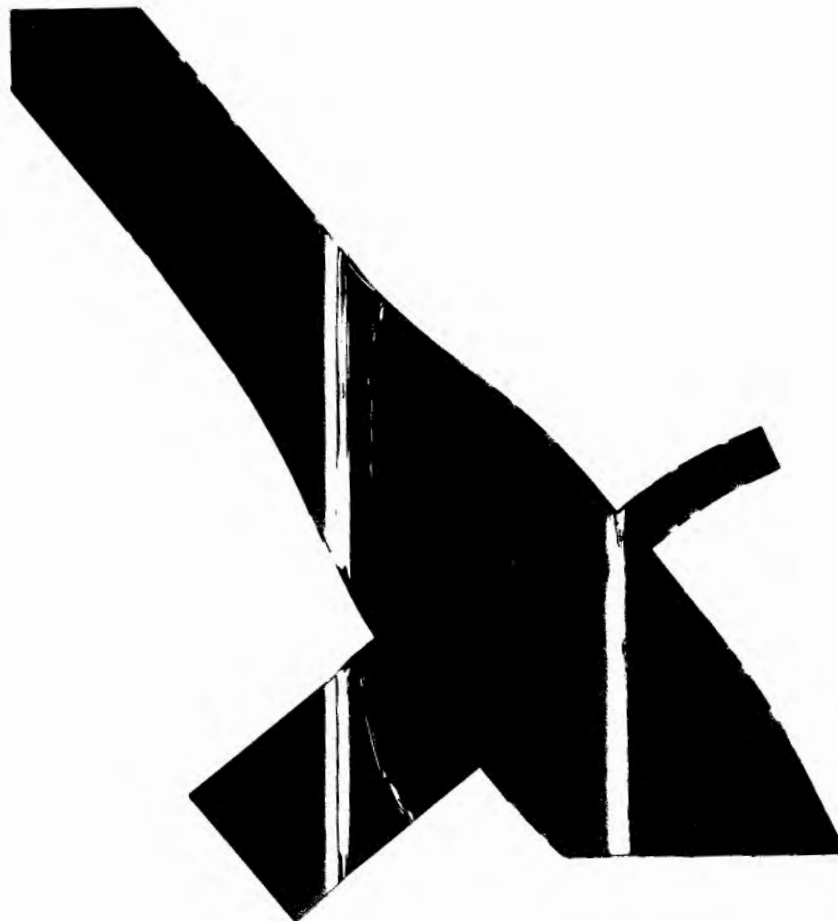
Respectfully submitted,

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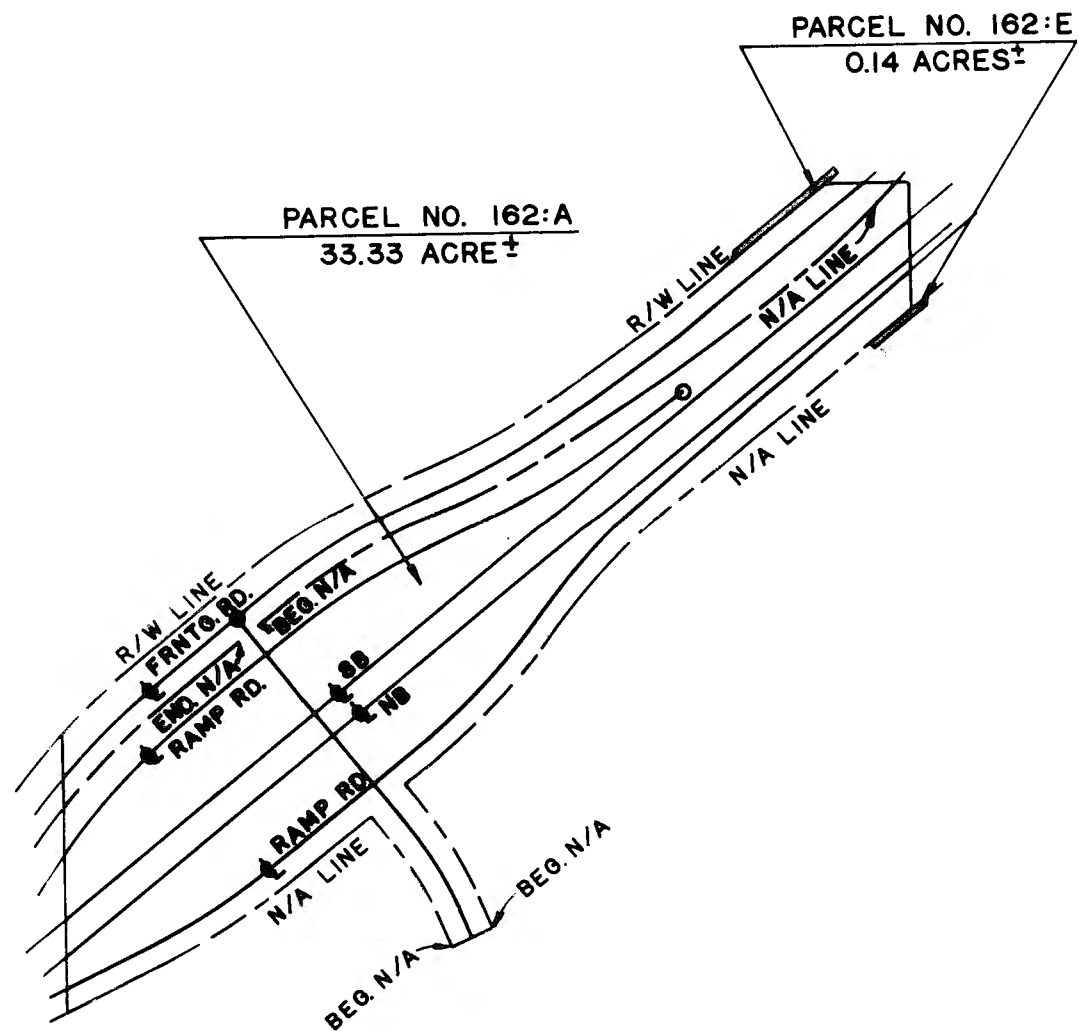
C. F. WILLIAMS,
Of Counsel,

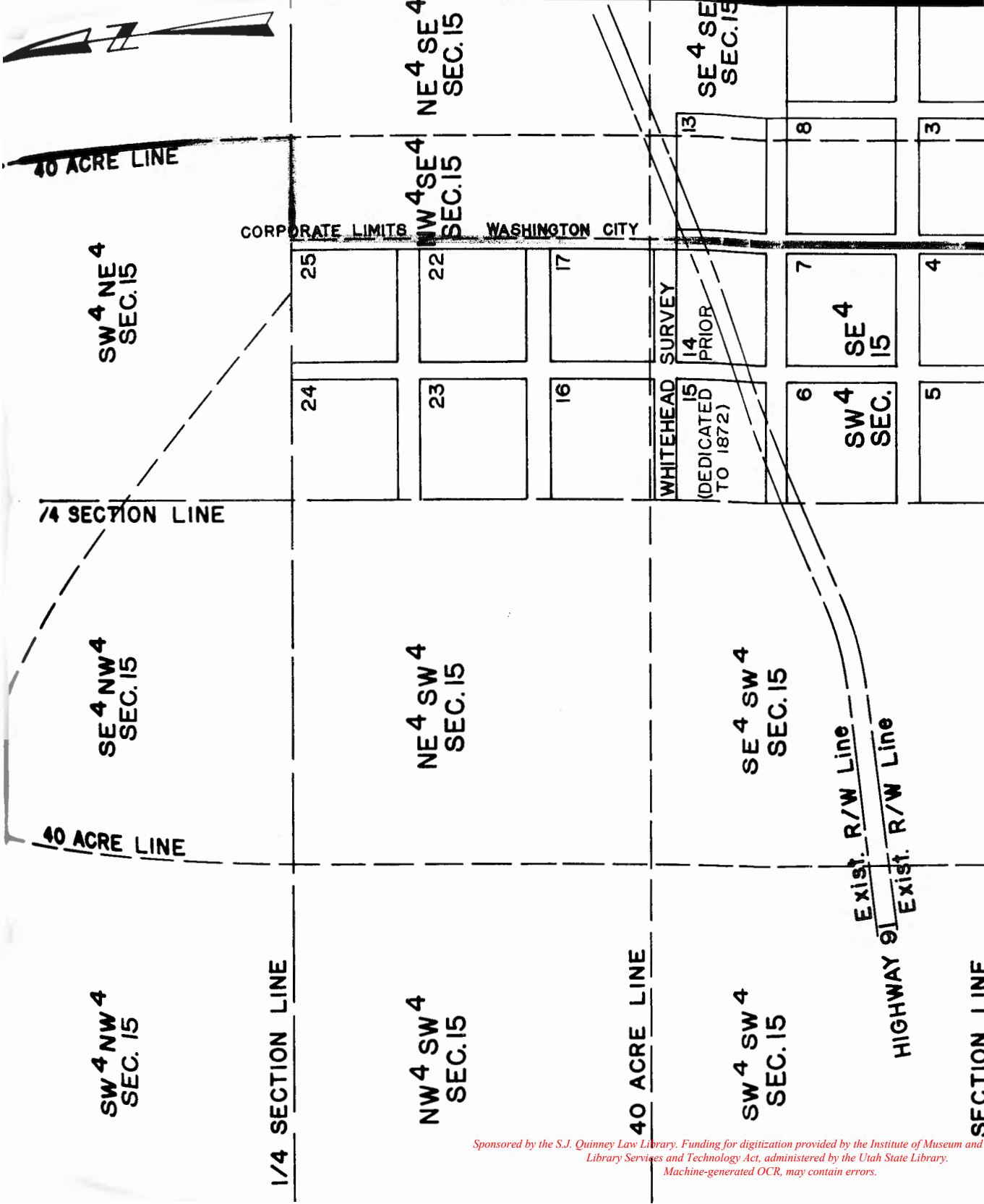
Attorneys for Respondent.



DEED CONVEYANCE FROM NELSON PER
HAFEN OPTION (JUNE 1962)

Sponsored by the Utah State Library. Funding for this project was provided by the Institute of Museum and Library Services Library Services and Technology Act administered by the Utah State Library. Machine-generated OCR may contain errors.





EXHIBIT

MAP SHOWING THE PROPERTY OF ISRAEL NEILSON JR., ET AL & BRIANT S. JACOBS, ET AL AND THAT PORTION REQUIRED FOR HIGHWAY PURPOSES.

PROJECT NO. 1-15-1(8)9 DATE
SCALE 1" = 500' WASHINGTON CO.

TOTAL TRACT	185.09 AC.
LESS LAND FOR	
HIGHWAY	33.33 AC.±
LESS EXIST. ROAD - US	
HIGHWAY 91	4.29 AC.±
EASEMENT	0.14 AC.±
REMAINING LAND	147.33 AC.±