1972

State of Utah, By And Through Its Road Commission v. Roberts J. Hopkins, And Betty L. Hopkins, His Wife; J. Andrew Holt And Hilma E. Holt, His Wife; Wayne Whitehead, A Widower; George W. Pace And Ann Pace, His Wife; Bernard Seegmiller, And Deloris Seegmiller His Wife; And Andrew B. Pace, And Verda F. Pace : Brief of Respondents

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, by and through its ROAD COMMISSION,
Plaintiff and Appellant,

vs.

ROBERT J. HOPKINS, and BETTY L. HOPKINS, his wife; J. ANDREW HOLT and HILMA E. HOLT, his wife; WAYNE WHITEHEAD, a widower; GEORGE W. PACE and ANN PACE, his wife; BERNARD SEEGMILLER, and DELORIS SEEGMILLER, his wife; and ANDREW B. PACE, and VERDA F. PACE, his wife,
Defendants and Respondents.

Case No. 12688

BRIEF OF RESPONDENTS

Appeal from Judgment on the Verdict of the Fifth Judicial District Court, Washington County, State of Utah Honorable J. Harlan Burns, Judge, presiding.

VERNON B. ROMNEY
Attorney General
ROBERT L. GARDNER
Assistant Attorney General
172 North Main Street
Cedar City, Utah
Attorneys for Plaintiff-Appellant

BRANT H. WALL, ESQ.
Suite 500, Judge Building
Salt Lake City, Utah 84111 and
PHILLIP L. FOREMASTER, ESQ.
75 North 100 East
St. George, Utah
Attorneys for Defendants-Respondents

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PRELIMINARY STATEMENT

All italics are ours and are added for emphasis. "R" refers to Record and "Tr." refers to Transcript of Record.

NATURE OF THE CASE

This is an action in eminent domain. In July, 1970, the State Road Commission instituted proceedings in the District Court of Washington County to condemn portions of three city blocks belonging to the Respondents herein, for the development and construction of a portion of Interstate Highway I-15. The appeal herein is taken by the State from the Judgment on the Verdict entered by the trial court.

DISPOSITION IN LOWER COURT

The owners admitted and the trial court found that the Road Commission was authorized to condemn, and the requisite finding of public use and necessity was made as to the property of the Respondents. The case was tried to a jury, the Honorable J. Harlan Burns, Judge, presiding. At the conclusion a verdict was returned in favor of the Respondents and against the State Road Commission.

The motion of the State for a new trial on the ground of errors in law, excessiveness of the verdict, and insufficiency of the evidence to justify the verdict was denied by the trial court on March 10, 1972 (Sup. Tr. 5).

RELIEF SOUGHT ON APPEAL

The State Road Commission herein seeks a reversal of the Judgment on the Verdict entered by the trial court.

STATEMENT OF FACTS

In the Statement of Facts submitted by State's counsel he has failed to set forth all of the facts which support the verdict and the trial court's rulings on matters of law. Therefore, in order that the court be advised of the issues, Respondents deem it necessary and appropriate to make their own Statement of Facts pursuant to 75(p)(2) U.R.C.P.

The State Road Commission instituted proceedings in 1970 to condemn three (3) separate parcels of land belonging to the Respondents. It was established that July 1, 1970 was the date of "taking" (Tr. 19, 20). The total ownership involved 5.72 acres of which 3.58 acres were taken for highway development leaving a remainder of 2.14 acres. The three parcels involved, although described by metes and bounds in the complaint, were in fact parts of Lots 2 and 3, Block 28, Lots 4, 5 and 6, Block 21, part of Lot 3, Block 21, and parts of Lots 3, 4, and 5, Block 20, Plat "E," St. George City Survey. (Exhibit P-1, Tr. 9, 11, 27, 59). On the date of taking, the properties were unimproved (Tr. 29). However, each parcel was platted and laid out within the bounds of St. George City and bounded by dedicated streets (Tr. 11, 27, 28, 59 and 60, Ex. P-1). Dixie College is located one block west of the subject property (Tr. 60, 142).

The Zoning Ordinance in effect at the date of taking was R-3 which permitted multiple and single family dwellings (Tr. 58, 59).

All witnesses agreed that the highest and best use was for multiple and single family dwellings, which fact was conceded by the State from the inception of the trial (Tr. 194, 234, 286, 287, 143, 72).

The zoning further required a minimum lot size of 6,000 square feet with not less than 60 feet frontage (tr. 59). The lots shown on Exhibit "P-1" and in conformity with the St. George City Survey, were 132 feet x 264 feet, and under the usual and normal procedure, as allowed by Ordinance, these lots were further divided into four (4) building lots each, 66 feet x 132 feet, (Tr. 185). A typical plan of use, as permitted by the existing Zoning Ordinance, was to divide the subject properties for residential use, in accordance with Exhibit D-1, which was admitted in evidence by the Court for illustrative purposes (Tr. 70).

In 1957 public hearings were conducted in the St. George area relative to the proposed location of the Interstate Highway (Tr. 221), and it was common knowledge among the citizens of the St. George area that the freeway was going to be constructed in the general area of the subject properties. The State's own expert witness testified that he found no sales in the area of the proposed taking (Tr. 221).

There was further testimony that for many years the area of the subject property had been under threat of land condemnation by a proposed expansion of Dixie College (R. 102, 177, 180).

The three city blocks involved were located in a north-south direction with the new highway facility transversing the property diagonally from northeast to southwest thereby creating odd shaped remainder parcels (Ex. P-1).

The landowners produced two witnesses on the issue of just compensation, whose opinions on fair market value of the properties condemned and the damages to the remainder were, respectively:

MEMORY H. CAIN, JR. (Tr. 72 ,73)
$79,000.00

Total Before Value:		$91,000.00
Total After Value:		13,000.00
Difference:		$79,000.00
Breakdown:		
Take:	$76,000.00	
Damage:	3,000.00	

CLARK HOUSTON (Tr. 157, 158)
$80,100.00

Total Before Value:		$89,700.00
Total After Value:		9,600.00
Difference:		$80,100.00
Breakdown:		
Take: 3.58 acres	$74,100.00	
Damage: 2.14 acres	6,000.00	

The two expert witnesses for the State Road Commission were respectively:

ROBERT LEWIS (Tr. 195)
$46,500.00

Take:	$35,800.00
Damage:	10,700.00
Total:	$46,500.00

KEN ESPLIN (Tr. 236, 237)
$44,941.64

Take:	$35,867.30
Damage:	9,004.34
Total:	$44,941.64

The jury found the market value of property taken to be the sum of $66,500.00 and damages to the remainder at $7,000.00 for a total award of $73,500.00 (Jury Verdict).

ARGUMENT

POINT I

THE RULING OF THE TRIAL COURT IN REFUSING TO PERMIT TESTIMONY AS TO THE PRICE PAID BY THE LANDOWNERS FOR THE SUBJECT PROPERTY AS EVIDENCE OF ITS PRESENT VALUE WAS IN FACT IN ACCORDANCE WITH RULING CASE LAW.

Whether or not a given sale is to be admitted or excluded is an issue which this court has long recognized as lying within the sound discretion of the trial judge, so long as such discretion is not abused. Salt Lake County v. Kazura, et al, 22 Utah 2d 313, 452 P.2d 869; Nichols, Eminent Domain, Sec. 21.31, Vol. 5, p. 442 (3rd Ed.); State v. Peek, 1 Utah 2d 263, 265 P.2d 630.

It should be noted that the area of the subject lots had been earmarked for condemnation beginning with public hearings as early as 1957 (Tr. 221). The area was likewise void of sales for a long period of time and had also been rumored to be under threat of condemnation for the expansion of Dixie College (Tr. 177, 180). Furthermore, the sale in question occurred in 1964 and there had been a very substantial increase in land values in the St. George area beginning in 1968 (Tr. 122, 124, 155).

The trial judge quite succinctly announced the court's thinking on the issue in its ruling on the matter during trial and in its ruling upon the Motion for New Trial. It is significant to quote a portion of the Court's comments:

> "* * * The Court, as I have stated, felt that it may have been misleading and confusing; one, because it involved the subject property; two, because there was considerable time that had elapsed in this area; this court having had the benefit of other condemnation proceedings and being in a position to take judicial knowledge of the change in the market value in Washington

County and particularly in the municipal limits of St. George.

* * * And the Court further realizing that under the proof that the entire area had been under the nebulous aurora of condemnation for some particular time; the court feeling that may have had a misleading value or misleading effect as to values on the trier of fact and therefore that was—the objection was sustained and the court feels no prejudicial error was committed at that time and overrules and denies your motion for a new trial on that basis." (Tr. Supp. 3, 4).

In Knollman v. United States (6th Cir. 1954), 214 F.2d 106, the court stated that it was the trial judge who knows the community, knows the areas of development, and is able to take judicial notice of expanding city limits. This rule was applied by the Kansas Supreme Court in sustaining the trial judge's refusal to allow in evidence a sale of condemned tract which had occurred 2½ years prior to the condemnation action. State Highway Commission v. Lee, 485 P.2d 310.

We submit that under the well recognized rule of law and the evidence presented, the trial judge did not abuse his discretionary powers in rejecting the prior sale of the condemned property and no prejudicial error was committed.

POINT II

THE RULING OF THE COURT PERMITTING DEFENDANTS' EXPERT WITNESSES TO USE A PLAT OR MAP SHOWING THE

LAND DIVIDED INTO LOTS AS ALLOWED BY ORDINANCE AND CUSTOM WAS NOT ERROR.

At the outset of the case, the Road Commission introduced into evidence an elaborate trial map of the subject properties showing the three separate parcels as being part of the Official Townsite of St. George City as platted on the Official Records and bounded by dedicated streets (Ex. P-1).

The exhibit further disclosed a subdivision of each city block into city lots and transposed over said blocks and lots was an overlay showing the manner in which the "taking" would effect the properties in question.

The peculiar aspect of the state's case arose when they took the position that the land should be considered only on an acreage basis without regard to the plat or designation of lots and blocks. In other words, the Road Commission, from the inception of the case, set out to impress the jury with the fact that they were condemning raw acreage and not city lots and blocks.

Point "II" of Appellant's brief is permeated with statements which fail to take into account many of the undisputed salient facts of the case. At the inception of counsel's argument under "Point II," he injects into the case that we are here dealing with "5.72 acres of raw, unimproved land," although in the next sentence he concedes that the property lies within the platted area of St. George City, bounded by dedicated streets and located

within designated city lots and blocks. The fact that the off-site improvements had not in fact been installed or constructed could not defeat the fact that the subject lands were residential building lots and that the abutting streets were in fact dedicated to public use.

The witnesses for the landowners took into account the fact that the subject properties were unimproved and approached their valuation of same on that basis (Tr. 29, 60, 72, 132, 142, 156). These same witnesses testified with respect to the cost of installing such "off-site" improvements and predicated their opinions on value based upon such considerations (Tr. 86, 170-172).

When counsel for the State argues that the jury could be misled "to believe that the properties were fully improved lots 'ready for resale,' " he obviously fails to acknowledge the pertinent testimony given by the landowners' expert witnesses who both testified that the land was undeveloped on the date of taking and that the "off-site improvements, consisting of streets, curb and gutter, sewer, water and power, would have to be supplied at an estimated cost of $1,500.00 per lot (Tr. 77, 168). Furthermore, the trial judge gave implicit instructions on this issue. (See Jury Instruction Nos. 10, 19, 22, 23, 24, 25, 26; R. 27, 36, 39, 40, 41, 42, 43.)

It is then suggested that the procedure of the instant case violates the rule of law announced in the case of State v. Tedesco, 4 Utah 2d 248, 291 P.2d 1028. We submit that the facts and issues are not appropo.

The landowners' witnesses testified to a before an

after value of the total tract (Tr. 72, 73, 157, 158), and further testified that *the approach used was to determine what the entire tract would sell for on the open market to a single purchaser*, taking into account the condition of the land at the time of the taking, and its highest and best use (Tr. 74, 75, 76, 77, 120, 132, 133, 165).

These same witnesses also testified that the lands were subject to development in many different manners and that the plan exhibited (D-1) was merely one such use (Tr. 74, 96, 167). How could a jury conceivably be misled or confused in the light of such testimony?

The "highest and best use" of the properties was never in dispute. Expert witnesses for both the state and landowners agreed without exception that the "highest and best use," was for single and multiple family residential development (Tr. 72, 76, 194). The landowners presented evidence that the city lots of the size and shape involved herein, and as permitted by Ordinance in effect at the date of the taking, were routinely and commonly developed in the manner illustrated by Exhibit D-1 (Tr. 145-149, 185, 259, 261). Although Exhibit "D-1" illustrated the subject properties to be divided into 23 lots, there was no effort on the part of the expert witnesses to approach the issue of just compensation on the basis of determining what amount the 23 lots would sell for to 23 separate purchasers, but rather to show a method of use and development which would appeal to a *single purchaser* who would buy the total tract as *one unit*. Furthermore, the method of use and development as depicted by Exhibit "D-1" was not presented as the

exclusive method of use and development, but merely one of several which a buyer would, in the opinion of the expert, consider (Tr. 120, 165).

The state claimed error because the use of the plat (Exhibit D-1) caused the jury to speculate and to value the land as subdivided lots that did not exist at the time of the service of summons.

The Supreme Court of Montana in rejecting the contention of error in a similar case, Montana State Highway Comm. vs. Jacobs, 435 P.2d 274, stated:

> *"The plats were shown to illustrate the basis of the testimony by way of demonstrating what path the new highway followed through the property and the shape of the two pieces into which it had been divided. They also demonstrated that the property was truly adaptable for a residential subdivision.*
>
> *The State claims that showing these plats to the jury was reversible error because they caused them to speculate and to value the land as lots and roads that did not exist at the time of the service of summons. The jury was well aware that these plats did not represent the tract as it existed at the date of summons or at the time of trial. While Mr. Marsden was on the stand he stated on both direct and cross-examination that these plats did not show improvements that were actually in existence. Several large aerial photographs were in evidence showing clearly that the tract was raw land. Throughout the entire trial it was made entirely clear that there were no improvements on the land and it was not to be valued as if there were. In its instructions to the*

jury, the court made it clear that the jury was not to speculate or guess what the land would be worth in the future but to value it as it was.

[15] *It is common practice to allow a witness to use such aids as these plats to illustrate his testimony to the jury. Whether the use of these aids is proper rests largely in the sound discretion of the trial judge. Unless there is a manifest abuse of this discretion we will not overturn the lower court's discretion in the matter.*" 98 C.J.S. Witnesses § 327, p. 28.

In the case of State of Alaska v. 7.016 acres, et al, 466 P.2d 364, the state objected to the introduction into evidence of a proposed subdivision plan arguing that evidence of potential uses to which condemned property may be put must be limited to those which are reasonably and naturally adaptable in the foreseeable future, and that evidence of a property owner's plan to subdivide property into lots, *where no significant steps had been taken to effect the subdivision*, was inadmissible because of being too remote and speculative to merit consideration by a jury.

It was stipulated at the trial that the "highest and best use" was for subdivision, not unlike the subject case. All of the evidence tended to show that the property was adapted for subdivision development. In rejecting the argument of the state, the court announced.

"* * * Where the adapability of the land for subdivision use is shown to be reasonably probable, and not too remote or speculative, then a subdivision plat is admissible as illustrating the po-

tential and reasonably probable use. Citing 5 Nichols, Eminent Domain, Section 18.11 (2); 26 A.L.R. 3rd 780-837."

The use of a plat or map to illustrate an expert witnesses opinion or testimony has long been recognized as proper and not an invasion of jury province. 5 Nichols on Eminent Domain (3rd Ed.), Section 18.11(2) at P. 157; City of Wichita v. Jennings, 199 Kan. 621, 433 P.2d 351; Board of Education of Logan City School District v. Croft, 13 Utah 2d 310, 373 P.2d 697. In Commonwealth Dept. of Highway v. McCready (Ky. 1963), 371 S.W. 2d 485; The Highway Commission of Kansas v. Lee, 485 P.2d 310. While the expert witness for the landowners testified that the map or plat employed (Ex. D-1) was considered, it was not the sole or decisive factor in the formation of their opinions as to market value.

The issue under discussion was raised in the recent case of State of Utah, by and through its Road Commission v. Jones, 24 Utah 2d 154, 467 P.2d 420. In the Jones case, the state argued, as they do here, that it was error to permit the testimony of defendants' expert witness, who arrived at his value on the basis of rural homesites, after taking into consideration the cost a developer would have constructing highways, a water system and other untilities on the ground, and that the subdivision involved had not been developed beyond the mapping and platting stage, citing the case of State of Utah v. Tedesco, supra, in support of such contention.

This court rejected the alleged error observing that

the expert witness had taken into account the various costs of developing the subdivision in arriving at his estimate of market value.

The attempt of state counsel to disguise the facts as being annologous to the Tedesco case, supra, finds no support in the record.

Under the authorities cited herein and the evidence as supported by the record, there was no error in permitting the expert witnesses for the landowners to develop their market value in the manner employed.

POINT III

THE DEFENDANT LANDOWNERS MET THEIR BURDEN OF PROOF ON ALL PHASES OF THE CASE.

The state charges that the defendant-landowners failed in their burden of proof. This issue has been raised by the Road Commission in several recent cases: State vs. Hawes, et al, 20 Ut. 2d 246, 436 P. 2d 803 (1968); State of Utah v. Style-Crete, Inc., 20 Utah 2d 365, 438 P.2d 537 (1968); State of Utah v. Bingham Gas & Oil Co., 21 Utah 2d 66, 440 P.2d 260 (1968); State of Utah v. Williams, et al, 22 Utah 2d 301, 452 P.2d 548 (1969), and this Court has, in each instance, responded in clear and unequivocal language. The landowner is not under the onerous burden of proving damage by "clear and convincing evidence," but rather, is required to satisfy only the ordinary "preponderance of the evidence" rule. Interestingly, the state's expert wit-

nesses found greater severance damages than did the landowners' expert witnesses, and the value of the take was amply sustained by competent probative testimony and evidence.

POINT IV

THE VERDICT WAS SUPPORTED BY COMPETENT EVIDENCE AND WAS NOT EXCESSIVE.

The thrust of the appellant's argument claiming excessiveness of the verdict seems to be founded in part upon the sale of two parcels of land by the Respondents which occurred in 1968 and 1970, prior to the condemnation, and in the area of the subject property.

The 1968 sale was made under rumors of condemnation and in an area of possible projected freeway development which prompted the owners to accept a deflated price for their property (Tr. 269). The other sale relied upon was under similar conditions and location and was not considered to be an "arms length transaction" by one of the experts for the landowners (Tr 279). Under these circumstances, it was a proper issue for the jury to consider and accept or reject and give such testimony the weight they considered proper.

In the case of State Road Commission v. Sillimar 22 Utah 2d 33, 448 P.2d 347, this court set aside a verdict which was in excess of that testified to by any witness and held the verdict was excessive "as a matter law." *The court noted, that, otherwise, the verdict co*

not be set aside unless so excessive as to be shocking to one's conscience. The Silliman case, too, presented a factual situation entirely different from the case at issue.

It should be noted also that in the instant case the jury returned a verdict on severance damages in an amount less than that testified to by the state's own witnesses and yet well within the range of the testimony on all issues of damages.

CONCLUSION

Appellant in substance is asking this Court to overrule the factual findings and consideration of both the jury and the trial judge. We submit that this case was tried before a trial judge who was knoweldgeable of conditions in the area, was in a position to observe the demeanor of the witnesses and was most certainly in an advantageous position to make a proper ruling as to the sufficiency of the evidence. For the reasons heretofore set forth and supported by ruling case law, we submit that the verdict and the judgment on the verdict should be affirmed.

Respectfully submitted,

BRANT H. WALL and
PHILLIP L. FOREMASTER
Attorneys for Defendants-
Respondents
Suite 500, Judge Building
Salt Lake City, Utah 84111