1972

Automotive Products Corporation v. Provo City Corporation : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

AUTOMOTIVE PRODUCTS CORPORATION,
Plaintiff and Respondent,

vs.

PROVO CITY CORPORATION,
Defendant and Appellant.

Case No. 12790

BRIEF OF RESPONDENT

Appeal from the Judgment of the Fourth District Court for Utah County, The Honorable George E. Ballif

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STATEMENT OF THE NATURE OF THE CASE

Although denominated in Appellant's Brief as an action in equity, this is, in fact, an action at law asserting constitutional rights initiated by a real property owner whose land was taken for public use by Provo City without formal condemnation proceedings and without payment for the land.

DISPOSITION IN LOWER COURT

The trial court determined that the city appropriated Respondent's land for public use when it widened 1230 North Street in 1967 and awarded judgment for the sum the parties had stipulated represented the value of the land taken. After a later hearing for taking evidence on the question of the city's claim that Respondent received "special benefits" from the street widening, the court denied any setoff.

RELIEF SOUGHT ON APPEAL

Respondent seeks to have the judgment of the trial court affirmed.

STATEMENT OF FACTS

Respondent controverts and supplements Appellant's statement of facts as follows:

Respondent, a small family held corporation (Transcript of Trial page 107), owns land 271 feet long, having a depth of 120 feet and fronting on its longest (north) side onto 1230 North Street in Provo, Utah (Plaintiff's Exhibits 4, 5, and 13). Although entirely owned by Respondent, the land has been leased to tenants in three separate parcels (Transcript of Trial pages 60 and 61).

When acquired by Respondent in 1946, the land consisted of an older residence surrounded by a picket

fence at its western end and vacant land surrounded by wire fencing on its eastern end (Transcript of Trial pages 66 and 68). The fence lines, which correspond with Respondent's title along the street (Transcript of Trial pages 37, 67 and 68), remained in place until 1959 (Transcript of Trial pages 36 and 37) on the western parcel, and 1967 (Transcript of Trial page 49) on the eastern parcel.

The city originally anticipated taking the north twelve feet of Respondent's property, but later actually appropriated thirteen feet (Transcript of Trial pages 40 and 41).

Appellant's brief erroneously stated this land was the south thirteen feet of the graveled shoulder of the road occupied by the power and telephone poles. In fact, the specific land taken by Provo City is the thirteen-foot strip of land extending southward from Respondent's north fence, or title line, along the 271 feet it fronts on 1230 North Street; and the gravel shoulder and power poles were north of Respondent's fences (Transcript of Trial pages 31, 79 and 80 and Plaintiff's Exhibits 4 and 8). After the taking, Respondent was left with land 107 feet deep instead of the 120-foot depth from north to south (Additional Testimony on Transcript of Trial page 92).

The eastern end of 1230 North Street terminates at the main entrance to Brigham Young University (approximately a city block east of Respondent's property), and its terminous was (before the street was widened)

offset northward from the B.Y.U. entrance (Plaintiff's exhibit 3). In 1955 the city drew up a master plan for street widening anticipating acquisition of twelve feet of land from Respondent and other property owners on the south side of the street to correct the misalignment and facilitate access to B.Y.U. (Transcript of Trial pages 23, 26 and 27 and Plaintiff's Exhibit 3).

In October 1959 Respondent made application for a permit to build a new commercial structure (laundromat and small restaurant) in the center of his property (Transcript of Trial pages 39 and 72). Although the zoning permitted structures to extend clear to the north property line, the City Engineer's Office informed Respondent that it would not grant a permit unless the structure were set back twelve feet south of the deed line (Transcript of Trial pages 38 and 39), and that if Respondent proceeded to build out to the line without a permit the city would stop him (Transcript of Trial pages 69 through 73).

In 1962 Respondent leased the corner at the west end of its property to Standard Oil Company of California for a service station. Standard Oil Company submitted a plot plan showing the proposed construction to the City Engineer's Office to get a building permit. Because the Standard Oil plans called for construction of a gasoline pump island in the twelve-foot area the city anticipated acquiring for street purposes, the permit was denied (Transcript of Trial pages 42 and 43). The city then required Standard Oil Company to modify their plans and move the structures southward out of the

twelve-foot strip in order to get a permit (Plaintiff's Exhibits 6 and 7). This necessitated acquisition by Respondent of a right-of-way across its neighbor on the south, and that Respondent grant Standard Oil more land to the east of the original station plan in order to permit easy access to customers of Standard Oil (Transcript of Trial pages 63, 64 and 65). In the final lease Respondent reserved to itself the right to convey the north twelve feet of the land in anticipation of the future street widening (Transcript of Trial pages 81, 82, 89 and 90 and Plaintiff's Exhibit 14).

The lines for the curb and guttering installed by the tenant in connection with its construction were fixed and surveyed by the Provo City Engineer's Office, not by Standard Oil, as stated in Appellant's Brief (Transcript of Trial pages 53 through 56).

While it is true that after construction of the new buildings, and as a result of the required set back customers of Respondent's tenants often used the thirteen feet of land which is the subject of this litigation for the parking of cars, Respondent asserted ownership of it and control over it while awaiting the street widening, designating that parking was to be done at 90 degree angles (Transcript of Trial pages 33 and 78). After the city did the physical acts of widening the street in 1967, it designated the area for parallel parking (Transcript of Trial pages 100 and 101).

In the latter part of July and first part of August 1967 the city was moving toward Respondent's property

with installation of curb, gutter, sidewalk and blacktop street surfacing in the area of the proposed widening. Mr. Earl informed the city respresentatives that he would be in Idaho for a few days, and they agreed to refrain from continuing with the work across Respondent's property until there had been a resolution of the matter (Transcript of Trial pages 98 and 99). It was while Mr. Earl was in the state of Idaho that the workmen for the city completed the blacktop surfacing and curb and gutter on the property of Respondent (Transcript of Trial pages 96 and 99).

Thereafter, even though the city had already negotiated with the other property owners for acquisition of their land (Additional Testimony on Transcript of Trial pages 36 and 44), when Mr. Earl attempted to discuss the matter with the Mayor of Provo City, the Mayor refused to discuss it, making it clear that the city was not going to do anything about it, and instructing Mr. Earl that he should bring a suit (Transcript of Trial page 100).

Appellant's brief is in error in stating that the Court found the taking to have been on or about the 1st day of January, 1969. That date was referred to in the Court's Memorandum Decision rendered July 14, 1971, but on July 15, 1971 Judge Ballif corrected the obvious clerical error (since no evidence related to that date) by an Amendment to Memorandum Decision ruling that the taking for public use occurred on or about August 1, 1967. The Findings and Judgment both used the date of August 1, 1967.

The value of the land taken as determined by the Court, was established by stipulation of the parties (Trnscript of Trial pages 16, 17, 18, 176 and 177). Appellant offered no evidence as to its claim to benefits at the trial except that counsel for Appellant asked Respondent's president, Mr. Frank J. Earl, if the widening of the street didn't make the land more valuable, to which he got a negative reply (Transcript of Trial page 126).

After judgment was entered, the Court reopened to take evidence on the question of benefits conferred and severance damages (Appellant's Motion to Reopen or for New Trial, dated August 6, 1971, and Orders dated October 14, 1971 and November 3, 1971 and Additional Testimony on Transcript of Trial).

At that later hearing Appellant called three witnesses as experts on the issues (NOTE: Page references are to the record denominated, "Additional Testimony on Transcript of Trial"):

Ray Murdock, Provo City Commissioner with responsibility of city streets and a former service station leasee with experience prior to 1963 of a street widening at his service station site located elsewhere in Provo, testified he did not know the value of the benefit, but that in his opinion Respondent was surely benefited because before the street was widened the B.Y.U. entrance constituted a traffic bottleneck that was relieved when 1230 North Street was aligned with that entrance, thus benefitting B.Y.U., Provo City and Respondent (pages 23 and 26); that this made Respondent's property more

easily accessible (page 27); created a special benefit by reason of more traffic in the area (page 30); and Respondent received a special benefit from installation of curbing and blacktopping (page 33).

Mr. S. E. Jacogsen, former realtor (page 34), owner of property on 1230 North Street five blocks west of the subject property and the former representative of Provo City, who negotiated the transactions with the other owners of property on 1230 North Street for acquisition of the land for the widening (pages 44 and 45) testified it was his opinion the subject property was benefited by the street widening (page 42), but he had made no appraisal of the subject property (page 43), had only mulled over his memory of the area without use of records to arrive at his opinion (page 47), considered the benefit no different from that of other properties on the street (page 49), and that the benefit consisted of an increase in accessability for general flow of traffic from Orem, west Provo and east Provo along the street, resulting in a general increase in property values in the area (page 49). He had made no studies and expressed no opinion on the question of severance damages.

W. Ward Heal, Provo Realtor, testified that his appraisal was only as to the market value of the land actually taken (page 60), except that the city had at a later date asked him to make a second appraisal relative to the amount of benefits conferred (page 62). His opinion was that there was no severance damage to the remaining property because the buildings had been already constructed prior to the street widening (pages

63 and 72). He expressly stated that the benefits that he measured in making his appraisal were the controlling of points of access by improvements of blacktop surfacing and curb and guttering, elimination of poor parking areas, and that people felt safer by ingress and egress to the property with the street improved (pages 65 and 66). Mr. Heal specifically stated that he was not asked to testify as to "special benefits," but rather "benefits to the property," and that he considered as a benefit the greater number of cars who could pass the area where the property was located as a result of the street widening (page 67). When asked on cross examination the amount of the "special benefit," he stated that it would probably be the value of the cost of installation of the curb, gutter and sidewalk (page 68), but that his testimony was to be taken as testimony as to the total benefits, both general and special, and that he had not arrived at any opinion of special benefits (page 75).

Respondent's expert, Mr. Gregory E. Austin, professional real estate appraiser, testified that there were no special benefits whatever in connection with the widening of the street (pages 81, 82 and 84), and that although in theory it would appear that the taking of 13 feet from the depth of the property should result in severance damages, such reduction in value of the remaining property could not be demonstrated by an evaluation of the real property market prices in the area (page 92).

Not only were both Appellant's and Respondent's witnesses in agreement that there were no severance

damages, but counsel for Appellant stipulated that there was no severance damage (page 81).

STATEMENT OF POINTS

POINT I

THE TRIAL COURT CORRECTLY HELD THAT PROVO CITY TOOK RESPONDENT'S LAND IN 1967 WHEN THE CITY ACTUALLY BEGAN WORK ON THE CURB AND BLACK-TOP SURFACING AND PHYSICALLY WIDENED THE STREET.

POINT II

THE TRIAL COURT PROPERLY HELD THAT RESPONDENT'S LAND WAS APPROPRIATED BY PROVO CITY AND THAT RESPONDENT HAD NOT DEDICATED ITS LAND TO THE PUBLIC USE.

POINT III

THE TRIAL COURT PROPERLY REFUSED TO ALLOW THE CITY AN OFFSET AGAINST THE VALUE OF THE LAND TAKEN FOR SPECIAL BENEFITS CONFERRED ON THE BALANCE OF THE PROPERTY BECAUSE: (1) THERE WAS NO EVIDENCE OF ANY

SPECIAL BENEFITS; AND (2) IF THERE HAD BEEN ANY SPECIAL BENEFITS, SUCH BENEFITS COULD BE OFFSET ONLY AGAINST SEVERANCE DAMAGES AND THERE WAS NO EVIDENCE OF SEVERANCE DAMAGES.

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY HELD THAT PROVO CITY TOOK RESPONDENT S LAND IN 1967 WHEN THE CITY ACTUALLY BEGAN WORK ON THE CURB AND BLACKTOP SURFACING AND PHYSICALLY WIDENED THE STREET.

Appellant's entire argument under Point I of its brief is built upon the premise that the trial court held that the city took Respondent's land when it restricted it from building to its property line. ***That assumption is*** *false*. The trial court correctly held that the city appropriated Respondent's land on or about August 1, 1967 (See Amendment to Memorandum Decision dated July 15, 1971 and Findings of Fact, paragraph 3). This was the date Provo City was involved in the actual installation of curb, guttering and blacktop surfacing along the south side of 1230 North Street (Transcript of Trial pages 95 through 99), and therefore the court held that the "taking" took place when the city actually assumed possession of the land.

Respondent was restricted from building to its property line on the center piece of land when it applied for a building permit in October 1959 (Transcript of Trial pages 38, 39 and 69 through 72). The second refusal to permit structures in the proposed roadbed was in April 1962 when the city required Respondent's tenant, Standard Oil of California, to move its structures on the western piece back from the line (Transcript of Trial pages 43, 44, 45 and 46). The final refusal to allow construction to the property line occurred on the eastern piece where the Taco Bell Restaurant is now located, and although this was in 1967 and prior to the installation of the street improvements by Provo City, the exact date was not disclosed by the testimony (Transcript of Trial pages 49 and 112).

If the trial court had found there was a taking when the city refused building permits for construction to the property line as suggested by Appellant, it would have necessitated finding a different date for the "taking" on each of the three parcels and interest on the damages would have to have been computed from those separate dates. The court made no such ruling.

While it is true that there was a discussion during the trial between counsel for Appellant and Judge Ballif on the question of a city's right to prohibit building to the property line because of the proposed street widening (Transcript of Trial page 145), when the court rendered its decision there was no holding that the taking occurred at the times the city restricted Respondent from building to its property line. In fact Judge Ballif

found that the taking did not take place until the date the city did the actual physical acts of widening the streets and appropriating the land for public use.

Not one of the authorities cited by Appellant under Point I of its brief involve in any way the rights of owners where the governmental body has gone into actual physical possession of the land. They all relate to the question of whether there is a taking when the governmental body merely limits an owner's use of his land in anticipation of a future street. An examination of them will disclose the following:

1. Section 10-9-23, Utah Code Annotated, 1953, as amended, concerns the authority of the municipality to establish an official map and amend it for widening and narrowing of streets.

2. Headly vs. Rochester, 272 N.Y. 197, 5 N.E. 2d 198 (1936) was a case where the land owner claimed the mere adoption by the city of a plan or map showing a proposed street constituted an unconstitutional taking of his land because it limited his use. The Court ruled there was no taking because the city had not *yet* divested him of his title, nor taken possession.

3. Miami vs. Romer, 73 So. 285 (1964 Florida) similarly involved an action by the owner of land against the city merely because its proposed street plan prevented building to the property line, and the court ruled that the mere plotting of a street upon a city plan *without anything more* does not constitute a taking of land.

4. Miller vs. Manders, 2 Wis. 2d 365, 86 N.W. 2d 469 (1957) was a mandamus action to compel

issuance of a building permit for construction in the area of a proposed street as shown on the official map of the city on the grounds that refusal to grant the permit constitued an unconstitutional taking of land. The Court ruled that it could not find any abuse of power by a legislative motive to depress existing property values of property which the city may, in the future, desire, and so found no unconstitutional taking at that time.

5. Hamer vs. State Highway Commission, 304 S.W. 2d 869 (1957 Mo.) was a case where the land owner had been notified by the state highway commissioner of their intent to take his land for a proposed highway and negotiated for the right-of-way causing the owner to change his plans for future use. Subsequently the highway commission abandoned plans for the proposed highway and the owner alleged the original highway plan constituted a taking and claimed damages. The court ruled that in absence of bad faith or unreasonable delay, the acts of the highway commission resulting in the owner's change of use did not constitute a taking.

6. Section 20.14, *American Law of Zoning*, by Anderson relates to the question of whether exercise of the power to grant building permits for construction in the beds of planned future streets constitutes a divesting of the owner of his land merely because of the refusal to grant the building permit.

Appellant asserts that the rational is that the landowner must "show some loss to himself *other than the actual property* involved in the street widening project in order to qualify himself for compensation." (Emphasis added.) This conclusion is in error. The rational is

that refusal to permit construction of structures in the roadbed of proposed streets shown on official maps is not an unreasonable exercise of governmental power and without more, will not constitute a taking. The authorities cited by Appellant do not address themselves to the question of damages when the city later actually widens the street.

If, as claimed by Appellant (and shown by the authorities it cites) Respondent could not claim there was a "taking," when the city refused the building permits to build in the proposed roadbed, then when was he divested of ownership, if not when the city actually moved in and began occupancy by installing the street improvements on his land?

The facts of this case demonstrate an example of tyranny by the municipal government. Respondent proposed to build commercial buildings conforming to the zoning in the area of his land and sought permits to build to his property line. The city informed him of the proposed street widening and forced him, against his will, to set back to the line of the proposed project. The city then delayed almost eight years before it actually physically widened the street, and then after negotiating for acquisition of the land of other owners on the street and actually taking possession of Respondent's land, it refused to make a just payment and would not commence eminent domain proceedings.

This action could be appropriately characterized as an "inverse condemnation," because the Utah statutes on

eminent domain do not provide a procedure for plain
to initiate an action thereunder, and Respondent ba
its claim both upon the common law concepts of trespa
and the right designated in Article I, Section 22 of
Utah Constitution:

> "Private property shall not be taken or damag
> for public use without just compensation."

(Transcript of Trial page 4 and 27 Am. Jun. 2d, Em
nent Domain, §478, p. 411.)

Where private property is taken for public purpo
by agencies having power of eminent domain und
circumstances such that no procedure provided
statute affords an applicable or adequate remedy, t
owner in the exercise of his constitutional rights, m
maintain an action to obtain just compensation [City
Charlotte vs. Spratt, (N.C. 1965,) 140 S.E. 2d 4
City of Jacksonville vs. Schumann, Fla. 167 S. 2d
Keck vs. Hafley, Ky. 237 S.W. 527]. Constitutio
provisions prescribing compensation for the taking
damaging of property are self-executing, and the
sence of enabling legislation cannot deprive a prope
owner of his right to such compensation (Pima Cou
vs. Bilby, 1960, 87 Ariz. 366, 351 P. 2d 647; Mar
vs. Port of Seattle, Wash. 1964, 391 P. 2d 540; Tho
burg vs. Port of Portland, Ore. 1962, 376 P. 2d 10

Where eminent domain statutes do not make p
vision for injured parties to commence the action
property owner has a right to initiate an inverse c
demnation proceeding (Phillips vs. Postal Tel. Ca

Co., 130 N.C. 513, 41 S.E. 1022); and constitutional provisions declaring just compensation for private property taken for public use are self-executing and an *action at law* will lie to recover compensation (Chick Springs Water Company vs. State Highway Department, 1931, S.C., 157 S.E. 842).

Also, where the eminent domain statute does not provide the land owner the right to initiate the action, the remedies in that statute are not exclusive and the owner is entitled to proceed under his constitutional rights (Hickman vs. City of Kansas, 120, Mo. 1112 25 S.W. 225).

POINT II

THE TRIAL COURT PROPERLY HELD THAT RESPONDENT'S LAND WAS APPROPRIATED BY PROVO CITY AND THAT RESPONDENT HAD NOT DEDICATED ITS LAND TO THE PUBLIC USE.

Appellant's answer to the complaint alleged as an an affirmative defense that Respondent had by its acts dedicated the land in question to the public use. At the trial, counsel for Appellant represented to the court that was the only issue (Transcript of Trial page 41). The burden of proving that allegation was upon Appellant. Appellant totally failed to prove any dedication, and in fact the evidence amply demonstrated there was none.

Dedication has been defined as the *intentional* donation or setting aside of land by an owner for some

public use (Whipporwill Crest Co. vs. Stratford, 145 Conn. 286, 141A 2d 241; Sioux City vs. Tott, 244 Iowa 1285, 60 N.W. 2d 510; Grinestaff vs. Grinestaff, Ky. 318 S.W. 2d 881; Clark vs. Grand Rapids, 334 Mich. 464, 55 N.W. 2d 137; and Kropitzer vs. Portland, 237 Ore. 157, 390 P. 2d 356).

> "The intention of the owner to set apart the lands for the use of the public is the foundation and life of every dedication."

and

> "The acts and declarations of the owner relied on to establish it must be convincing and unequivocal, indicating, expressly or by plain implication, a purpose to create a right in the public to use the land adversely to him and as of right.",

further, the

> "User, in order to constitute proof of dedication, must have been by the public, and adverse to, and exclusive of, the use and enjoyment of the property by the proporietors, and not a mere use by the public under and in connection with its use by the owners in any manner desired by them. . . ." (58 A.L.R. 240)

Since proof of dedication rests primarily upon intention of the owner (Brown vs. Oregon Short-Line Railroad, 36 Utah 257, 102 Pac. 740) and the intention of the owner must be clearly manifest (Culmer vs. Salt Lake City, 27 Utah 252, 75 Pac. 620), appellant was required to show Respondent had such an intention in order to meet the burden of this affirmative defense.

Counsel for Appellant urges the trial court should have presumed an intent to dedicate because Respondent's tenants had used the area in question primarily for customer parking after the commercial buildings were constructed and this had continued several years. However, 27-12-89, Utah Code Annotated, 1953, as amended makes it clear that public use must be in the character of a "thoroughfare" and must be continuous for ten years in order to raise any such presumption. Mere use in common with the owners is not sufficient to show a dedication (Thompson vs. Nelson, 2 Utah 2d 340, 273 P. 2d 720). Appellant introduced no evidence whatever that the area was used as a "thoroughfare." Frank J. Earl testified that it "couldn't have been," (Transcript of Trial pages 79 and 95), and Plaintiff's Exhibits 4 and 8 demonstrated that telephone poles just outside the property line would have prevented thoroughfare travel over the subject piece. The evidence was that after construction of Respondent's commercial building, the land was used for access to Respondent's buildings and for customer parking at a ninety-degree angle to the building—in other words, with the cars facing the building and occupying the 13-foot of land in dispute, plus a portion of the gravel shoulder of the road (Transcript of Trial pages 33 and 78).

Further, the 10-year statutory period requisite to the presumption had not elapsed because Respondent's uncontroverted testimony was that the fences remained intact along the entire property line until October of

1959 when the fence in the center parcel was removed to begin construction on a building. The rest of the fence came down at later dates, and this action was commenced in September 1968.

Not only did Appellant fail to show evidence of intent to dedicate the land, the trial court would have had to ignore the overwhelming evidence to the contrary in order to make such an inferrence:

1. Provo City had an agreement with B.Y.U. since 1955 to align 1230 North Street with the main entrance to the University by widening the street where Respondent's property fronted on it (Transcript of Trial pages 24 to 29).

2. The City adopted a master plan for the street widening in 1956 (Transcript of Trial pages 24 to 29).

3. The city established a policy of refusing building permits for construction of buildings in the proposed roadbed (Transcript of Trial pages 37 and 38).

4. In October 1959 Respondent applied to the City Engineer's Office for a permit to construct a building on the center piece of his land with the front of the building extending to his property line (Transcript of Trial pages 72 and 73).

5. The city refused the permit and informed him the building would have to be set back from his line and when he threatened to build to the line without a permit his compliance with the city's desire was coerced by the threat that the city would stop him (Transcript of Trial pages 72 and 73).

6. Again in 1962 when Respondent's tenant, Standard Oil Company of California, sought a building permit with plans calling for a gasoline pump island in the proposed roadbed, the City Engineer refused the permit requiring them to move south away from the area of the proposed street widening (Transcript of Trial pages 43 through 46).

7. The City Engineer's office did the actual survey work in establishing the line of the curb and guttering at the service station (Transcript of Trial pages 53 through 56).

8. The use of the land was by customers of Respondent's tenants and for parking (Transcript of Trial page 95). There was no evidence of any other use.

9. Respondent exercised control over the manner of parking, requiring 90 degree parking until August 1967 when the city actually widened the street and changed it to parellel parking (Transcript of Trial pages 33 and 78).

10. Respondent's reservation in the service station lease of the right to convey to the city the twelve feet of land showed an intent to protect his ownership in that area and deal with the street widening when the city was ready (Transcript of Trial page 80 and Plaintiff's Exhibit 14).

11. The area remained unsurfaced until the city took possession in 1967 by installing curb and guttering and blacktop surfacing (Transcript of Trial page 97).

12. The attempts by Mr. Earl to get the city to discuss the matter and his meeting with city employees at the site when the construction of the

street improvements was approaching his land and the city agreement to refrain from construction on his land until there was a resolution of the matter not only is evidence that there had been no dedication, but also that the Commissioner of Streets and City Engineer believed there had been none (Transcript of Trial pages 98 and 99).

13. The later attempt by Mr. Earl to discuss the matter with the mayor when he was told to start his suit contradicts any intent to dedicate (Transcript of Trial page 100).

14. Mr. Frank J. Earl, President of Respondent, expressly testified that there was never any intent to make a gift of the land to the public (Transcript of Trial page 103).

Appellant takes the position that Respondent's compliance with the city requirement that his structures be set back out of the proposed roadbed is evidence of intent by Respondent to dedicate the land to the city, but all of the evidence contradicts that contention. In fact, Respondent's compliance was forced by the city. There was no evidence of any oral or written declarations of intent to dedicate, no evidence of acts of setting aside the land for public use; there was no evidence of thoroughfare travel over the land. Respondent maintained control over the manner of parking, and mere use by patrons of Respondent's tenants for less than ten years did not give rise to any presumption of dedication. There was no dedication.

POINT III

THE TRIAL COURT PROPERLY REFUSED TO ALLOW THE CITY AN OFFSET AGAINST THE VALUE OF THE LAND TAKEN FOR SPECIAL BENEFITS CONFERRED ON THE BALANCE OF THE PROPERTY BECAUSE: (1) THERE WAS NO EVIDENCE OF ANY SPECIAL BENEFITS; AND (2) IF THERE HAD BEEN ANY SPECIAL BENEFITS, SUCH BENEFITS COULD BE OFFSET ONLY AGAINST SEVERANCE DAMAGES AND THERE WAS NO EVIDENCE OF SEVERANCE DAMAGES.

Appellant's brief is confused in that it raises as its Point III the question of whether the city should have received an offset for *special benefits* and then proceeds with argument to the effect that the Court should have allowed an offset for *general benefits.* Although Appellant has expressed objection to the trial court applying the Utah Eminent Domain Statute as to the question of whether special benefits should have been applied as an offset to the damages in this action, it cited no authorities, neither to the trial court, nor in its Brief on Appeal as to why the trial court should not have applied the rules on the question of measure of damages set forth in Section 78-34-10, Utah Code Annotated, 1953, as amended. It has been held that the principals which affect property rights in an inverse condemnation suit are the same as in an eminent domain

actoin (Breidert vs. Southern Pacific Co., Calif. 1964, 394 P. 2d 719).

The State of Utah, in handling its condemnation proceedings, takes the position, as evidenced by the Attorney General for the State of Utah's Handbook known as "The Law of Eminent Domain," that benefits which will accrue to a condemnee for construction of improvement on condemned land in connection with benefits to the general public, are not special or direct benefits to the condemnee, and cannot be considered in reduction of damages [See also State of Idaho vs. Dunclick, 286 P. 2d 1112 (1953)].

In Village of Ridgewood vs. Sreel Investment Corporation, 28 N.J. 121, 145 A. 2d 306, the court ruled that general benefits may not be considered in reduction of damages of an individual property owner for the reason that:

> "There is no reason why a man whose land is taken for public improvements should be made to contribute more for the public in common benefit than his neighbor, whose lands are not taken, but who is equally benefited by the improvements."

Hempstead vs. Salt Lake City, 32 Utah 261, 90 P. 397, involved a situation in which the owner of a residence and real property located in Salt Lake City initiated an action against the city claiming a taking and consequential damages to his property where the city had raised the grade of the street and sidewalk in front of the property and along one side, a height rang-

ing from four feet to nine feet, thus cutting off the water for irrigating the lawn, trees and shrubbery, cutting off access to the lot from the front and side, and making the property inconvenient and undesirable for use as a dwelling, resulting in its abandonment. The city claimed the property was benefited by reason of the improved condition of the street; and the court, applying the constitutional provision that private property shall not be damaged for public use, adopted the rule that general benefits could not be considered by a jury in awarding damages, and that the only proper offset, if any, would be special benefits. The rationale of the court was to the effect that if general benefits could be used by the city as an offset, it would result in not making full compensation to the injured property owner, since the general benefits are enjoyed by the other property owners on the same street who may not have been injured by the installation of the improvement. Thus, something would then be withheld from the injured property owner which would be enjoyed by property not injured. The court defined as general benefits, general increase in market value which is common to the other property owners in the area, and made it clear that increased facilities for public travel and transportation are not "special benefits," and not allowable as a credit.

Since the doctrine adopted in the Hempstead case arose out of an action initiated by the property owner on the basis of Article I, Section 22 of the Utah Constitution, it would appear to be controlling in the instant

case. Moreover, it is consistent with the Utah statute on eminent domain.

Section 78-34-10, Utah Code Annotated, 1953, as amended, states:

> "(5) As far as practical, compensation must be assessed for each source of damages separately,"

and

> "(2) If the property sought to be condemened constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned and the construction of the improvement in the manner proposed by the plaintiff."

then Subsection (4) provides that there will be a separate determination as to how much the portion not sought to be condemned will be benefited, if at all, by the construction of the improvements proposed by the plaintiff, and specifically states,

> "If the benefit shall be equal to the damages assessed under Subdivision (2) of this section, the owner of the parcel shall be allowed no compensation except the value of the portion taken; but if the benefit shall be less than the damages so assessed, the former shall be deducted from the latter, and the remainder shall be the only damages allowed in addition to the value of the portion taken."

Under the statute, benefits, if any, can only be set off against the consequential, or severance damages

If there are no severance damages, the city is not permitted to set off any benefits.

In Salt Lake and U. R. Co. vs. Butterfield, et. al., 46 Utah 431, 150 P. 931, this court distinguished the difference between general and special benefits, ruling that special benefits only may be used as setoff, and that such special benefits cannot be set off except against severance or consequential damages. See also, Ogden Short-Line Railroad Company vs. Fox, et al., 28 Utah 311, 78 P. 800.

In *Just Compensation, Revised,* by Henry Kaltenback, Part I, Section 2-3-4, "How Benefits Are to be Set Off," is found the following language:

> "When a benefit has once been determined, whether it be a special benefit or a general benefit, the question remains as to how it affects the award. There are two possibilities: (1) that it may be deducted from the entire award; or (2) that it may be deducted only from the damages to the remainder. A substantial number of states permit the setoff only against damages to the remainder."

The author states that Utah follows the second rule. See also, Schmutz-Rams, *Condemnation Appraisal Handbook,* pages 96, 97 and 98; Nichols, on Eminent Domain, Volume 3, page 146; and *Jury Instruction Forms for Utah,* compiled and edited by Judge J. Allen Crockett, Form 90.55, at pages 181 and 182 to the same effect .

In Hughes vs. State of Texas, 302 S.W. 2d 747, the court ruled that where a landowner does not ask

for damages for a decrease in value of his remaining land by reason of the taking of the strip of his land in question, evidence as to the enhancement of the value of the land not taken is not admissable. Steele vs. City of Ason, 229 S.W. 2d 948, ruled that although special benefits is a legitimate offset to damages, it may not be offset against the value of the land actually taken.

After all of the evidence was introduced, there was nothing upon which the trial court could make a determination of a setoff. Appellant had the burden of proving the claim for special benefits, and the amount. All of Appellant's testimony related to general benefits. Appellant's witnesses did not identify any special benefits as defined in the cases. The city had already assessed Respondent for the cost of curbing and blacktop surfacting (Plaintiff's Exhibits 9 and 15 and Transcript of Trial pages 50 and 102).

Even if the court had concluded that some of Appellant's witnesses' testimony identified some special benefits, it could only be allowed as a setoff against an award for consequential or severance damages. There was no evidence in the case of any severance damages. In fact, Appellant's and Respondent's witnesses both agreed there were none and counsel for Appellant stipulated there were none. (Additional Testimony on Transcript of Trial page 81).

Appellant has claimed this action was not timely brought, but did not raise that issue to the trial court. A statute of limitations is an affirmative defense which

must be set forth in the pleadings [Rule 8 (c), Utah Rules of Civil Procedure; and Thomas vs. Braffet's Heirs, 6 Utah 2d 57 305 Pac. 2d 507].

Nevertheless, since Respondent's claim was founded upon Article I, Section 22 of the Utah Constitution, Webber vs. Salt Lake City, 40 Utah 221, 120 P. 503 is apropos. That case held that a statute of limitations provision arising out of statutory law does not apply to rights created by the Constitution.

CONCLUSION

This court has often expressed the principle that in order to justify a reversal of the trial court, the burden is upon the Appellant to affirmatively demonstrate error (Carter vs. Jackson, 351 P. 2d 957, 10 Utah 2d 284); that the reviewing court will recognize, with deference, the advantaged position of the trial court in making determinations of fact (Peterson vs. Holloway, 334 P. 2d 559, 8 Utah 2d 328); and will refrain from disturbing a trial court judgment and findings if they are substantially supported by evidence (Charlton vs. Hackett, 360 Pac. 2d 176, 11 Utah 2d 389). Respondent respectfully submits that Appellant

has made no showing of error and that the evidence amply supports the judgment of the trial court and it should be affirmed.

RESPECTFULLY SUBMITTED this 22nd day of May, 1972.

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