

1968

Salt Lake County v. Nobumichi Kazura, Frank E. Roberts, Harold F. Roberts, Beth Purdue, Roberta Berry And Carol Bunnell : Brief of Respondents

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

SALT LAKE COUNTY,

Plaintiff and Appellant,

vs.

NOBUMICHI K A Z U R A , * * * ,
FRANK E. ROBERTS, HAROLD F.
ROBERTS, BETH PURDUE, RO-
BERTA B E R R E Y and CAROL
BUNNELL,

Defendants and Respondents.

Case No.

11011

BRIEF OF RESPONDENTS

Appeal from Judgment of the Third District Court
in and for Salt Lake County
Honorable Leonard W. Elton, District Judge

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110
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TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT AND MOTION TO STRIKE	1
DISPOSITION IN LOWER COURT	4
RELIEF SOUGHT BY APPELLANT ON APPEAL ..	5
STATEMENT OF FACTS	6
1. Condemned property	6
2. Hotel Operation	6
3. Maintenance	7
4. Market condition	7
5. Cost replacement approach	8
6. Income approach	9
7. Cross examination of Jensen	12
8. Sale of Upland Hotel	13
9. Other witnesses called by County	13
ARGUMENT	14
POINT I. THE VERDICT AND JUDGMENT STAND FULLY SUPPORTED UNDER THE ADMITTEDLY COMPETENT EVIDENCE OF THE COST REPLACEMENT APPROACH TO MARKET VALUE	14
POINT II. THE TRIAL COURT PROPERLY RECEIVED THE TESTIMONY OF RESPONDENTS, AS WELL AS APPELLANT, ON THE CAPITALIZATION APPROACH TO MARKET VALUE IN THE EVALUATION OF THE COLONIAL HOTEL	17
1. The income approach is admissible in the market value determination in eminent domain, particularly as to special purpose properties....	18
2. The hotel use of the subject property is special within the "Bingham" definition	20

TABLE OF CONTENTS—Continued

	Page
3. Income approach of Respondents was fully supported and properly received by Judge Elton	20
4. The authorities fully sustain Judge Elton's approval of the capitalization approach of Respondents herein	23
5. The argument of Appellant is without merit and citations are of no precedent	28
6. Appellant's witness admitted and agreed with Respondents that the income approach of Respondents was a recognized and proper evaluation method	31
7. Appellant, itself, used as its final basis of market value the "gross rent multiplier"	31
 POINT III. THE TRIAL COURT DID NOT ERR IN PERMITTING CROSS EXAMINATION OF THE COUNTY WITNESS JENSEN, ON ASSESSED VALUE OF AND TAXES PAID ON THE COLONIAL HOTEL	 32
1. Cross examination was pursued to impeach and test the weight and credibility of the opinion of the County's expert, and not to introduce substantive evidence of market value	32
2. The precedent overwhelmingly supports cross-examination as a matter of right of tax appraisements under these facts	35
 POINT IV. THE TRIAL COURT DID NOT ERR ON THE LOLL TESTIMONY WITH RESPECT TO HIS CONSIDERATION OF THE LDS CHURCH TRANSACTIONS	 37
 POINT V. THE TRIAL COURT, IN ITS INHERENT DISCRETION, PROPERLY DETERMINED THAT THE UPLAND SALE, AS OFFERED BY APPELLANT WAS INADMISSIBLE	 39

TABLE OF CONTENTS—Continued

	Page
POINT VI. THE TRIAL COURT DID NOT ERR IN REJECTING THE TESTIMONY OF KIEPE AND MCEWAN OFFERED BY APPELLANT..	41
1. As to Kiepe	41
2. As to McEwan	43
POINT VII. THE CLOSING ARGUMENT OF COUNTY COUNSEL WAS AN ATTEMPT TO PREJUDICE A FAIR TRIAL OF THE CASE	44
CONCLUSION	47

AUTHORITIES CITED

1 A. L. R. 2d 878 and Supplements	42
27 Am. Jur. 2d 94, Eminent Domain §291	42
31 Am. Jur. 2d 557, Expert Evidence §51	33
Nichols on Eminent Domain Vol. 4, p. 113 (3rd Ed.)....	24
5 Nichols on Eminent Domain, 188 §18.45(2) (3rd Ed.)	33
Wigmore on Evidence III p. 630 §992 (3rd Ed.)	33

CASES CITED

Anderson v. Thomas, 108 Utah 252, 159 P. 2d 142 (1945)	16
Baird v. Denver & R. G. R. Co., 49 Utah 58 at 69, 162 Pac. 79 (1916)	16
Brandley v. Lewis, 97 Utah 217, 92 P. 2d 338 (1939) ..	4
Central Illinois Light Co. v. Nierstheimer, 185 N. E. 2d 841 (1962)	38
Central Pacific Ry. Co. v. Feldman, 92 Pac. 849 (Cal. 1907)	35

TABLE OF CONTENTS—Continued

	Page
City of Detroit v. Ehinger, et al., 316 Mich. 360, 25 N. W. 2d 516 (1947)	36
City of Los Angeles v. Deacon, et al., 7 P. 2d 378 (Cal. 1932)	36
City of Los Angeles v. Klinker, 219 Cal. 198, 25 P. 2d 826	42
County of Maricopa v. Shell Oil Co., 84 Ariz. 325, 327 P. 2d 1005 (1958)	23, 25
Garden Grove School Dist. of Orange County v. Hendler, 45 Cal. Rptr. 313, 403 P. 2d 721 (1965)	46
Hales v. Peterson, 11 U. 2d 411, 360 P. 2d 822 (1961) ..	16
In Re Blackwell's Island Bridge, 198 N. Y. 84, 91 N. E. 278 (1910)	15
Lemmon v. D. & R. G. W. R. Co., 9 U. 2d 195, 341 P. 2d 215 (1959)	17
McGaw v. Mayor of Baltimore, 102 Atl. 544 (Md. 1917)	15
Public Market of Portland v. City of Portland, 170 P. 2d 586 (Ore. 1946)	23
Package Machinery Co. v. Commonwealth, 188 N. E. 2d 871 (Mass. 1963)	37
Rasmussen v. Davis, 1 U. 2d 96, 262 P. 2d 488 (1953) ..	43
Regents of University of Minnesota v. Irwin, 57 N. W. 2d 625 (Minn. 1953)	27, 30
Reliable Furniture Co. v. Fidelity & Guaranty Insurance Underwriters, Inc., 14 U. 2d 169, 380 P. 2d 135 (1963)	4
S. L. C. Board of Education v. Bothwell & Swaner, 16 U. 2d 341, 400 P. 2d 568 (1965)	39
Sevy v. Utah Farm Bureau Insurance Co., 8 U. 2d 321, 334 P. 2d 554 (1959)	16

TABLE OF CONTENTS—Continued

	Page
Sill Corp. v. U. S., 343 F. 2d 411 (10 Cir. 1965)	24
Southern Pac. Co. v. Arthur, 10 U. 2d 306, 352 P. 2d 693 (1960)	40
Startin v. Madsen, 120 Utah 631, 237 P. 2d 834 (1951)	17
State Department of Public Works v. Styner, 72 P. 2d 699 at 702 (Ida. 1937)	15
State of Arizona v. Wilson, 420 P. 2d 992 (Ariz. 1967)	25, 30
State Road Comm. v. Bettilyon, Inc., 17 U. 2d 135, 405 P. 2d 420 (1965)	43
State Road Comm. v. Bingham Gas & Oil Co., 21 U. 2d 66, 440 P. 2d 260 (1968)	15, 18
State Road Comm. v. Hansen, 14 U. 2d 305, 383 P. 2d 917 (1963)	23
State Road Comm. v. Jacobs, et al., 16 U. 2d 167, 397 P. 2d 463 (1964)	40
State Road Comm. v. Marriott, 444 P. 2d 56 (Utah 1968)	46
State Road Comm. v. Papanikolas, 19 U. 2d 153, 427 P. 2d 749 (1967)	29, 43
State v. Peek, 1 U. 2d 263, 265 P. 2d 630 (1953)	32, 40
State Road Comm. v. Peterson, 12 U. 2d 317, 366 P. 2d 76 (1961)	39, 40
State Road Comm. v. Stanger, 21 U. 2d, 442 P. 2d 941 (1968)	31
State Road Comm. v. Taggart, 19 U. 2d 247, 430 P. 2d 167 (1967)	42
State Road Comm. v. Valentine, 10 U. 2d 132, 349 P. 2d 321 (1960)	43
State Road Comm. v. Woolley, 15 U. 2d 248, 390 P. 2d 860 (1964)	40, 41, 42

TABLE OF CONTENTS—Continued

	Page
U. S. v. Eden Memorial Park Assoc., 350 F. 2d 933 (9 Cir. 1965)	24, 30
U. S. v. 2.4 Acres of Land, 138 F. 2d 295 (7 CCA 1943)	15
U. S. v. 6.28 Acres of Land, 64 F. Supp. 117 (Ga. 1946)	27
Watkins v Simonds, 14 U. 2d 406, 385 P. 2d 154 (1963)	2
Weber Basin Conserv. Dist. v. Nelson, 11 U. 2d 253, 358 P. 2d 81 (1960)	31
Weber Basin Conserv. Dist. v. Ward, 10 U. 2d 29, 347 P. 2d 862 (1959)	18, 21, 30, 40

RULES CITED

Rule 75 (p) (2) (2) (d), U.R.C.P.	4
--	---

STATUTES CITED

Art. VIII, Sec. 9 Utah Const.	5
Utah 78-34-10(1) U. C. A. 1953	43

TREATISES CITED

Encyclopedia of Real Estate Appraising, (Revised and Enlarged) Friedman, Prentice Hall (1968) p. 619	22
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The Valuation of Estate, A. A. Ring, Prentice Hall (1965) pp. 174-176	32

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BRIEF OF RESPONDENTS

PRELIMINARY STATEMENT AND
MOTION TO STRIKE

If the Brief filed by County counsel herein is not violative of every norm of appellate brief writing, it may be only an inadvertence. The Brief is so distorted in its Statement not only of the facts but in argument as well, that it does not calculate a review of the matter on the record or within the rulings of the trial court. In its parts, Appellant's Brief contains an assortment of substantial irregularities, improper argument, statements de hors the record and misstatements of the record. For the purpose of

a Motion to Strike to be herein made, a few of the more prominent deviations are noted below.

To begin with, the first three and one-half pages of counsel's Brief on "Disposition in Lower Court" is a self-righteous and inaccurate argument, without record citation whatsoever, on the events at the first trial leading to a mistrial order of Judge Elton.¹ The great bulk of County counsel's Statement of Facts are not the facts of trial at all, but rather sheer argument.² The diatribe is illustrated on page 9 of counsel's Statement where it is represented as fact that:

"It is at least *problematical*, whether Defendant's *highly imaginative appraisal* would have taken the jury from a realistic valuation of the Hotel property, but for, *a deliberately posed highly prejudicial question of defendant's counsel, asked of plaintiff's witness*, Max Jensen, as to whether the county's valuation of the Colonial Hotel for tax purposes was not \$130,000, accompanied by a flour-

¹Even if this soliloquy of counsel were remotely accurate (*which it is not*) it cannot be considered in the appeal. *Watkins v. Simonds*, 14 U. 2d 406, 385 P. 2d 154 (1963). Nevertheless, this invented argument and statement of Mr. Nielson thereafter serves as the basis for his Statement of Facts at page 9 and for Point II of his Brief with respect to the propriety of cross examination by the landowners as to the validity and consistency of income figures used by the County's experts. Such tactics are ill-fated in this Court.

²See pages 6 and 7 of counsel's Brief wherein the owners' witnesses are said to have "ignored" previous experience on the condemned property and to have made "completely hypothetical projections of an imaginary operation". Appellant then proceeds on page 7 to use his own concocted "hypothetical" resume of the landowners' experts, totally unsupported by the record.

And on page 8 of counsel's Statement of Facts, a sale of property excluded from evidence by Judge Elton is self-styled by counsel as comparable "probably more than any hotel *anywhere in the world*".

ish of a yellow card which defendant's counsel handed to the Clerk for marking (R. 865, 831, 868 and 874). *Counsel of course knew* that Judge Elton had ruled that such evidence was inadmissible at the previous trial."³

Clear misstatements and misrepresentations of the record are made at several stages of Appellant's Brief.⁴

³As noted in F. N. #1, the record citation does not support in the slightest this vitriolic argument or that the owners' counsel "knew" of an earlier ruling in an earlier trial. Indeed, there is no such record or ruling and Mr. Nielson's statement above is not only improper and unsupported argument, *but it is a patently false misrepresentation.*

But this personal beratement of the landowners and their counsel was typical of County counsel's approach throughout the trial. See counsel's closing argument to the jury where, without evidential basis and in the face of continuing admonishment of the trial judge, the personal character of the owners was maligned and their honesty and integrity as citizens questioned, where the owners' counsel was said to have intentionally retained unprofessional witnesses to be brought before "a new and inexperienced jury" and where it was said that the owners and their counsel were, by their evidence in the case, trying to "steal" from the jurors who were taxpayers (R. 809-813).

⁴On page 8 of the Brief, it is claimed that the sale of the Upland Hotel was rejected by the trial court "*in spite of testimony that the beneficiaries were acting at arms length*". There is clearly nothing in the record to even suggest that the beneficiaries were acting at all in the matter, much less acting at arms length (R. 672-674). Rather, the testimony strictly shows that the sale was from one party, as trustee, to himself, as trustee for another (R. 533-534).

On page 9 of Appellant's Brief, County counsel indicates what the testimony of Owen McEwan, former Salt Lake City Fireman would have been if permitted to testify and a record citation is given to that end. The record indicates no proffer as claimed by counsel as to McEwan and indeed, no part of the record remotely supports counsel's claim on the matter. Further, on page 6 of Appellant's Brief, it is stated that the County appraiser determined the income producing potential of the condemned property by "comparative analysis" and record citation is given. The record, itself, including the noted citations, is quite to the contrary and indicates that the county expert did not make a comparative analysis of room rentals in other city hotels of similar class (R. 641, 1. 23-25).

These irregularities which ring throughout counsel's Brief are capped by his almost unique disclosure of a personal conversation held by him with jurors after return of the verdict.⁵

This Court has served notice time and again that it will not condone such a stuffing of the record by a party, that it will not consider a self-invented argument in the Statement of Facts and that it will, in its deliberations, disregard misrepresentations and misstatements of the record such as have been above-noted in Appellant's Brief. *Reliable Furniture Co. v. Fidelity & Guaranty Insurance Underwriters, Inc.*, 14 U. 2d 169, 380 P. 2d 135 (1963); *Brandley v. Lewis*, 97 Utah 217, 92 P. 2d 338 (1939); Rule 75(p) (2)-(2) (d), U.R.C.P. Each of such failings noted herein are subject to a motion to strike as impertinent and scurrilous and Respondents so move this Court at this time to strike such matters from Appellant's Brief and from the Appeal. They should not be considered in the determination of this Appeal and Respondents should not be required to respond to the same.

DISPOSITION IN LOWER COURT

At no point does Appellant's Brief give any indication of the amount of or difference in the value testimony at trial. *Nor does Appellant even suggest in its Brief the amount of the jury verdict or its relationship to the value evidence.* Apparently, the assumption is that Appellant is to prevail in this appeal on the basis of abstract theory.

⁵"The jurors I talked to indicated that some of the jury held out for a time for a verdict of \$130,000 based on the taxes alone. The situation fairly sings with poetic justice" App. Br. p. 23.

without regard to or in spite of the facts of trial. A synopsis of the proceedings in the lower court is accordingly in order.

A mistrial (upon motion of the landowners) having been declared at the end of three days of trial, the case was reset and brought on for new trial on the issues of Just Compensation in June, 1967 (R. 66-67, 71-72). The opinion evidence of the parties on the market value of the Colonial Hotel property under condemnation was:

Testimony of Loll for Landowners\$120,600.00
(R. 484)

Testimony of Roberts, one of the owners .. 130,000.00
(R. 384)

Testimony of Jensen for County 67,200.00
(R. 677)

The jury verdict of Just Compensation, returned after six and one-half days of trial, was a compromise of \$97,500.00 (R. 113).

Plaintiff's Motion for a new trial for claimed errors of law was denied by Judge Elton on August 2, 1967 (R. 127).

RELIEF SOUGHT BY APPELLANT ON APPEAL

The County has appealed from the "Judgment of August 2, 1967" denying its Motion for a new trial.⁶ It requests herein a new trial on the issues of Just Compensation and further seeks an "advisory opinion" of sorts of this Court

⁶That Plaintiff has appealed from a non-final order and not from the Judgment on the Verdict of June 21, 1967 (R. 120) has been made the subject of a separate motion to dismiss brought by Respondents herein.

on the use of the income approach in determining market value.

STATEMENT OF FACTS

As noted above, the impropriety of Appellant's Statement of Facts, makes it impossible for Respondents to concur with or except to such Statement. Respondents will accordingly, set forth their own statement of evidentiary facts as follows:

1. *Condemned property.* In March 1966, the Plaintiff condemned Defendants' property to make way for the construction of the County Salt Palace (R. 3). The property, long known as the Colonial Hotel, was situated on the north side of First South between West Temple and First West Streets in Salt Lake City (R. 235). Constructed around 1900 of sandstone foundation and two foot thick brick walls, the Hotel stood five stories high (R. 244, 353). The ground floor served as a lobby and for business rentals (cleaning shop and barber shop) (R. 248-249). The upper floors consisted of some 24 apartment units and 70 hotel rooms (R. 248). The basement had been occupied for many years through the early 1960's by the Pagoda Restaurant (R. 246-247).

2. *Hotel Operation.* For many years, the patrons of the Hotel came primarily from the city's oriental community, a fact which lent rental stability to the property (R. 433-434). Many renters resided in the Hotel on a permanent basis (R. 249). In recent times, the Hotel averaged about 75% occupancy rate (R. 248-249). The property

had been under an operating lease from the middle 1940's to the late 1950's between Frank E. Roberts (father of the other Defendants) as lessor, and Fuge Iwasaki (owner of the Pagoda) as lessee (R. 370-371). Thereafter Frank sold to his children and Fuge assigned his interest to one Takanaka in the late 1950's and early 1960's (R. 366-369). While there had been some adjustment of the base lease rental of the Hotel upward toward market rental value through the 1950's (R. 366-368), the lessee refused to pay an otherwise justified rental increase after 1963 on the Hotel (R. 365). The reason — the imminency of the Salt Palace Project in the area had caused merchants, residents and Hotel patrons to vacate, move away and relocate, and the vacancy rate in the Hotel substantially increased after early 1963 (R. 393). The lease rental thus being paid was not fair market rental (R. 481). By 1966, room rentals were most marginal with all customary renters having gone elsewhere because of the Salt Palace acquisitions in the two city block section (R. 249).

3. *Maintenance.* All floors of the Hotel were served by an automatic elevator, an unusual feature for an older-class Hotel (R. 355). A rewiring of the entire Hotel took place in 1961 and 1962. The building had recently undergone a complete outside painting, and the interior rooms had been refurbished from time to time (R. 356-358).

4. *Market conditions.* The buying activities of the County and the L.D.S. Church (who combined their acquisitions for the construction of the Salt Palace Project) had their affect on the open market in the area (R. 436-439). After 1961, there were no sales whatsoever in the two block

region between individual buyers and sellers (R. 442-443). Because of this condition and the impending project, tenants could not be held, property could not be sold in a normal and competitive environment and a depressed market resulted (R. 439, 467, 519, 522). As a consequence, *value witnesses on both sides* looked outside the two block zone of influence for market information in arriving at land value opinion (R. 469, 646). Mr. Loll for the landowners investigated and considered sales made to the L.D.S. Church (R. 465-466, 470), but determined that because of the seller's relations with the Church, such transactions were not typical of market value (R. 466). Nor did the County value witness, Jensen, utilize any Church transactions.

5. *Cost replacement approach.* By its Brief, Appellant would have us believe that the income approach to market value was the exclusive method used by the landowners. Quite to the contrary, the cost replacement approach (cost new less depreciation and obsolescence) was employed as a substantial index of market value under the owners' case. Mr. Loll concluded that the condemned property, under the cost method, had a value of:

Market value of land	\$ 44,000.00
(by comparable sales #1, 2, & 3)	
Value of building	103,000.00
(cost new less depreciation)	
	<hr/>
Total value	\$147,300.00
(R. 467-472, 482-483)	

Such value opinion of Loll, received in evidence without objection by the County, was some \$26,700.00 less than

that value determined by the income approach (R. 484)⁷

6. *Income approach.* This approach was adopted as an appraisement method by both sides. The difference in the case lay in the rental income tested, the landowners having analyzed the ground floor and room rentals of the Hotel (R. 453-455), and the County having relied on leasehold income (R. 612-617). For the landowners, Mr. Johns, MAI, and Mr. Loll testified that in determining market value of a hotel, the income approach is the recognized method because of the following reasons:

- (a) A hotel is a special use property which because of wiring, plumbing, lay-out and design, is not adaptable to other general uses (R. 761, 502). The subject property had always been put to such special use (R. 250).
- (b) Because of the substantial difference in size, location and type of each hotel in the city, there was a lack of genuine comparable sales of hotel property (R. 449). No comparable hotel sales were introduced by either party.
- (c) That the buyer and seller in the market, in determining a fair price for a hotel, rely substantially on the income approach and income *potential* of the property (R. 279, 481-482). On this point, all witnesses were in agreement (R. 610, 762-764).

⁷Loll stated that the cost replacement approach was less reliable than the income method on the subject property because of the difficulty in estimating the proper amount of depreciation to a building some 70 years old (R. 445, 449).

Johns and Loll for the owners stated that it is basic appraisal practice in the evaluation of a hotel site to utilize the income approach by estimating and determining probable room and ground floor rentals under typical and average management, deduct from such income estimate the expenses (taxes, insurance, maintenance, utilities) incident to the hotel, then deduct from the remaining rental income that portion allocable to a reasonable return upon the land investment, then capitalize the remaining income by a rate of return that would be expected by an ordinary and prudent hotel buyer and seller (R. 284-296, 453-465). Such capitalized figure, when added to the already determined land value, reveals market value of the entire property by the income approach (R. 296, 481-482, 484). Such method (sometimes called a rental operating statement) *is the typical manner* in which hotels are bought and sold in the market (R. 279, 338, 376).

Mr. Loll for the condemnees utilized this appraisal method. In estimating room and ground floor rentals, he considered the actual experience and vacancy rate of the Colonial Hotel, (R. 451, 453-454), the depressed rental market in the area caused by the Salt Palace (R. 453, 481, 559), the room rentals vis-a-vis vacancy rates *of at least three other local hotels of comparable class* to the Colonial (R. 475-480), and a rent pattern which, in the appraiser's judgment, represented sound and average management (R. 452-455, 473-475). Expenses against such determined gross rent were similarly based on a substantial survey of other hotels and actual operating expenses of the Colonial, typical management operation again being assumed (R. 475-480).

One of the condemnees, himself a leading hotel expert in the City, testified as to average ground floor and room rentals and expenses for the Colonial (R. 377-379).

While it was the fee interest in the Hotel which was condemned, the County witness, Jensen, chose to appraise only the *leasehold* rental as the sole basis for his income approach (R. 612-613, 714-715). Jensen also used the actual expenses of the leasehold agreement, including *taxes* and insurance (R. 612-613). He admitted that he made an initial and constant assumption throughout his appraisal that the actual leasehold rent equated fair market rent of the Colonial Hotel (R. 611-612, 613, 643, 835). On the other hand, the value witnesses for the owners did not rely on the actual leasehold rent as the sole basis for value because:

- (a) The actual leasehold rental was not in their opinions, fair market rental (R. 338, 345-346, 392, 394, 481, 550);
- (b) Since the total property was being condemned and not just the leasehold interest, the rental from the whole property and not just a lease interest, was the more relevant data to be considered (R. 299-300, 343-344, 481-482, 500, 764-769);
- (c) The actual lessee, Takanaka, was sick and not a typical hotel operator (R. 488-489, 546);
- (d) The appraiser could not determine a fair leasehold rental until the rental of the entire Hotel was determined (R. 768-769).

The witnesses for both parties used practically the same capitalization rate of return, the owner's appraiser using a more conservative rate than that of the County (R. 462, 616). Mr. Jensen for the County, also appraised the Hotel on the basis of the cost replacement approach (R. 666).

For the County, Mr. Kiepe admitted that the estimated rentals of a hotel, as depicted by the appraisal approaches of the landowners' witnesses, was a recognized and approved method for evaluating hotel properties, *particularly*, when it was determined by the appraiser that the leasehold rental was not fair market rent (R. 749).

7. *Cross examination of Jensen.* On direct examination, the County witness, Jensen, testified that as a part of his income approach to value, he *used the actual taxes* paid on the Colonial property, \$2500.00, as an expense deduction from his gross income figure (R. 612). On cross examination, the witness admitted that the taxes were out of balance and disproportionately high with respect to his gross income figure (R. 831), but in further testimony he indicated there was no imbalance (R. 831). Thereupon, Jensen was asked whether or not the \$2500.00 tax bill as used by the witness was not, in fact, based upon a market value estimate made by the State Tax Commission of \$130,000.00 (R. 831). Jensen answered he did not know (R. 831). Jensen was then requested to identify an exhibit (which was not shown to the jury) with respect to the taxes paid on the property, but he was unable to make the identification (R. 832). Thereupon, the examination terminated (R. 832).

8. *Sale of Upland Hotel.* On cross examination of the owners' witness, Loll, County counsel asked by way of new evidence, if the Upland Hotel had not sold in 1961 for \$97,600.00 (R. 532-533). Testimony of the sale was stricken by Judge Elton on redirect examination when it was shown that the sale was from Tracy Collins Bank, Trustee, to Tracy Collins Bank, as Trustee for another (R. 533-534, 557-558, 570). The basis of the Elton ruling was that the transaction was a sale from a Bank to itself, and not an arms length transaction in the open market (R. 557-558, 570, 674). Jensen for the County did not know whether the transaction was an open market, arms length, bona fide sale (R. 674), and the trial court refused to permit the sale as comparable (R. 675). *The County made no offer of proof whatsoever to show* that the sale was made in the open market, that it was voluntary, that it was the result of normal bargaining and that it was otherwise an arms length transaction between a buyer and seller in the competitive market (R. 675).

9. *Other witnesses called by County.* W. Kiepe, an appraiser, was called by the County as another value witness. He testified categorically that he had never physically inspected the Colonial Hotel and that he had not made an appraisal of the Hotel (R. 736, 751). The witness had appraised other properties within the Salt Palace area (R. 751). On the latter basis alone, County counsel asked Kiepe if he had an opinion as to the value of the real property of the Colonial Hotel (R. 751). The trial court sustained the objection to such question and to Kiepe's opinion, the foundation for the ruling being that the witness, admittedly, had not appraised the condemned property and that such

appraisal was not to be conducted by “separating it piecemeal”, the land from the building (R. 752). *County counsel made no offer of proof* as to what value, if any, the witness would have testified if so permitted (R. 753, 776).

The County also called a Mr. McEwan, Fire Marshall at Utah University (R. 721). The witness went on the condemned premises one month *after* the date of condemnation to make arrangements for fire-training courses to be held in the Hotel prior to demolition (R. 722). At the time of inspection, the Hotel was in the process of being dismantled (R. 722). The witness was asked by County counsel whether he observed the fire resistant qualities of the building and its conformance to fire regulations of the City and County (R. 722-723). An objection, based on relevancy and materiality, was sustained (R. 723). County counsel made no offer of proof as to what McEwan’s testimony, if any, would have been (R. 724, et seq.).

ARGUMENT

POINT I.

THE VERDICT AND JUDGMENT STAND FULLY SUPPORTED UNDER THE ADMIT- TEDLY COMPETENT EVIDENCE OF THE COST REPLACEMENT APPROACH TO MAR- KET VALUE.

One reading no further than the County’s Brief in this appeal is left with the distinct impression that the evidence of trial, the verdict and judgment, all rest solely

on the income approach to market value. Throughout its Brief, the capitalization of income is the only value testimony as to which Appellant makes any reference. Appellant has failed by its Brief to advise this Court that, contrary to the intended impression, the landowners (indeed, both parties) submitted substantial testimony at trial of the market value of the Colonial Hotel, *using as a basis of value the cost replacement approach*.

The owners' value witness testified at some length on the employment of the cost approach, the source of cost factors considered, the amount of accrued depreciation estimated on the building, and the depreciated value of the building, \$103,300.00, which when considered with and as a part of the real property, \$44,000.00, indicated a total value of \$147,300.00 (R. 448, 482-484). Such testimony, exceeding by more than \$27,000.00 the value of the condemned property under the capitalization method of valuation, was received without objection by the Appellant. And the appraiser for Appellant also testified to and used the cost replacement approach in arriving at his opinion (R. 666-668).

Although sometimes criticized as unsophisticated, the cost approach has been long recognized as a proper basis for market value in eminent domain, *State Road Comm. v. Bingham Gas & Oil Co.*, 21 U. 2d 66, 440 P. 2d 260 (1968), *In re Blackwell's Island Bridge*, 198 N. Y. 84, 91 N. E. 278 (1910), and such method, itself, will adequately support a damage verdict and judgment. *U. S. v. 2.4 Acres of Land*, 138 F. 2d 295 (7 CCA 1943); *State Department of Public Works v. Styner*, 72 P. 2d 699 at 702 (Ida. 1937); *McGaw v. Mayor of Baltimore*, 102 Atl. 544 (Md. 1917).

Quite apart, therefore, from any evidence of the income approach in the case at hand, the verdict and judgment is amply grounded on admittedly competent and substantial evidence of market value via the cost replacement approach. And this Court will not order a new trial even were it assumed *arguendo* that errors of law were committed by the trial court on other issues. *Baird v. Denver & R. G. R. Co.*, 49 Utah 58 at 69, 162 Pac. 79 (1916); *Anderson v. Thomas*, 108 Utah 252, 159 P. 2d 142 (1945). As stated by this Court in *Servy v. Utah Farm Bureau Insurance Co.*, 8 U. 2d 321, 334 P. 2d 554 (1959) :

“No evidence attacked either the purchase or salvage price, and on such unassailed testimony, the court could have found the market value of the car to have been \$200 after the mishap, with a resultant damage of up to \$2,095. *Having arrived at the much lower figure of \$1,446.92 in applying one of two tests for determining damages, which test proved objectionable because based on inadmissible evidence, should not preclude plaintiff from recovery where, on uncontroverted, admissible evidence, canvassed in the light of an equally effective test for assessment of damages, plaintiff might merit a far greater award.*”

The rationale of *Servy* was further outlined by the Court in *Hales v. Peterson*, 11 U. 2d 411, 360 P. 2d 822 (1961). While there was no error committed by Judge Elton in admitting evidence of the capitalization approach, as hereinafter discussed, the verdict and judgment are in any event fully sustained within the substantial framework of the cost approach testimony adduced at trial.

POINT II.

THE TRIAL COURT PROPERLY RECEIVED THE TESTIMONY OF RESPONDENTS, AS WELL AS APPELLANT, ON THE CAPITALIZATION APPROACH TO MARKET VALUE IN THE EVALUATION OF THE COLONIAL HOTEL.

For Appellant to be heard in this Court, it has the burden of showing that error was committed by Judge Elton and that such error was prejudicial to the verdict and judgment:

“* * * The verdict has been given some additional verity by the rulings of the trial court on motions presented, including the motion for a new trial. When such a trial has been had, the presumptions are in favor of validity of the judgment entered. *This court is loathe to disturb it and will not do so unless the appellant meets its burden of showing error and prejudice which deprived it of a fair trial.* We are not persuaded that it did so here.” *Lemmon v. D. & R. G. W. R. Co.*, 9 U. 2d 195, 341 P. 2d 215 (1959).

This Court has consistently held the “prejudice” in the appeal sense requires proof that the verdict would, in all probability, have been different and in favor of Appellant but for the alleged error. *Startin v. Madsen*, 120 Utah 631, 237 P. 2d 834 (1951). Contrary to this mandate, the County has shown neither error nor prejudice in this appeal. With respect to the only genuine point raised by it, to-wit, the propriety of using the capitalization approach in evaluating the Colonial Hotel, the authorities and precedent of this Court fully affirm the trial court ruling.

1. The income approach is admissible in the market value determination in eminent domain, particularly as to special purpose properties.

Point I of the County's Brief is devoted to a general disparagement of the income or capitalization approach in condemnation. Indeed, its censure of the income method and the dependency upon the Sackman speech suggests that Appellant's claim is that the capitalization approach is not admissible at all in eminent domain "in the absence of a constitutional provision or statute requiring a different rule". App. Br. p. 18. At the least, Appellant's argument assumes that the issue of income and income approach has never before been raised in this Court, since it cites no Utah precedent at all.

Not only does Appellant's argument fail to focus on the motivations and plain realities of the hotel market (which in this case indicate that income potential is *the leading characteristic* in the eyes of the hotel buyer and seller), but it fails to heed the admonition of this Court as to the relevant factors which are and may be taken into account in determining market value.⁸ But more specifically, Appellant's argument on the income approach ignores the plain holding in the recent case of *State Road Comm. v. Bingham Gas & Oil Co.*, 21 U. 2d 66, 440 P. 2d 260 (1968) wherein this Court expressly gave its approval of the use of the income approach in the condemnation of a special purpose property, a service station and cafe. In *Bingham*, in proving the value of the condemned premises,

⁸*Weber Basin Conserv. Dist. v. Ward*, 10 U. 2d 29, 347 P. 2d 862 (1959).

the owner relied (in addition to the cost replacement approach), upon the capitalization of the net lease and gallonage pumped at the station. The condemnor made the same argument as Appellant does herein — that the income approach was not admissible in arriving at market value and that in all events, gallonage was attributable to business profits and management and could not be properly capitalized to determine value. This Court, in an undivided opinion, rejected both arguments. Speaking through Justice Tuckett, it was held:

“In general, appraisers of real estate use three different approaches for the determination to market value; these are: (1) the market data approach or consideration of comparable sales; (2) the reproduction of cost at the time of taking, less depreciation; and (3) *the income approach or capitalization of projected income.*

“* * * The owner’s appraisers used the cost approach as well as the capitalization approach in determining the market value. *The cost approach indicated a market value of the property taken equal to or in excess of the value based upon capitalization.*

“It would seem to us that in view of the *special use* to which the property had been put prior to taking and its location the most reasonable and practicable method the trial court could use in its determination of value was the capitalization approach.”

With the authorities referred to therein in support of the holding, *Bingham* is one of the leading decisions in the

country on the use of the income approach in eminent domain. When the highest and best use of the property is a "special use" for which its income potential is a prime consideration in the market place, *Bingham* is applicable.

2. The hotel use of the subject property is special within the "Bingham" definition.

That a hotel is a special purpose or use of property should provoke no debate, not even from Appellant. Witnesses on both sides at trial agreed as to the special and unordinary use. Unlike a typical building, a hotel is not amenable to ready conversion to garden variety business uses. Its floor plan, wiring, plumbing and bathroom systems require adherence to the hotel use. *McMichaels' Appraising Manual*, Prentice Hall, (4th Ed.) 1959 pp. 248-249. In the sale of a hotel, the willing and informed buyer and seller will, therefore, take into consideration those factors which have particular relevancy to the special hotel purpose, and such factors may not have any relationship to those factors which involve typical business property.

The key factor in the purchase and appraisal of a hotel property is its income potential:

"Hotel properties are bought and sold on the market and new hotels are constructed and placed in operation, yet in both instances the primary purpose is the producing of net income." *McMichael's Appraising Manual*, supra p. 248.

3. Income approach of Respondents was fully supported and properly received by Judge Elton.

In determining whether Judge Elton erred, as charged by the County, in permitting the capitalization of hotel rentals, the threshold statement of this Court in *Weber Basin Conserv. Dist. v. Ward*, 10 U. 2d 29, 347 P. 2d 862 (1959) is the guideline:

"We are in accord with what appears to be the better view, adopted by the trial court, that the condemnee is entitled to the fair market value of his property at the time of the service of summons in the condemnation proceedings as provided by statute; *and that all factors bearing upon such value that any prudent purchaser would take into account at that time should be given consideration, including any potential development in the area reasonably to be expected.*"

Although Appellant might like us to believe otherwise, it is unable to advocate the total excision of the income approach to value in this case. The reason — *because the County itself used the method at trial*. In fact, most of its testimony hinged upon the income method. So what Appellant is forced to argue is that all other analyses of income of the property, *other than that specifically adopted by Appellant*, are improper. And that is just what it claims in this appeal.⁹

The facts are that both parties relied at least in part upon the income approach to market value. The Respondents relied upon the reasonable rental from rooms and ground floor (exclusive of concessions, restaurants or strictly business income) as its basis for the approach. The Appellant chose to use a leasehold rental as its income

⁹See App. Br. p. 19.

basis, although it was the fee estate in the property which had been condemned. *Respondents' value witnesses clearly denied that leasehold rental in the matter constituted fair market rental.* While both of the income methods thus used by the parties have their proper place in the capitalization approach of special purpose properties, the appraisal authorities leave no doubt that the method of the landowners is by far preferred in the evaluation of a hotel. In the leading appraisal treatise, *Encyclopedia of Real Estate Appraising*, (Revised and Enlarged) Friedman, Prentice-Hall (1968) p. 619, it is stated that with respect to the appraisal of a hotel:

“The appraiser gives consideration to reproduction cost less depreciation, and to comparison with sales of similar hotels, *but he is especially concerned with the analysis and capitalization of probable future operating income or of rental income under a lease.* Problems peculiar to the particular hotel or type of hotel under appraisal arise continually.

“* * * *Capitalization of net income from actual operation of the hotel in the past may or may not be a fair indication of its value.* After careful study of the hotel in its environment, the appraiser estimates the net income that the property should produce under ‘normally’ efficient management. If the actual net income produced by the operation in the past is well below that which reasonably may be anticipated for the future, the appraiser may find that the past record was the result of inefficient or indifferent management; he may adjust his valuation upward if not to the valuation based on income from normally efficient management.”

The expert testimony of this trial concurred in the *Encyclopedia* statement. And the reasonable rental pro-

duction of the Colonial Hotel, was determined by Respondents' witnesses only after an exacting study of past rentals, occupancy rates, net income, expenses, and typical management of the Colonial Hotel and other competing hotels.

The expert testimony shows that if these owners had, in fact, sold their property on the open market to a private buyer, the capitalization approach which Respondents pursued at trial, would have been used by that private buyer and seller in determining a fair sales price. Should they, as the County contends, be foreclosed from utilizing that very evaluation approach to market value because their property was involuntarily placed in the teeth of a condemnation suit? The answer has to be no, not without doing violence to the cardinal definition of market value¹⁰ and the Equal Protection Clause of the 14th Amendment. The answer is as Judge Elton found it to be, that such income rentals and capitalization approach of the Colonial Hotel is admissible in evidence because it is the chief and most fundamental element considered by the buyer and seller in the hotel market.

4. The authorities fully sustain Judge Elton's approval of the capitalization approach of Respondents herein.

The precedent of this Court, under the *Bingham* decision and a wealth of authorities otherwise, affirms the discretionary ruling of the trial court. *Public Market of Portland v. City of Portland*, 170 P. 2d 586 (Ore. 1946); *County of Maricopa v. Shell Oil Co.*, 84 Ariz. 325, 327 P. 2d

¹⁰*State Road Comm. v. Hansen*, 14 U. 2d 305, 383 P. 2d 917 (1963).

1005 (1958). *Nichols on Eminent Domain*, Vol. 4, p. 113 (3rd Ed.).

In *U. S. v. Eden Memorial Park Assoc.*, 350 F. 2d 933 (9 Cir. 1965), unimproved cemetery property was condemned by the Government for construction of a freeway. The owners' witnesses, over objection, utilized the capitalization approach on projected income of the cemetery in arriving at market value. In giving its approval to the capitalization method under the particular circumstances, the Ninth Circuit held:

"In seeking to establish the value of the land taken, Eden relied upon evidence of the capitalization of projected income, or as it is sometimes referred to 'the income approach'. The Government assigns the introduction of this evidence as error.

"* * * 'Appraisers commonly think of value in three ways:

1. The current cost of reproducing a property less depreciation from all sources, that is, deterioration and functional and economic obsolescence.
2. The value which the property's net earning power will support, based upon a capitalization of net income.
3. The value indicated by recent sales of comparable properties in the market.

"* * * We conclude the Court properly admitted the evidence as to capitalization of income to establish the value of the property taken."

Further authority for the use of income (other than leasehold rentals) as a criteria of market value is found in *Sill Corp. v. U. S.*, 343 F. 2d 411 (10 Cir. 1965). Therein, the Government condemned the owner's interest in a Wher-

ry Housing Project. While the parties agreed as they did on the Colonial Hotel, that the income approach was competent, the owner claimed that it was entitled to capitalize *income without expenses* because of the relevancy of the factor in the market for that type of property. The Tenth Circuit writing through Murrah, C. J., agreed with the owner and sustained the verdict:

"We know, of course, that the law is not wedded to any particular formula or method for determining fair market value as the measure of just compensation. It may be based upon comparable sales, reproduction costs, capitalization of net income, or an interaction of these determinants. The parties agreed in this case that the capitalization of income is the most satisfactory method."

In *County of Maricopa v. Shell Oil Co.*, supra, the Arizona Supreme Court approved the capitalization of gross income of a service station in arriving at market value because the buyer, in purchasing station sites, commonly considers such factor. While the *Sill* and *Shell Oil* decisions extend quite beyond the evidence and rulings of Judge Elton herein,¹¹ they are significant in this appeal because they reflect the extent to which highly respected courts have gone in approving capitalization of income estimates where such factor was a material element of value in the market.

In *State of Arizona v. Wilson*, 420 P. 2d 992 (Ariz. 1967), a guest ranch was partially condemned for freeway

¹¹Respondents herein did not in any way capitalize *gross income* into value. Rather, it was based strictly on net income, after expenses, of determined room and ground floor rental.

usage. The owner predicated severance damage to remaining property on the basis of a reduction in the gross income of the property. The trial court permitted the evidence over objection under a limited instruction that while the evidence could not be used to show "loss of profit to a business", it could be admitted as an element in determining the value of the condemned property before and after the taking. On appeal, the Arizona Court affirmed the holding and in so doing, pointed out the distinction between the loss of profits, per se, and property income. The latter is admissible where it is a relevant market factor:

"It seems to be the general law that in a condemnation action evidence of profits derived from a business conducted on the property is too speculative or uncertain to be considered as a basis for computing or ascertaining market value of property. However, the courts have consistently distinguished between profits from a business and income from the real property itself, which is considered to have relevancy as to the market value of the land. Though this distinction has almost universal acceptance, the courts have had difficulty in determining when income arises from a 'business' as opposed to that derived from the intrinsic nature of the property itself."

In approving capitalization of gross income, the Arizona Court went on to emphasize the inherent discretion placed in the trial court in passing on this type of evidence:

"In drawing a dividing line between the two types of income involved, we believe that considerable room for the discretion of the trial court must be allowed. We see sufficient relationship between the income from a guest ranch and the value of the real property used as that guest ranch so that we do

not consider the admission of the evidence in question to be an abuse of discretion."

Two cases involving the condemnation of hotels are noteworthy. *Regents of University of Minnesota v. Irwin*, 57 N. W. 2d 625 (Minn. 1953) and *U. S. v. 6.28 Acres of Land*, 64 F. Supp. 117 (Ga. 1946). In *Irwin*, the Minnesota Supreme Court upheld the capitalization of room rentals in the condemnation of a large apartment house and rejected the claim of the Regents that such constituted evidence of profits:

"It seems to us that because of the apparent demand for rental space in that particular location, the rentals received from the rooms available for rental purposes, with other elements would necessarily affect values placed on the entire property and would be considered by prospective purchasers in estimating the market value of the premises.

"* * * In determining the value of these respective properties, particularly where income was being considered, it seems to us that *both the buyer and the seller would consider these facts and the income derived from each property in determining the market value.*"

And in *U. S. v. 6.28 Acres of Land, supra*, value witnesses in appraising a condemned hotel, relied on past and estimated earnings of the hotel in arriving at market value. The Federal Court held that such evidence was admissible because it would have been taken into account by a buyer and seller in negotiations:

"Both parties having relied upon actual income as one of the elements to be considered in the determination of the issue of just compensation, and

having submitted evidence that the highest and best use for the property was as a hotel, the testimony of earnings was properly admitted."

All of the authorities cited herein are in full accord with the holding of this Court in the *Bingham Gas* and *Weber Basin v. Ward* decisions and sustain the rulings of Judge Elton at trial. They do not hold and we would not claim that income evidence or the income approach is applicable in every eminent domain suit. Quite to the contrary, it is not. But when, as in this case, the Court is involved with the valuation of a special purpose property which has as its leading and most potent value element, the determined income potential to be derived from a typical operation of the property, the rationale of *Bingham Gas* and the authorities herein cited are highly relevant and critical to the market value determination. To hold otherwise, would be to ignore a plain factor which the buyer and seller would consider in a private sale of the property. The Government will not be permitted to deny the seller-owner fair consideration of that factor because it has resorted to condemnation as a vehicle to acquire the property.

5. The argument of Appellant is without merit and citations are of no precedent.

The County's argument on the capitalization approach consists of three factions (1) that the capitalization method followed by Respondents improperly utilized personal property of a hotel business, (2) that such income constituted loss of profits from a business, and (3) that such testimony was conjectural. Appellant's main reliance is on a 1965 *speech* delivered by J. Sackman, a condemnor-attorney from

the State of New York.¹² *Appellant has not cited a single hotel case* in its Brief to support its position. And the Sackman article is largely irrelevant, being devoted to those case citations wherein the landowner has hypothecated a building on what, in fact, is unimproved land and then attempts to capitalize an estimated income from the theoretical building. Such attempts are uniformly rejected by the Courts and are not herein involved whatsoever.

As to claim (1), Appellant is in error on the facts. The facts are that the value witnesses of Respondents did properly deduct personal property in the Hotel from the capitalized income. The Hotel furnishings of the Colonial, admittedly, were not fixtures under the definition of this Court in *State Road Comm. v. Papanikolas*, 19 U. 2d 153, 427 P. 2d 749 (1967), and were not appraised as part of the just compensation award. So far as the capitalization approach to market value is concerned, Respondents' witnesses took out of the expenses from gross income, a return and depreciation attributable to personalty (R. 369, 456-459). Appellant in its Brief has not referred the Court to a scintilla of evidence to indicate the contrary.¹³ It is its burden to do so.

As to claim (2), no testimony was offered by Respondents or received that even vaguely resembled loss of prof-

¹²This speech remains unpublished by anyone. It was offered for publication to and declined by the University of Utah Law Review in 1966.

¹³County counsel should take a look at its own income evidence as to personalty since its witness, Jensen, did not reflect in his rental income calculations the fact that the landlord and not the lessee herein, owned the Hotel furnishings. Because the lessee would typically supply his own furnishings, the same should be reflected in the leasehold rental normally payable. Nor did Jensen, in his *gross rent multiplier*, consider such personalty.

its. If the evidence had been directed at business loss, the damage testimony and claims of Respondents would have inordinately exceeded the actual evidence at trial. Respondents' use of hotel rentals and capitalization approach was proffered as a factor which the thinking buyer and seller would weigh, and was no more a loss of business profits than the evidence in income approach in *Bingham Gas*, or the testimony in *State of Arizona v. Wilson, supra*, *Regents of Univ. of Minn. v. Irwin, supra*, *U. S. v. Eden Memorial Park Assoc. supra*, and the other decisions cited herein wherein similar claims of profit and business loss were rejected. Appellant has not cited one decision involving special purpose property where such evidence was determined as profit loss, per se, and hence inadmissible. The County's argument on this point is a hoax, a worn-out cliché made in the hope that somehow the words "loss of profits", per se, will strike a magic chord resulting in a new trial for Appellant. The answer is that the realities of the market place do not operate that way and neither does the controlling law. *Weber Basin Conserv. Dis. v. Ward, supra*.

As to claim (3) of Appellant (that the testimony of Respondents was conjectural and not based upon "reality in the market place") a dispassionate review of the evidence quickly reveals its fallacy. Past operation of the Colonial and operation of other hotels of similar class were reviewed in detail by the value witnesses of Respondents and subjected to cross-examination by Appellant. And Judge Elton at several points, charged the jury that just compensation was not to be based on conjecture. The capitalization evidence being fully admissible, the issue of its weight

and credibility was properly one for the jury, which this Court will not disturb. *State Road Comm. v. Stanger*, 21 U. 2d, 442 P. 2d 941 (1968); *Weber Basin Conserv. Dist. v. Nelson*, 11 U. 2d 253, 358 P. 2d 81 (1960).

6. Appellant's witness admitted and agreed with Respondents that the income approach of Respondents was a recognized and proper evaluation method.

Contrary to the lament of Appellant herein, the County witness, W. Kiepe, testified that in the appraisal of a hotel, capitalization of net rentals is an important market consideration and recognized appraisal method, particularly when "the appraiser found that the contract rent was either above or below what could reasonably be expected in the market" (R. 750, 774). The value witnesses of Respondents had already in their appraisements, met the condition of Kiepe's statement, i. e., both found that contract rental was substantially below the economic or fair market rental of the Colonial Hotel.

7. Appellant, itself, used as its final basis of market value the "gross rent multiplier".

The County has neglected in its Brief to inform the Court that in its final correlation of market value opinion, its witness, Jensen, used the *gross rent multiplier* as the sole basis of value (R. 677-678). Under this method, the determined *gross income*, without consideration of expenses, is multiplied by a factor which the appraiser estimates from the gross income of other properties. The caveat and danger attached to such method is quickly apparent — neither the gross income or the multiplication

factor used reflect differences in the studied properties for age, size, location, state of repair, or available facilities.

The gross rent multiplier is widely condemned in appraising circles as inaccurate and unanalytical. *The Valuation of Estate*, A. A. Ring, Prentice Hall (1965) pp. 174-176. Yet the County used this approach as its major and ultimate test of value of the Colonial Hotel herein. It should not be heard to complain of the far more reliable, authoritative and proven capitalization method employed by Respondents.

POINT III.

THE TRIAL COURT DID NOT ERR IN PERMITTING CROSS EXAMINATION OF THE COUNTY WITNESS JENSEN, ON ASSESSED VALUE OF AND TAXES PAID ON THE COLONIAL HOTEL.

1. *Cross examination was pursued to impeach and test the weight and credibility of the opinion of the County's expert, and not to introduce substantive evidence of market value.*

The importance of the breadth of cross-examination was emphasized by this Court in *State v. Peek*, 1 U. 2d 263, 265 P. 2d 630 (1953) :

"There is no other instrument so well adapted to discovery of the truth as cross-examination, and as long as it tends to disclose the truth it should never be curtailed or limited. Any inquiry should be allowed which an individual about to buy would feel it in his interest to make."

Other authorities echo the *Peek* statement and the broad discretion vested in the trial court in ruling on such matters:

“The trial court has a particularly large discretion in allowing cross-examination of an expert witness as to value, because the object of such examination is principally to determine the credibility of the witness and whether or not he has taken into consideration all the elements of value in arriving at his conclusion.” 31 *Am. Jur.* 2d 557, Expert Evidence §51.

To the same effect is *Wigmore on Evidence, Vol. III*, p. 630 §992 (3rd Ed.), 5 *Nichols on Eminent Domain*, 188 §18.45(2) (3rd Ed.).

County counsel claims by Point II of its Brief, that Judge Elton erred in permitting cross-examination of the County witness, Jensen, as to the taxes paid and the assessed and appraised value for tax purposes of the Colonial Hotel. The only authorities cited by Appellant for the claim are those wherein a party has attempted to introduce evidence of assessed and appraised taxation figures for the purpose of proving substantive market value and are not in point here.

The simple facts confronting the County's argument on this issue are these:

(a) Appellant's witness, Jensen, on direct examination, in testifying as to market value by the income approach, specifically used the actual lease income as his gross income, and also used the actual real property taxes of \$2500.00 paid by Respondent as an expense deduction from gross income (Ex. P-13).

(b) Said taxes under Jensen's own figures on direct examination constituted better than 30% of his gross income estimate. Asked if the ratio of taxes *vis-a-vis* his calculation of rental income was not out of line, the witness first said "yes" and then on cross-examination indicated "no" that they were in line.

(c) At that point, Jensen was asked if the taxes which he had used in his appraisal were not based on an appraisement and assessment of \$130,000.00.¹⁴ The witness answered he did not know whether such was true. He then asked if he had seen the State Tax Commission evaluation schedule of the Hotel, and he answered, "no". Cross-examination on the subject thereupon terminated.

(d) County counsel had full opportunity on re-direct examination to show the taxes were in line with the gross income figures of Jensen, as Jensen claimed, or to move for a mistrial if he felt that prejudicial error had developed. He did neither.

Jensen had voluntarily raised the issue of taxes on his examination in chief. It was crystal clear thereunder that a serious imbalance existed between Jensen's gross income figures and taxes. Either income was too low (if the taxes were accurate) or the taxes were more than twice as high as they should have been (if his income figures were fair

¹⁴It should be noted that the County in this case has never denied either the truth of this statement or that these owners were, in fact, paying real property taxes on the Hotel based on assessed and appraised valuation of \$130,000.00. Yet Jensen's opinion of market value under the income approach was \$67,200.00 or about 1/2 of the value upon which taxes were paid.

market rental). An adjustment of either to bring gross income and taxes into balance would have, in any event, meant a very substantial increase in the market value of the Hotel under Jensen's own appraisal. Having introduced such testimony itself, Appellant claims now that cross-examination was not available to Respondents to get at the root cancer of this inconsistency.

As reflected by the attitude of the trial judge, cross-examination on the appraised and assessed tax values was not put to Jensen to introduce substantive evidence on market value. Rather, it was to test on cross-examination the reliability and credibility of this expert's opinion which had been developed on direct examination.

2. *The precedent overwhelmingly supports cross-examination as a matter of right of tax appraisements under these facts.*

In the condemnation case of *Central Pacific Ry. Co. v. Feldman*, 92 Pac. 849 (Cal. 1907), the California Supreme Court passed on the identical issue herein in the following manner:

"The same witness, Feldman, having testified on direct examination that in his opinion the property was worth \$30,000, was asked on cross-examination whether he did not know that it had been in recent years assessed for taxation at amounts varying from \$1,925 to \$2,525. Objections to questions of this character were rightly overruled. *While the assessed value of property is not admissible as original evidence of its market value, a witness who has testified as an expert may properly, on cross-examination be asked what is his knowledge regarding such assessment for the purpose of testing the value of his opinion.*"

Feldman was reaffirmed by the California Court in *City of Los Angeles v. Deacon, et al.*, 7 P. 2d 378 (Cal 1932) wherein it was said in a condemnation case:

"On cross-examination, however, questions may be asked about these various matters: Assessment and probate appraisals (citing authorities)."

In *City of Detroit v. Elinger, et al.*, 316 Mich. 360, 20 N. W. 2d 516 (1947), the trial court refused to permit the property owner to show on cross-examination, the assessed valuation of the property for the current year made by the City on the condemned property. The Michigan Supreme Court reversed, holding the refusal to be prejudicial error. The Court ruled:

"The City fixed a current 1945 assessed valuation for parcel No. 15 as the basis for obtaining tax money for governmental purposes. The city now seeks to obtain the land itself, for public purposes. While the 1945 assessed valuation does not determine with finality the fair market value in this condemnation case, it does have a material bearing on the issue as to what is the 1945 fair market value of the property. When offered by the defendants in condemnation proceedings, the assessed valuation for the current year placed by the city on the property in question is in the nature of an admission against interest. Refusal to admit this proof when offered by the defendants was prejudicial to them and the award in this case must be set aside."

Elinger is a fitting response to the cry of Appellant's counsel of "poetic justice" on page 21 of its Brief. Salt Lake County assessed and accepted \$274,000 taxes from the Respondents on the Colonial Hotel property for 1965. It then condemned the property the following year

and claimed at trial that the Hotel was worth less than half of the basis of the tax assessment and value. Apart from the right of cross-examination because of the income approach used by Jensen in this case, *Ehinger* holds that such evidence was properly received in evidence as an admission against interest.

And in *Package Machinery Co. v. Commonwealth*, 188 N. E. 2d 871 (Mass. 1963), the Massachusetts Supreme Court held in an eminent domain suit that questions running to tax evaluation and assessment were proper on cross-examination to test the credibility of the expert:

“There was no error. The questions answered by the expert and the assessor were asked for the purpose of testing the valuation placed by the expert on the land taken, and the evidence was thus admissible even though it could not be received as evidence of the fair market value of that land. (Citing authorities.)”

Judge Elton in no way erred in permitting cross-examination of this most important element of Jensen’s opinion. Indeed, it would have been prejudicial error if Respondents had not been allowed to so cross-examine.

POINT IV.

THE TRIAL COURT DID NOT ERR ON THE LOLL TESTIMONY WITH RESPECT TO HIS CONSIDERATION OF THE LDS CHURCH TRANSACTIONS.

The remaining issues discussed by Appellant in Points III, IV, and V of its Brief are makeweight. In III, Appellant argues that Respondents’ expert, Loll, “artificially ex-

cluded from his appraisal * * * the numerous purchases of the LDS Church", and ergo, that Loll's opinion should have been totally rejected by Judge Elton. For such esoteric claim, the County cites an Illinois decision¹⁵ wherein an expert based his opinion on severance damage in a power line condemnation on "the feelings of the community", possible danger of wire breakage and other items, which under Illinois law, are all non-compensable elements of damage. Even if Appellant were otherwise correct on the facts and the law herein (which it is not), one has to torture the reasoning process to relate the Illinois case to the case at hand.

The Appellant has misstated the fact of the matter. Loll did not testify that he excluded the Church sales from his value conclusions. To the contrary, he testified that *he did consider such sales* but found in such consideration that their circumstances did not reflect open, arms-length transactions¹⁶ (R. 439, 466). Accordingly, Loll investigated land sales in another downtown area. And it turns out that the County witness, Jensen, did the same as Loll did. *Jensen did not use one Church sale in determining land value*, although he probably considered and investigated the same. In fact, he went to the same area as Loll did for his comparable land information. Under the County's theory herein, the Jensen testimony should likewise be rejected for failure to consider the Church transactions.

¹⁵*Central Illinois Light Co. v. Nierstheimer*, 185 N. E. 2d 841 (1962).

¹⁶There had been but one sale between a private buyer and seller in the two block, 20 acre Salt Palace area in the five years before the date of condemnation (R. 439-443). Loll found this to be an uncommon market occurrence in relation to other similar areas. Church influence in the sales was also present (R. 437-439, 466).

The County is as well wrong on the applicable law. The expert witness is not required, as a matter of legal competency, to consider and weigh each and every sale as against all others, as though in a crucible. This Court has left no doubt as to its repudiation of any such doctrine. *S.L.C. Board of Education v. Bothwell & Swaner*, 16 U. 2d 341, 400 P. 2d 568 (1965). The rule of this Court is that the claimed failure, if any, of a qualified witness to give significance to a particular sale or sales raised by the adversary goes to the weight of the expert's opinion and not to its competency or admissibility. *State Road Comm. v. Peterson*, 12 U. 2d 317, 366 P. 2d 76 (1961).

The trial court was entirely correct in denying the Appellant's motion to exclude the Loll testimony.

POINT V.

THE TRIAL COURT, IN ITS INHERENT DISCRETION, PROPERLY DETERMINED THAT THE UPLAND SALE, AS OFFERED BY APPELLANT WAS INADMISSIBLE.

The Appellant next argues in Point IV of its Brief that Judge Elton erred in rejecting the 1961 sale of the Upland Hotel in determining value of the subject property. County counsel first brought out the sale and sale price before the jury on cross-examination of Respondents' expert. The sale was thereafter stricken as comparable on Respondents' motion. And Judge Elton later ruled against the admission of the sale when offered by the County through its witness, Jensen. The reason for the rulings of Judge Elton on the Upland transaction is clear in the rec-

ord . . . *the sale was from Tracy Collins Bank to Tracy Collins Bank, as Trustee for others.* It was not an arms-length, open-handed transaction between an independent buyer and seller, each acting for his own interest in the ordinary sense. At least, there was no testimony whatsoever to so indicate.

The trial judge has wide discretion in ruling on the admissibility of an alleged comparable sale in eminent domain, *Weber Basin Conserv. Dist. v. Ward*, 10 U. 2d 29, 347 P. 2d 862 (1959), and that discretion will not be overturned on appeal unless it is manifestly shown to have been clearly abused. *State Road Comm. v. Peterson*, *supra*, *State v. Peek*, *supra*.

This Court, perhaps as well if not better than any in the country, has spelled out the conditions required of a party in proffering a claimed sale in evidence. *State v. Peek*, *supra*, *Southern Pac. Co. v. Arthur*, 10 U. 2d 306, 352 P. 2d 693 (1960), *Weber Basin Conserv. Dist. v. Ward*, *supra*, *State Road Comm. v. Peterson*, *supra*, *State Road Comm. v. Woolley*, 15 U. 2d 248, 390 P. 2d 860 (1964), *State Road Comm. v. Jacobs, et al.*, 16 U. 2d 167 397 P. 2d 463 (1964). One of those conditions is that the proffered sale meets the typical standards of the market value definition, i. e., that of the willing buyer and seller in an arms-length and open market transaction. *State Road Comm. v. Peterson*, *supra*. A sale from one to himself, even acting as trustee for others, is a misfit in such definition, unless there is otherwise proof of typical conditions underlying the sale. *No offer of proof was made by the County as to circumstances of Upland.*

The County claims in its Brief that the Upland transaction was offered to show (1) direct comparability and (2) *as a basis for the gross income multiplier method of Jensen*. App. Br. p. 30. The latter is a patent misrepresentation of the record of trial. No such proffer was ever made by Appellant. Nor did Appellant offer to show the conditions and circumstances of the Upland deal which would begin to indicate that such transaction was conducted at arms-length and under normal competitive negotiations in an open market. The burden of making that offer of proof and of making it clearly, is squarely on Appellant's counsel under the holding of this Court in *State Road Comm. v. Woolley, supra*.

The balance of Appellant's challenge in its Brief of the ruling on Upland are unworthy of comment. Judge Elton, in his discretion, properly rejected the evidence.

POINT VI.

THE TRIAL COURT DID NOT ERR IN REJECTING THE TESTIMONY OF KIEPE AND MCEWAN OFFERED BY APPELLANT.

1. *As to Kiepe.*

There is no uncertainty as to W. Kiepe's testimony. It was and is that he did not appraise the Colonial Hotel property or any part thereof. But because he did appraise other property in the Salt Palace complex, Appellant attempted to elicit Kiepe's opinion on the value of the physical land, alone, of the condemned property, without the building. Upon objection and sustaining ruling, no offer of proof was made as to what Appellant claimed for such

opinion or what Kiepe's opinion would be. The absence of such proffer alone, is dispositive of the whole question in this appeal since this Court and counsel have no knowledge as to what that testimony might have been. *State Road Comm. v. Taggart*, 19 U. 2d 247, 430 P. 2d 167 (1967); *State Road Comm. v. Woolley*, *supra*.

But in any event, (even if there had been a proffer) a witness may not in eminent domain, legally appraise as ultimate opinion the value of any part of the condemned property, without also appraising the other parts. He may in explaining his opinion and appraisal methodology of the entire property, allocate certain values to the land and certain values to the building or improvements, but he may not, as Kiepe attempted to do here, appraise less than all of the property. What effect does the existence of the building have upon the underlying land? Is the building a detriment or enhancement to the land value? Is the highest and best use of the land inconsistent or compatible with the existence of the building? Is the appraiser entitled to appraise only that which he chooses of the property? All of these questions must go unanswered when a witness poses to testify as to only part of the condemned property. And so the "unit rule of evaluation" has been adopted without respectable dissent, by the overwhelming decision in this country.¹⁷ 27 *Am. Jur.* 2d 94, Eminent Domain §291; *City of Los Angeles v. Klinker*, 219 Cal. 198, 25 P. 2d 826. The holding in *Klinker* was under a compensation statute

¹⁷County counsel claims in his Brief, p. 35, that he is unable to find case precedent on the legal prohibition of appraising only the physical land of an improved property. For openers, we refer him to better than 110 citations in 1 A. L. R. 2d 878 and Supplements.

identical to that in Utah, 78-34-10(1) U.C.A. 1953. This Court is in full accord with the enforcement of the unit rule of evaluation. *State Road Comm. v. Papanikolas*, 19 U. 2d 153, 427 P. 2d 749 (1967).

Kiepe's testimony was introduced by Appellant as substantive opinion of market value of the condemned property. It is a ruse to classify it as "rebuttal or corroborating", as labeled by Appellant in its Brief. Even at that, it would be inadmissible in law and Judge Elton so ruled.

2. *As to McEwan.*

The fireman, McEwan, did not see the Hotel until more than a month after the date of value herein and then at a time when the property was being dismantled for the Salt Palace. On objection, the Court ruled that the evidence was not material to any issue before the Court. Appellant's counsel made no offer of proof as to what, if anything McEwan might say, which fact precludes raising the question on appeal. *Rasmussen v. Davis*, 1 U. 2d 96, 262 P. 2d 488 (1953).

The only relevant date in the case is the date of service of Summons in establishing market value. 78-34-11 U.C.A. 1953. *State Road Comm. v. Bettilyon, Inc.*, 17 U. 2d 135, 405 P. 2d 420 (1965). If there was a substantial change in the premises after the date of value, testimony relating to such change is of no materiality. *State Road Comm. v. Valentine*, 10 U. 2d 132, 349 P. 2d 321 (1960). The McEwan testimony was correctly rejected by the trial court.

POINT VII.

THE CLOSING ARGUMENT OF COUNTY
COUNSEL WAS AN ATTEMPT TO PREJU-
DICE A FAIR TRIAL OF THE CASE.

While Appellant does not indicate in its Brief the nature of the verdict or even its amount, or how it was prejudiced by the evidence of trial, it is probably a safe assumption that its basic complaint is with the amount of the verdict. That being the gravamen of its appeal, it may well be that the remarks of Appellant's counsel in his closing summation may have contributed to the result it now protests. Exceeding all fair bounds of propriety, fair play, and the evidence, County counsel, in his argument, accused Respondents' counsel of manufacturing testimony of unqualified witnesses, attacked the personal honesty and integrity of the landowners, accused Respondents of trying to pull-off a swindle before an "inexperienced jury" and of trying to "steal" from the jury, who also were taxpaying citizens of Appellant-County:

"MR. NIELSON: And you heard Mr. Campbell cross examine Max Jensen on the figure that he used and how did he have those figures. It's because the landowner had those figures and that price ever since the appraisal was first done. Now, notice what was the effect of that. *That means the landowner can come into this Courtroom and say to you the property's worth something different? He can say that it's worth more money without any risk of taking less money.* * * * He's got everything to gain and nothing to lose. Now, how is he going to gain? What is he going to gain? *First, he hires an appraiser and can he hire an*

M.A.I. for this purpose? No. He has to hire an appraiser without a professional —

“MR. CAMPBELL: Object to this, if the Court please.

“THE COURT: Yes. We are reaching a point here, Mr. Nielson, that the ladies and gentlemen of the jury, it makes no difference as to what the negotiations have been in regard to this property prior to the matters that have been heard in evidence in this case. This makes no difference whatsoever.

“MR. NIELSON: Now, he gets assistance, service of an appraiser *and then he tells the appraiser the basis of the information that the appraiser makes the estimate on.* * * * *Then they get a new and inexperienced jury and project that information to that jury —*

“MR. CAMPBELL: I think that we’re getting into a very serious problem in this case, and I ask that that statement be stricken. That is —

“THE COURT: Yes. I don’t know — I don’t know the problem about whether a jury is inexperienced or experienced. I would suspect that any jury we have here has to be an inexperienced jury, because we demand that they know nothing about the matter, Mr. Nielson. I don’t understand any reference to experience or an inexperienced jury. * * * You may proceed, I’m going to suggest to you that you avoid that type of comment.

“MR. NIELSON: *By this process, ladies and gentlemen, the landowners are trying to induce you to give them more money than they’re entitled to for this property. They’re trying to steal from you by overstating the value of their property; by saying that it’s worth something a great deal more than they have said that it was worth in the market*

place for twenty-five years. *When I tell my Board, my clients, that what this case is about, they can't believe that after —*

"MR. CAMPBELL: I can't believe this either, your Honor.

"THE COURT: Mr. Nielson —

"MR. CAMPBELL: This is impossible, your Honor.

"THE COURT: What difference has any problems that you have with your client got to do with your argument? * * * I am going to again ask you to avoid and let's stay to the evidence in this case, and what reference you do have, what remarks you want to make about the credibility of witnesses, * * * I will anticipate that your remaining argument will be addressed to those matters. * * * Sir, you may go ahead.

"MR. NIELSON: This is just a means of projecting my argument, Your Honor.

"THE COURT: Well, I am just suggesting that you are getting out of the area of a proper summation. Go ahead" (R. 810-813).

That such argument would have been substantially prejudicial if an appeal had been taken by Respondents in this case, is not subject to reasonable debate. *Garden Grove School Dist. of Orange County v. Hendler*, 45 Cal. Rptr. 313, 403 P. 2d 721 (1965), *State Road Comm. v. Marriott*, 444 P. 2d 56 (Utah 1968). But it could be that the trier of fact in this case found such diatribe of Appellant as offensive to common fairness as did the Trial Court and the Respondents. If so, Appellant has no license to complain herein.

CONCLUSION

The verdict and judgment of the trial court are manifestly supported by competent evidence and in any event, by the cost replacement approach to market value used by witnesses for both sides. The capitalization approach of Respondents and, for that matter, of the Appellant was competent and admissible under the controlling case law, and it was for the jury to weigh the credibility of the evidence. The rulings of Judge Elton on the cross-examination of Jensen as to the basis of his taxes in the income approach, on the consideration by Respondents' expert of Church sales, on the admissibility of the Upland sale, and on the testimony of Kiepe and McEwan, were properly conceived and made without error.

The verdict was a fair compromise and result, returned on the second trial after seven days of hearing. Appellant has failed to show any error or prejudice, or either, in the trial. Accordingly, the judgment entered should be affirmed, it is respectfully submitted.

Respectfully submitted,

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