

1968

# State Of Utah, By And Through Its Road Commission v. Lloyd Stanger And Edna Olson Stanger, His Wife : Petition For Rehearing

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH, by and through  
its Road Commission,

*Plaintiff and Respondent,*

vs.

LLOYD STANGER and EDNA  
OLSON STANGER, his wife,

*Defendants and Appellants.*

Case No.  
11028

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## PETITION FOR REHEARING

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Appeal from Judgment and Order  
Second District Court, Weber County  
Honorable John F. Wahlquist, Presiding

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**FILED**

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Clerk, Supreme Court, Utah

## INDEX

	Page
PREFACE .....	1
ARGUMENT .....	2
POINT I. CONSEQUENTIAL AND SEVERANCE DAMAGES DO NOT BOTH EXIST IN ANY CASE INVOLVING A SINGLE PROPERTY, NOR IS IT THE PROVINCE OF A JURY TO SEGREGATE THE TWO TYPES OF DAMAGES. ....	2
POINT II. DEFENDANTS' PROPERTY SUSTAINED DAMAGES AS A MATTER OF LAW AND FACT. ....	7
POINT III. THIS COURT SHOULD CLEARLY RULE WHETHER THE FACTORS CONTRIBUTING TO SEVERANCE DAMAGES IN AN EMINENT DOMAIN ACTION MUST BE SPECIAL AND UNIQUE FROM THOSE SUSTAINED BY OTHER PROPERTIES IN THE GENERAL NEIGHBORHOOD IN ORDER TO BE CONSIDERED. ....	9
CONCLUSION .....	10

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## PETITION FOR REHEARING

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### PREFACE

Appellants seek a rehearing and a reconsideration of the opinion handed down in this matter by this Court on June 24, 1968. It is submitted that the opinion perpetuated the errors committed by the lower court as to basic legal principles, and that it was premised on facts entirely contrary to those established at the jury trial.

Appellants further contend that the effect of the opinion creates considerable confusion in the field of eminent domain law in the State of Utah in several respects. Furthermore, the basic issue of law presented to the Court was not clearly decided in a manner such as will furnish guidance in future cases of this general type.

## ARGUMENT

### POINT I

CONSEQUENTIAL AND SEVERANCE DAMAGES DO NOT BOTH EXIST IN ANY CASE INVOLVING A SINGLE PROPERTY, NOR IS IT THE PROVINCE OF A JURY TO SEGREGATE THE TWO TYPES OF DAMAGES.

In its unanimous opinion this Court made the following comment —

“Someone certainly should tell the jury the difference between the two types of damages — one compensable and the other not.”

The foregoing statement, referring to *severance* damages and *consequential* damages, contains major errors under Utah condemnation law. In fact, the quoted sentence from the opinion is probably the key error from which several errors of law radiate. As pointed out in Appellants' Brief at page 10, and following, if there has been a partial taking the entire proceeding as to damages to remaining properties is gov-

erned by sub-section (2) of Section 78-34-10, Utah Code Annotated, 1953 — *severance* damages. On the other hand, if there is no underlying taking, then the proceedings and the type of damages recoverable come under sub-section (3) of the same statutory section — *consequential* damages. In short, the two types of damages are mutually exclusive and can never be found in any litigation involving the same piece of property.

There is absolutely no reason why in any case there should be any cause for a jury to segregate the two types of damages for the simple reason that the distinction is one to be decided by the Court as a matter of law. And, in cases involving the State of Utah, the matter of consequential damages can never get before the jury since the entire proceeding is barred by the doctrine of sovereign immunity. Either the State of Utah is properly in court as to all damages, or it is not in court at all — it is just that simple in eminent domain proceedings. If there has been no taking, then sovereign immunity operates to keep the matter clearly out of court in *consequential* damage situations; if there has been an actual taking, then the nature of the damages are *severance*, and all pertinent evidence is admissible.

Perhaps the error into which this Court fell in the quoted statement can best be illustrated by taking the latter part of the statement, wherein mention is made that severance damages are compensable and consequential damages are not, and making an analysis of factual illustrations. To begin with, the statement that conse-

quential damages are not compensable is clearly erroneous, except in situations where sovereign immunity is the basis for denying recovery. In the previously cited case of *Board of Education of Logan City v. Croft* (1962), 13 Utah 2d 310, 373 P. 2d 697, it was clearly pointed out that consequential damages *definitely are compensable* in cases where no actual taking has occurred, if they meet certain requirements. A reading of that opinion and the basic law supporting it further points out the inconsistency of this Court's opinion in stating that the sovereign immunity "... issue was never raised." When this Court stated that consequential damages are not compensable — apparently as applied to this case, it could only do so by invoking sovereign immunity.

Perhaps another approach to illustrate this argument might help the Court. In the case of *Springville Banking Company v. Burton* (1960), 10 U. 2d 100, 349 P. 2d 157, and the case of *Fairclough v. Salt Lake County* (1960), 10 U. 2d 417, 354 P. 2d 105, we actually had two cases involving *consequential* damages for the simple reason that there was no basic underlying taking such as would bring the governmental agencies into court. Now, let us assume that in both cases there was in fact an actual taking of a portion of the property owner's lands, classfying the type of damages in both instances as *severance* damages. Under such a situation had those two cases gone to trial we would have had a situation illustrative of the distinction which this Court might actually have had in mind. In the *Springville*

*Banking* case, since the nature of the damages was caused by the creation of traffic islands or dividers in the street, the trial court would have ruled, upon the offer of evidence of such damage, that the damage was *non-compensable* — and that the evidence would not go to the jury at all. This would be so because the action taken was a function of the police power in regulating the flow of traffic.

On the other hand, if we assume that there was an actual taking of a portion of the properties in the *Fairclough* case, the matter would have been entirely different since the taking and the construction of the project was tied to a substantial change of highway grade affecting the property right of access. The nature of the damage under such facts would also be severance, but the evidence of loss of value to the remaining properties would be clearly admissible under our Utah cases and those of practically every other jurisdiction known to the writer, since this type of damage is compensable.

Appellants suggest that the Court probably was confused in its statements attempting to distinguish severance and consequential damages by attempting to consider *compensable* and *non-compensable* damages. In any event, the matter of distinguishing even compensable and non-compensable damages — let alone severance and consequential damages — is never for the jury. The segregation and admissibility of any kind of damages is always the province of the court itself!



As pointed out in Appellants' Brief filed in this matter, this Court has consistently and properly categorized *consequential* damages in its prior decisions. The impact of this decision leads one to believe that the classification of consequential damages in the prior opinions of this Court was probably accidental. This is particularly so since the clear impression now exists as a result of this opinion that *consequential* damages and *severance* damages can in fact exist as to the same property in the same litigation. If this is going to be the law in Utah then it is respectfully submitted that lawyers and the courts are going to wander into a morass of confusion for a long time to come.

If one reads the record in this case it will be readily apparent that appellants' witness gave testimony as to damages to their remaining properties which was premised solely on elements of damage which were properly compensable. There was no testimony relating to damages to the subject remaining properties based upon loss of the flow of traffic or similar non-compensable items. The verdict forms submitted by the Court served only to confuse the jury by requesting that they attempt to separate damages of two different types, and without giving any criteria whatsoever to the jury by which such damages could in fact be separated, if they so found. Further, the various illustrations given by the Court to the jury of situations where damages could not be recovered were completely foreign to the case and could only be calculated to influence the frame of mind of the jury against appellants.

## POINT II

### DEFENDANTS' PROPERTY SUSTAINED DAMAGES AS A MATTER OF LAW AND FACT.

Although this Court's opinion proceeded from a statement that the case simply involved the taking of .23 of an acre of defendants' land so as to provide them with an access road for their benefit, such begs the point of the factual situation involved. The damages caused to the remaining properties of these defendants were primarily related to their easements of light and view (caused by the erection of a 17 foot earthen-fill overpass directly in front of their home), and the loss of their direct access to a previously existing street which ran in front of their home and as to which they owned fee title to the center of the road (a right clearly recognized in this Court's prior decision in *Utah Road Commission v. Hansen* (1963), 14 U. 2d 305, 383 P. 2d 917). It was the loss of and damage to these rights which caused the damages in this case.

Appellants again wish to call the Court's attention to the Utah cases and those of other jurisdictions which clearly recognize that damages sustained by remaining properties resulting from a change in grade. Factually, it is submitted that the Court in its opinion in this case avoided the factors causing damages to appellants' remaining properties, as well as the actual property rights taken.

In this Court's opinion considerable emphasis was

placed on the contention that the jury found that "... there were no damages at all — severance, consequential or otherwise." Actually, it is rather easy to pick up such a statement out of context if this Court chooses to completely disregard the underlying facts, as will shortly be pointed out. However, in the next to the last paragraph of the opinion in this case a comment was made relative to conversation concerning neighbors suffering no loss due to the construction of the freeway project.

As pointed out and referenced in Appellants' Brief (p. 24, 26) the pattern of damage to neighboring properties was brought into the lawsuit by the plaintiff in an attempt to show that others in the general vicinity had in fact sustained damages to their remaining properties similar in nature to those suffered by defendants. This evidence came into the litigation in form and testimony exactly opposite to the impression given by the Court in the next to the last paragraph of its opinion. Further, the attempt to show similar damages to other properties was introduced through the State's appraiser because his entire analysis of damages to defendants' properties was predicated upon a finding that the damages to their properties had to be different in kind from those sustained by neighboring properties. It was just this type of approach — completely opposite to the impression secured by the Court in writing its opinion — that gave the State's appraiser reason and basis for stating that the remaining properties of the defendants had in fact sustained no damages at all.

### POINT III

**THIS COURT SHOULD CLEARLY RULE WHETHER THE FACTORS CONTRIBUTING TO SEVERANCE DAMAGES IN AN EMINENT DOMAIN ACTION MUST BE SPECIAL AND UNIQUE FROM THOSE SUSTAINED BY OTHER PROPERTIES IN THE GENERAL NEIGHBORHOOD IN ORDER TO BE CONSIDERED.**

From a careful reading of the opinion it would appear rather clear that the basic issue submitted to this Court has not been answered in a manner which will be of assistance in future cases of this type. This Court comments upon the use of the word "unique" as possibly having been unfortunate, but later in considering the claimed inaccuracy in instruction No. 7 raises a doubt as to whether the challenged portion of the instruction has merit. As such, it is submitted that the opinion as written leaves the issue entirely in the clouds and serves no assistance as to similar situations which will arise in the future.

Whether severance damages must be special and unique from similar damages sustained by other properties in the general neighborhood who may or may not be in Court is a matter which this Court should clearly resolve. If it wishes to take a position contrary to every jurisdiction which has approached the matter, then such should be done. But the matter needs resolving and, if not clearly resolved at this time, will probably be before

the Court for a clear-cut determination in the near future.

## CONCLUSION

As a lawyer primarily involved in trial work relating to eminent domain matters, the opinion in this case needs a complete revision. If this Court chooses to stand on its position relative to the facts asserted in its opinion, then that is clearly its province. But, as a member of the Bar of the State of Utah sincerely interested in assisting this Court in establishing clear-cut legal principles in eminent domain cases so as to advance the administration of justice, this writer earnestly solicits the Court to review its opinion and to properly outline the legal principles governing cases such as this — even if it cannot be persuaded to change its decision in the instant case.

Respectfully submitted,

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