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Anderson Investment Corporation v. State of Utah, Utah State Department Of Highways, Utah State Road Commission, and the Following-Named Individuals in their Capacity As Commissioners of the Utah State Road Commission: Clem H. Church, R. Lavaun Cox, Francis Feltch, Ross H. Plant And Wayne S. Winters And Weyher Construction Company : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

ANDERSON INVESTMENT CORPORATION,
Plaintiff-Appellant,

vs.

STATE OF UTAH, UTAH STATE DEPARTMENT OF HIGHWAYS, UTAH STATE ROAD COMMISSION, and the following-named individuals in their capacity as Commissioners of the Utah State Road Commission: CLEM H. CHURCH, R. LaVAUN COX, FRANCIS FELTCH, ROSS H. PLANT and WAYNE S. WINTERS and WEYHER CONSTRUCTION COMPANY,
Defendants-Respondents.

Case No. 12832

BRIEF OF APPELLANT

Appeal From the Judgment of the Third District Court for Salt Lake County Honorable James S. Sawaya, Judge

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APPELLANT'S STATEMENT OF THE NATURE OF THE CASE

This is an appeal by Plaitniff-Appellant from an order of the court below dismissing plaintiff's Complaint as amended and supplemented.

DISPOSITION IN THE LOWER COURT

The Lower court granted defendants' Motion To Dismiss Plaintiff's Complaint as amended and supplemented on the grounds that the Complaint as amended and supplemented failed to state a claim upon which relief can be granted against any of the defendants, and plaintiff-appellant appeals from the Order of Dismissal.

RELIEF SOUGHT ON APPEAL

Plaintiff-appellant seeks on this appeal a reversal of the Order Dismissing plaintiff's Complaint as amended and supplemented; a determination by this court that the Complaint as amended and supplemented does state a claim upon which relief can be granted against any or all of such defendants; and a determination that upon the pleadings and the evidence introduced at the hearing on the Order To Show Cause, the pleadings and facts presented a circumstance in which a preliminary injunction could have been issued.

IDENTIFICATION OF THE PARTIES AND EXPLANATION OF ABBREVIATIONS

Anderson Investment Corporation, plaintiff-appellant, will hereinafter be referred to as "plaintiff". The State of Utah, Utah State Department of Highways, Weyher Construction Company, Utah State Road Commission and the individual Commissioners of the Utah State Road Commission, will hereinafter collectively be referred to as "defendants", or where appropriate,

"State of Utah". Weyher Construction Company, where appropriate, will hereinafter be referred to as "Weyher". "R" refers to a page reference in a record of the case.

STATEMENT OF FACTS

The State of Utah, by its Highway Commission, advertised for bids for construction of a viaduct on North Temple Street between Second and Fifth West streets in Salt Lake City, Utah, with bid opening to be November 16, 1971. On November 5, 1971, plaintiff filed a Complaint (R 104-108) in the Third District Court of the State of Utah alleging a threatened taking and material impairment of plaintiff's rights of access, light, air and view and a change of the grade of the road in front of its premises located on the Southeast corner of the intersection at North Temple and Third West Streets in Salt Lake City, directly in front of which the proposed viaduct was to be constructed. The Complaint sought an injunction against all defendants from proceeding with the project until eminent domain proceedings had been instituted. On this same day, November 5, 1971, the Third District Court issued an Order To Show Cause to the defendants, not then including Weyher Construction Company, to appear November 15, 1971 and show cause why a temporary injunction should not issue enjoining the defendants from proceeding with the project until an eminent domain action was commenced to determine and compensate plaintiff for its damages.

Plaintiff's Order to Show Cause came on regularly for hearing before the Honorable James E. Sawaya on the 16th day of November (R 109-161). Following the presentation of plaintiff's case, counsel for plaintiff and defendants, stipulated that if the court deems this case as one in which an injunction might issue, all parties would then treat the proceedings as one in eminent domain for condemnation with a proceeding and determination after a thorough presentation of the evidence of the amount of damages incurred by the plaintiff (R 149-161).

Pursuant to the Stipulation, the Honorable James S. Sawaya took the matter under advisement and allowed the State to proceed with awarding the contract and commencing construction of the viaduct (R 149-161).

Prior to a responsive pleading being filed, plaintiff filed an Amended Complaint on November 24, 1971, naming Weyher Construction Company as defendant, the State having in the meantime awarded the contract to Weyher Construction Company (R 97-102).

In response to plaintiff's Amended Complaint, defendants, including Weyher Construction Company on December 17, 1971, filed a Motion To Dismiss on the ground that the Amended Complaint failed to state a claim upon which relief can be granted (R 96).

On January 6, 1972, plaintiff with and pursuant to the permission of the court, filed a Supplemental Complaint setting forth the trespass of the State of

Utah and its agent, Weyher Construction Company, in the construction on North Temple Street and the total deprivation of plaintiff's access to North Temple Street (R 26-28).

Subsequently, on January 28, 1972, the court having taken the matter under advisement, determined that plaintiff's Amended Complaint failed to state a claim upon which relief can be granted, and reserved the allegations of plaintiff's Supplemental Complaint for further determination (R 15-18).

In response to plaintiff's Supplemental Complaint, on February 7, 1972 and February 11, 1972, the defendants, Weyher Construction Company and the State of Utah et al., respectively filed motions to dismiss plaintiff's Supplemental Complaint (R 13-14; 11-12), which motions were submitted to the court without argument and were granted (R 7-8).

From the orders dismissing plaintiff's Complaint as amended and supplemented (R 15-18; 7-8), plaintiff appeals.

ARGUMENT

POINT I.

THE CASES OF *STATE V. DISTRICT COURT, FOURTH JUDICIAL DISTRICT*, 94 Utah 384, 78 P. 2d 502 (1938) AND *DOOLY BLOCK V. SALT LAKE RAPID TRANSIT COMPANY*, 9 Utah 31, 33 P. 229 (1893) ARE THE LAW OF THE STATE OF UTAH.

The lower court, in dismissing plaintiff's Complaint, has overruled and declared no longer the law of this State, the decision of this Supreme Court in *State v. District Court, Fourth Judicial District,* 94 Utah 384, 78 P. 2d 502 (1938), a viaduct case identical on the facts to plaintiff's case, and in the order has also held inapplicable and overruled the law as set forth in *Dooly Block v. Salt Lake Rapid Transit Company,* 9 Utah 31, 33 P. 229 (1893).

In *District Court, Fourth Judicial District, supra,* an action was brought to enjoin the defendants from constructing a viaduct along a portion of Center Street in Provo City, until the plaintiffs as abutting owners had been compensated through eminent domain for the taking of their rights of access, light, air and view by reason of the proposed construction, even though there had been and would be no physical intrusion upon plaintiff's property.

This court expressly stated that an injunction could properly issue to compel the individual members of the State Road Commission to institute condemnation proceedings and adequately compensate a private property owner when his rights of access, light, air and view would be taken or substantially impaired by the construction of the proposed viaduct:

> *"We think it is clear that the framers of the Constitution did not intend to give the rights granted by Section 22, and then leave the citizen powerless to enforce such rights.* We hold that this is so whether the injury complained of by the plaintiffs in the injunction suit is considered a

'taking' of property, or a *'damaging'* of property. The framers of the fundamental law, after much debate and careful consideration of the hardship of the old rule which allowed compensation only in the case of a taking of property, wrote into the Constitution a provision by which we think they intended to guarantee to the landowner whose property is damaged just compensation with the same certainty as to the landowner whose property is physically taken . . .
"Much argument might be devoted to the question whether there is involved in this case a 'taking' or a 'damaging' of property. Almost countless decisions of courts might be cited on either side of the question. We believe, however, that in incorporating in the Constitution a provision requiring just compensation for property damaged for public use, it was intended to put an end to such controversy and to protect the damaged property owner equally with the property owner whose land was physically entered upon.
"We hold that the defendant contractor and the individual members of the Road Commission can be enjoined from doing an act forbidden by the Constitution." *Id.* at 508.

The principle announced by this court in the *District Court, Fourth Judicial District, supra,* case, is entirely consistent with the case of *Dooly Block v. Salt Lake Rapid Transit Company, supra.* There this court specifically held that Salt Lake City could be enjoined from granting a franchise to Salt Lake Rapid Transit Company to construct railroad tracks on Second South, substantially impairing plaintiff's rights of access, light, air and view, until condemnation proceedings were instituted and Dooly Block adequately com-

pensated:

> "The rights of access, light, and air, constitute the principal values of such property, and it must be presumed that when lots are sold the grantees purchase them with a view to the advantages and benefits which attach to them because of these easements . . . "
> " . . . the abutters have the right to have the street kept open and not obstructed so as to interfere with their easements, and materially diminish the value of their property. When the lots of plaintiffs were sold under the town-site act, above mentioned, it was, in effect, agreed with the grantees that they were entitled to the use of the street as a means of ingress, egress, light, and air. These rights were inducements to purchasers, became a part of the purchase, are appurtenances to the land which cannot be so embarrassed or abridged as to materially interfere with its proper use and enjoyment, and they are, in effect, property of which the owners cannot be deprived without due compensation." *Id.* at 231, 232.

The firm principles established in the cases of *District Court, Fourth Judicial District, supra,* and *Dooly Block, supra,* have been consistently recognized and affirmed by this court in subsequent decisions.

In *State v. Rozelle,* 101 Utah 464, 120 P.2d 276 (1941), this court stated:

> "We have held that an abutting property owner may recover for losses sustained such as result from the shutting off or interfering with his access, light, or air. Dooly Block v. Rapid Transit Co., 9 Utah 31, 33 P. 229, 24 L.R.A. 610;

State v. Fourth Judicial District Court, 94 Utah 384, 78 P.2d 502. To the extent that the present taking or construction so violates condemnee's rights, he is entitled to recover; but be the loss what it may it must have a causal connection with the taking of the property or the construction thereon." *Id.* at 278.

In *Hjorth v. Whittenburg,* 121 Utah 324, 241 P. 2d 907 (1952), this court stated:

> "This court has held that the individual members of the Road Commission may be enjoined from proceeding to take or damage private property without first providing for just compensation to the owners. State, by State Road Comm. v. District Court, Fourth Judicial District, 94 Utah 384, 78 P.2d 502." *Id.* at 908.

In the case of *Utah Road Commission v. Hansen,* 14 Utah 2d 305, 383 P. 2d 917 (1963), this court stated:

> " . . . in the case of Dooly Block v. Salt Lake Transit Co. this court stated that an owner whose property abuts an established public street had an easement of access thereto, and we agree that where such is taken it would constitute the taking of property covered by our eminent domain statute." *Id.* at 919.

In the case of *Hampton v. State Road Commission,* 21 Utah 2d 342, 445 P.2d 708 (1968), this court again affirmed the principle found in the *Dooly Block* case:

> "In Dooly Block v. Salt Lake Rapid Transit Co., this court determined that the rights of access, light and air are easements appurtenant to the land of an abuting owner on a street, and that they are property rights forming part of the

owner's estate. These rights "cannot be so embarrassed or abridged as to materially interfere with its proper use and enjoyment, and they are, in effect, property of which the owners cannot be deprived without due compensation." *Id.* at 710.

The lower court by its express words, directly overruled the principle in the *Fourth Judiical District Court, supra,* and *Dooly Block, supra,* cases; and therefore erred in dismissing plaintiff's Complaint as amended and supplemented.

Any refusal of this court to provide a judicial procedure to allow a citizen access to the courts to prevent a threatened unlawful invasion and deprivation of property, or damage to property, would make impotent the judical system of this State. It is inconceivable that in this day the court would abandon constitutional rights and privileges and leave them helpless before the onslaught of the whims of the individuals acting in the name of the State.

POINT II

THE COURT ERRED IN HOLDING THAT PLAINTIFF'S COMPLAINT AS AMENDED AND SUPPLEMENTED, DID NOT STATE A CLAIM UPON WHICH INJUNCTIVE RELIEF CAN BE GRANTED AGAINST ANY OF THE DEFENDANTS.

A. PLAINTIFF'S COMPLAINT AS AMENDED AND SUPPLEMENTED, ALLEGES A TAKING AND SUBSTANTIAL IMPAIRMENT OF PLAINTIFF'S RIGHTS OF ACCESS, LIGHT, AIR AND VIEW.

In substance, plaintiff's amended and supplemented Complaint (R 97-102) alleges: On or about October 19, 1971, the Commissioners of the Utah State Road Commission, by way of Motion, authorized the construction of a new viaduct to be erected on North Temple Street between Second West and Fifth West, a portion of which was to be constructed directly in front of plaintiff's property which lies on the Southeast corner of the intersection of Third West and North Temple Street. This viaduct is to occupy approximately 80 feet in width of the center of North Temple Street leaving only a narrow 15-foot one-way street in front of plaintiff's premises. As a direct and proximate result of this proposed construction, plaintiff will suffer substantial and material impairment of its rights of access, light, air and view constituting a taking and damaging of plaintiff's property within the meaning of Article 1, Section 22 of the Constitution of the State of Utah, for which plaintiff has received no just compensation through eminent domain proceedings and has no adequate remedy at law or equity other than the injunction prayed for enjoining the individual Commissioners of the State Road Commission from commencing with the construction of the proposed viaduct.

Defendants contended before the lower court that an injunction should not properly issue in this case, because there is a procedural distinction between a "taking" and "damage" under Article I, Section 22 of the Constitution of the State of Utah.

It is plaintiff's position that defendants have "taken" plaintiff's property rights of access, light, air and view by the construction of the proposed viaduct.

No serious contention can be made that as a requisite to recovery in an eminent domain action there must be a physical intrusion on a private property owner's land. This court, together with numerous other courts throughout the country, have repeatedly held to the contrary.

In the case of *Hampton v. State Road Commission*, 21 U. 2d 342, 445 P.2d 708 (1968), this court correctly pointed out the unfounded position of the State that "Since there has been no taking of any real property contained within the legal description of appellant's deed, the alleged impairment of egress and ingress constitutes a mere consequential damage to which the State's defense of sovereign immunity is applied.":

> "Respondents have overlooked the fact that all easements of a permanent character, that have been created in favor of the land sold, and which are open and plain to be seen, and are reasonably necessary for its use and convenient enjoyment, unless expressly reserved by the grantors, pass as appurtenances to the land. Therefore, re-

spondents can place no reliance on the fact that an easement appurtenant is not specifically contained within the property's legal description." Id. at 710.

Further, the court in *Hampton, supra,* affirmed its position in *Dooly Block v. Salt Lake Rapid Transit Company,* 9 Utah 31, 33 P. 229 (1893), in that rights of access, light and air "cannot be so embarrassed or abridged as to materially interfere with its proper use and enjoyment, and they are, in effect, property of which the owners cannot be deprived without due compensation." 445 P.2d at 710. See also *Cheek v. Floyd County,* 308 F. Supp. 777 (Dic. Ga. 1970); *Hendrikson v. State,* 127 N.W. 2d 165 (Minn. 1964); *Utah Road Commission v. Hansen,* 14 Utah 2d 305, 383 P. 2d 917 (1963); *State v. Marion, Circuit Court,* 153, N.E. 2d 327 (Ind. 1958).

By the sworn affidavit of Reed H. Richards (R 63-65), an attorney who has examined the abstract of title to the property in question, it was established at the hearing on the Order To Show Cause that title to the property came by way of a patent from the United States to Mayor Heber Wells, and then passed to Fredrick Kesler. Further, that the right-of-way over the streets in front of such property was an appurtenance of necessity which required no special grant in the conveyance to Fredrick Kesler, bringing this case squarely within the holding of the *Hampton, supra,* and *Dooly Block, supra* cases.

For this reason alone, there is no question that the State has "taken" plaintiff's rights of access, light, air and view within the meaning of Article I, Section 22 of the State Constitution entitling plaintiff to the issuance of an injunction as denied by the Court below.

Even under defendants' theory of the law, there can be no question that plaintiff's property rights of access, light, air and view have been sufficiently impaired to constitute a "taking" within the meaning of Article I, Section 22 of the State Constitution.

The Court's attention is invited to Footnote 6 on page 710 of the *Hampton, supra,* case, wherein this court clarified the meaning of the procedural distinction between a "taking" and "damage" specifically recognizing that when property rights are unreasonably or substantially impaired, there exists a right to compensation:

> "There is some language in Justice Wolfe's dissent in State by State Road Commission v. District Court, Fourth Judicial District, footnote 3, supra, which might cast doubt on whether interference with an abutting owner's easement constitutes a "taking." The Justice clarified this matter in his concurring opinion in State by State Road Commission v. Rozelle, 101 Utah 464, 469, 120 P.2d 276, 278 (1941), where he stated: " * * * Any losses resulting from unreasonably cutting off their own access to their property or unreasonably interfering with their light and air given by reason of their abutting on a public highway are compensable. * * * " *Id.* at 710.

The holding of the *Hampton, supra,* case is in accord with this view:

> "In plaintiff's remaining causes of action, insofar as they allege a substantial and material impairment of access to their property, constituting a 'taking', the trial court erred in granting defendants' Motion To Dismiss." *Id.* at 712.

Further, not only has this court in the case of *State v. District Court, Fourth Judicial District,* 94 Utah 384, 78 P. 2d 502 (1938), recognized that the construction of a viaduct sufficiently impairs a property owner's rights of access, light, air and view to constitute a "taking" of these rights but numerous other jurisdictions have reached the same conclusion.

The Supreme Court of Texas in *DuPuy vs. City of Waco,* 396 S.W. 2d 103 (Texas, 1965), a case substantially identical to the present case, held that the construction of a viaduct deprived the owner of reasonable access to his property, and he was entitled to compensation where the construction of the viaduct resulted in plaintiff's property fronting on a cul-de-sac under the viaduct with a one-way street abutting on the side of plaintiff's property providing access to the main stream of traffic. In holding that this constituted sufficient impairment of the right of access to compel compensation, the court stated the following:

> "The attorney general argues that Petitioner has no damage because he still has complete access to the system of public roads and summarizes his position in saying that, 'The access

is less convenient and the loss of traffic flow by the front door is apparent, but it is settled that both the real elements of loss to commercial value are damnum absque injuria.' "

"It is settled that a direct physical invasion of property is not required under the present provisions of Article I, Section 17 of the Constitution of Texas, to entitle an owner to compensation. It was the injustice of requiring an actual taking which explains the inclusion for the first time of the Constitution of 1876 of the requirement that compensation be paid for the damaging of property for public use."

"It is the settled rule in this State that an abutting property owner possesses an easement of access which is a property right; that this easement is not limited to a right of access to the system of public roads; and that diminishment of the value of property resulting from a loss of access constitutes damage."

"It is not enough that DuPuy can get to the system of public roads and the traveling public can get to his building. We are clear in the view that the construction of the viaduct has deprived DuPuy of reasonable access which entitles him to invoke the provision of the Constitution requiring the payment of compensation when property is damaged for public use." *Id.* at 106, 108 and 110.

The position of the Supreme Court of Texas was followed in the 1968 decision of *City of Waco v. Texland Corporation,* 425 S.W. 2d 374 (1968), where the Court of Appeals held that the construction of a viaduct

deprived abutting property owners of reasonable access to their building and they were entitled to compensation where the viaduct elevated the street above the building, deprived the plaintiffs of their former uninhibited access and resulted in plaintiffs having access to the front of their property under the viaduct between cement supports and access on the side of their property to a side street which was primarily a railroad street. The court stated:

> "Plaintiffs here have access to Mary Avenue, in addition to the lower level of 17th Street (which terminates on each end in a cul-de-sac). But Franklin is a main and unobstructed thoroughfare; and Mary Avenue is impaired and obstructed by the presence of three railroad tracks. The impairment and obstruction of a street by the presence of railroad tracks on the same is obvious . . . We think plaintiffs' access by way of Mary Avenue unsuitable because of the presence of the railroad tracks.
> "From the record, we conclude that under the authority cited, plaintiffs have been deprived of reasonable access to their properties." *Id.* at 376.

In the similar case of *Anderlik v. Iowa State Highway Commission,* 38 N.W. 2d 605 (Iowa, 1949), the Iowa Supreme Court held that the construction of a viaduct in front of plaintiff's premises with the resulting substantial impairment of the rights of access, light, air and view, constituted a "taking" of private property within the applicable Iowa State Constitution. The

court in awarding compensation described the remaining access as follows:

> "The only means of access to plaintiff's properties is over that part of the old highway between the west edge of the embankment and their east lot line. This old road comes to a dead end at the south line of the railroad right-of-way. To get on the present highway from plaintiffs' properties it is necessary to travel what is left of the old road to Prairie avenue which intersects Highway 84 at the southeast corner of the Harper tract. The respective distances from this point to the Harper, Anderlik and Robinson houses are 399, 569 and 779 feet. Thus on a round trip into Cedar Rapids the Robinsons must travel 3116 feet further than before." *Id.* at 606.

The court further pointed out that the construction of the viaduct also obstructed and impaired the light, air and view from plaintiff's properties for which the State must also provide adequate compensation. See also *Liddick v. City of Council Bluffs,* 5 N.W.2d 361 (Iowa, 1942).

Numerous other decisions have outlined the degree of impairment necessary to recover damages through eminent domain.

In a well reasoned opinion, the Arizona Supreme Court in *State v. Thelberg,* 350 P.2d 988 (Ariz., 1960), held that either the destruction or the material impairment of the access of an abutting property owner

to the controlled access highway was compensable. The material facts of the *Thelberg, supra,* decision are that the defendant's property had approximately 185 feet frontage on a highway which was to be designated a limited access facility. Prior to the construction of the limited access facility, the property was being used by the defendant as a motel with ready and unlimited access thereto. The State proposed construction of a controlled access highway with separate through roadways for both East and Westbound traffic. No access was to be permitted to or from these through roadways except at certain designated points. Frontage roads were to be constructed running parallel to the through raodways. The frontage road in front of defendant's property was to be a one-way road going West, the grade of which was to be from 1 to approximately 2½ feet above defendant's property. Defendant would have ready access to this frontage road with the nearest access to the through roadways being 170 feet West of the property. After construction of the controlled access highway was completed, a Westbound traveler on the Tucson-Benson Highway could reach defendant's property by leaving the Westbound through roadway approximately 1400 or 1500 feet East of the take-off road and driving down the ramp to the frontage road which served the defendant's property. An Eastbound traveler on the Eastbound through roadway would have to drive approximately one mile easterly from the intersection of the takeoff road to the Tucson-Benson Highway, then cross over to the through road-

way onto the frontage road serving defendant's property.

In sum, the material facts of the *Thelberg, supra,* decision are almost identical to that of the present case. The Arizona Supreme Court stated the applicable law as follows:

> "When the controlled access highway is constructed upon the right of way of the conventional highway and the owner's ingress and egress to abutting property has been destroyed or substantially impaired, he may recover damages therefor. The damages may be merely nominal or they may be severe. Other means of access such as frontage roads as in the instant case may be taken into consideration in determining the amount which would be just under the circumstances. Other means of access may mitigate damages, but does not constitute a defense to the action however." *Id.* at 992.

The 1969 decision of the Court of Appeals of Arizona in *State Ex Rel. Herman v. Hague,* 459 P.2d 321 (Ariz. App. 1969), pointed out the underlying reasoning of the *Thelberg supra,* decision:

> "Our Supreme Court, however, has decided that for the real economic injury which results from limiting access, the community as a whole and not the abutting landowner can better bear the cost." *Id.* at 323.

See also *Mississippi State Highway Commission v. Null,* 210 So. 2d 661 (Miss. 1968); *McMoran v. State,* 345 P. 2d 598 (Wash. 1959); *State v. Geiger and Peters, Inc.,* 196 N.E. 2d 740 (Ind. 1964); *Hen-*

drikson v. State, supra; Balog v. State Department of Roads, 131 N.W. 2d 402 (Neb. 1964); *State v. Kodama,* 483 P. 2d 857 (Wash. 1971); *Breidert v. Southern Pacific Company,* 394 P.2d 710 (Cal. 1964).

A further matter of significance in this case was pointed out in *Rogers v. State,* 321 N.Y.S.2d 481 (1971), wherein the New York Supreme Court, Appellate Division, held that claimants were entitled to compensation for consequential damages for loss of access to a multi-lane highway resulting in reduced size and irregular shape of property where the remaining access was by way of a narrow road which was unsuitable for the *highest and best use of the property.* See also *Slepian v. State,* 312 N.Y.S.2d 338 (1970); and *State Ex Rel. Department of Highways v. Linnecker,* 468 P.2d 8 (Nev. 1970).

Not only have defendants "taken" plaintiff's property rights of access, light, air and view, but by the construction of the viaduct, they have left plaintiff's property wholly unsuitable for its highest and best use.

Applying the facts of the present case as alleged in the Complaint as amended and supplemented, to the law as outlined, it is manifestly evident that plaintiff's right of access will be sufficiently impaired to warrant the issuance of an injunction compelling the State to institute condemnation proceedings and adequate compensate plaintiff for the impairment of these rights.

The limited evidence brought out at the hearing on the Order To Show Cause demonstrates that the viaduct will occupy approximately 80 feet in width of the center of North Temple Street in front of plaintiff's property leaving only a narrow 15-foot wide one-way street in front of plaintiff's premises, whereas at the present time, plaintiff, its guests and business visitors have free and unobstructed access to all traffic flow going East and West on North Temple Street. A person desiring to leave plaintiff's premises from the North must enter the frontage road and proceed East parallel to North Temple Street and then must turn right at Second West; they are denied access to North Temple at the next intersecting street. Further, a person desiring to enter plaintiff's premises from the West coming off from the viaduct must enter an offramp, cross Third West Street and enter the one-way street for entrance to plaintiff's premises. A person desiring access to plaintiff's property from the East must enter the frontage road on the North side of the proposed viaduct, cross under the viaduct, travel between cement supports and through a parking lot and then enter the one-way frontage road immediately in front of plaintiff's premises. In addition, as was pointed out in the *City of Waco v. Texland Corporation, supra,* Third West Street is obstructed by railroad tracks.

It is therefore evident that the lower court erred in granting defendant's Motion To Dismiss plaintiff's

Complaint as amended and supplemented in that clearly, plaintiff's rights of access, light, air and view have been both taken and substantially impaired, and the remaining access is left wholly unsuitable for the highest and best use of the property.

Of final and paramount significance in this case is the fact that the lower court, by granting defendants' Motion To Dismiss precluded a jury determination, after a full presentation of the evidence of whether plaintiff's property rights have been sufficiently impaired to constitute a "taking", as required by this court in the *Hampton, supra,* decision, if such is necessary in view of the pleadings and evidence of record.

We therefore respectfully urge this court to reverse the lower court's order that plaintiff's Complaint as amended and supplemented failed to state a claim upon which relief can be granted, and make a determination that the pleadings and facts presented a circumstance in which a preliminary injunction could have been issued.

B. PLAINTIFF'S COMPLAINT AS AMENDED AND SUPPLEMENTED ALLEGES A MATERIAL CHANGE IN THE ELEVATION OF THE HIGHWAY IN FRONT OF PLAINTIFF'S PREMISES.

In substance, plaintiff's Amended Complaint alleges that the construction of the proposed viaduct will ma-

terially change the elevation of North Temple Street in front of plaintiff's property, by moving the elevation of North Temple Street to a maximum height of approximately 22 feet and an average height of approximately 15 feet in front of plaintiff's property without the State instituting condemnation proceedings to insure just compensation.

By State Constitution, statute and case law, a private property owner must be awarded just compensation for the material change of the grade of the road in front of his property by the construction of a viaduct.

Utah Code Annotated, Section 10-8-89 (1953) states as follows:

> "10-8-89. Whenever by the grading of any street, alley or other public ground in a city, pursuant to the action of the city authorities in changing the established grade of such street, alley or public ground, after valuable improvements have been made upon real property abutting thereon such real property is injured or diminished in value, the owner of such real property or improvements may recover from such city the amount of such damages or diminution in value in a civil action brought for that purpose." *Id.*

Although this statute is framed in the terms of action by a city, this court in *Webber v. Salt Lake City*, 40 Utah 221, 120 P. 503 (1911), expressly held that the statute is a mere codification of the principle established by Article I, Section 22 of the State Constitution:

> "As we pointed out in Kimball v. Salt Lake City, supra, which was an action like the one at bar, section 282, just referred to, was adopted in 1896, after the Constitution of this state had been adopted, and said section was evidently passed for the purpose of harmonizing the statutory law of this state with section 22 of article 1 of the Constitution, which provides that 'private property shall not be taken or damaged for public use without just compensation." Appellant's counsel concede that this constitutional provision is self-executing, and to make it available required no legislative aid. The right to recover consequentiai damages for injury to private property by reason of making public improvements therefore does not rest upon section 282, supra, but is based upon the provision quoted from section 22 of article 1 of our Constitution." *Id.* at 504.

It is therefore evident that this statute applies equally to City as well as State authorities.

To construe the statute in any other manner than as a recognition of property rights in the street grade enjoyed by all citizens would deny plaintiff equal protection of the laws as guaranteed by the 14th Amendment to the Constitution of the United States and by Article I, Section 2 of the Constitution of the State of Utah.

The present case presents a clear and simple example of the disparity that would result in reading this statute as only applicable to cities. If plaintiff be

denied recovery and a second property owner similarly situated on North Temple Street be allowed recovery merely because it was the City authorities which changed the grade of the road in front of its premises, there would be a clear denial of equal protection of the laws. The Constitutions of the United States and the State of Utah will not tolerate such inequitable and arbitrary results.

Plaintiff's rights with respect to the change of the elevation of the street in front of its premises were carefully outlined in the case of *Dooly Block v. Salt Lake Rapid Transit Company, supra,* wherein this court stated:

> "Plaintiffs' lots were represented on the original plat of Salt Lake City as fronting Second South street which was platted in said plat, and when they were purchased under the forms prescribed by the town-site act the grantees secured the right and privilege to have the street forever kept open . . . The rights of access, light, and air constitute the principal values of such property, and it must be presumed that when lots are sold the grantees purchase them with a view to the advantages and benefits which attach to them because of these easements . . . Such privileges are easements in fee—incorporeal hereditaments, —and form a part of the estate in the lots. They attach at the time the land is platted and the lots are sold, and will remain a perpetual incumbrance upon the land burdened with them . . .
>
> "In either case the abutters have the right to have the street kept open and not obstructed so as to inetrfere with their easements, and ma-

terially diminish the value of their property. When the lots of plaintiffs were sold under the town-site act, above mentioned, it was, in effect, agreed with the grantees that they were entitled to the use of the street as a means of ingress, egress, light and air. These rights were inducements to purchasers, became a part of the purchase, are appurtenances to the land which cannot be so embarrassed or abridged as to materially interfere with its proper use and enjoyment, and they are, in effect, property of which the owners cannot be deprived without due compensation." *Id.* at 231-232.

It is therefore evident that the lower court erred in holding that plaintiff's Complaint as amended and supplemented did not state a claim upon which injunctive relief can be granted against the individual Commissioners of the State Highway Commission in that the Complaint as amended and supplemented alleges a material change in the elevation of the highway in front of plaintiff's premises.

C. THIS ACTION WAS COMMENCED AND HEARD BEFORE THE CONTRACT WAS AWARDED OR THE CONSTRUCTION WAS COMMENCED.

This court has carefully drawn the distinction between (1) an action seeking to restrain the State Road Commission from doing an act, which if completed, will cause injury and (2) a proceeding seeking to compel institution of condemnation proceedings, or the recovery

of damages, after the injury has occurred, allowing an injunction to issue in the former case as a matter of course, and only allowing an injunction to issue in the latter case if the plaintiff's property rights have been "taken" or "substantially impaired."

In *Hjorth vs. Whittenburg*, 121 U.324, 241 P.2d 907 (1952), this court in holding that the Utah State Road Commissioners did not need to personally respond in damages for acts done in the good faith performance of their ministerial duties, stated:

> "The situation differs materially from one wherein a public official is thought to be restrained from doing an act which will cause injury. There the purpose is to prevent injury and call the possibility of such to the attention of the appropriate public officials and secure a determination as to whether the damage will be irreparable or compensation may be had for it. In such case, upon proper proceedings, an appropriate determination can be made, and if the injury is compensable, then the public agency responsible may respond in damages." *Id.* at 909.

This view is consistent with that expressed in *Shaw v. Salt Lake County*, 119 Utah 50 224 P.2d 1037 (1950) wherein this court denied the application of the doctrine of soverign immunity in an injunction suit brought to compel the Salt Lake County Commissioners from putting into operation a hot asphalt plant. In so holding, the court stated:

> "In the present case the plaintiffs sought to re-

strain the creation of a nuisance, which would impair their property rights, and for which damages would provide no adequate compensation even assuming they could be obtained. *The principal of sovereign immunity is not one which allows the sovereign to continue to inflict injury, but rather, one which absolves the sovereign from responding in damages for past injuries.* It does not give the sovereign the right to totally disregard the effect of its actions upon the public or adjoining property owners. The doctrine of soverign immunity is open to criticism, and exceptions have been engrafted upon it repeatedly in order to obviate its harsh effects . . . This court does not desire to extend the doctrine of soverign immunity to include immunity from injunction to restrain the creation or operation of a nuisance impairing property rights. *Accordingly, we hold that a county may be enjoined from creating or maintaining a nuisance which impairs or injures private property rights." Id.* at 1040. (Emphasis added)

There can be no question that the present action was filed and heard before the contract for the construction of the viaduct was awarded or the construction was commenced; therefore, the lower court erred in holding that the doctrine of soverign immunity barred the issuance of an injunction.

The lower court based its decision on the case of *State v. Parker*, 13 Utah 2d 65, 368 P.2d 585 (1962), which is not controlling nor relevant to the facts of the present case.

The *Parker, supra,* case, involved a condemnation suit by the State in which a counterclaim was brought seeking to enjoin further construction of a freeway. The court held that inasmuch as the action was commenced after the construction had begun, the doctrine of sovereign immunity was a bar to action, making the *Parker, supra,* case completely distinguishable to the facts of the present case where the action was filed and heard prior to the awarding of the contract or commencing construction.

In addition, the court in the *Parker, supra,* case, entirely passed over the question of whether there had been sufficient impairment of plaintiff's rights of access, light, air and view, to constitute a "taking" as required by the more recent decision of *Hampton v. State Road Commission, supra.*

Further, careful note should be made of the fact that all of the cases cited and relied on in the *Parker, supra,* decision, are cases in which suit was commenced after the construction had begun or was completed, compelling the conclusion that the case of *State v. District Court, Fourth Judicial District, supra,* which has never been overruled and has been repeatedly affirmed, represents the law in this State today, i.e., that an injunction can properly issue to compel the State of Utah or a subdivision thereof to institute condemnation proceedings and adequately compensate a property owner when his rights of access, light, air and view *will be* "taken" or "substantially impaired."

Inasmuch as this action was filed and heard before the contract for the construction of the viaduct was awarded or the construction was commenced, the doctrine of soverign immunity does not bar the issuance of an injunction as prayed in plaintiff's Complaint as amended and supplemented.

D. PLAINTIFF HAS NO ADEQUATE REMEDY AT LAW OR EQUITY OTHER THAN THE ISSUANCE OF AN INJUNCTION AS PRAYED.

By stipulation of council in court (R. 148) and further substantiated by the affidavit of appraiser, Dan Simons (R. 61-62), it is conceded that plaintiff's property fronting on the Southeast intersection of Third West and North Temple has been damaged. The stipulation of the attorney general did not concede such damage to be compensable damage.

The State, through its agents, have proposed to do an act prohibited by State Constitution by taking plaintiff's property rights without just compensation.

Unless this court holds that this case is one in which an injunction may properly issue, thereby forcing the State to convert this action into one for damages and eminent domain, the plaintiff has no remedy at law or equity by which it can recover for the admitted damages suffered by reason of defendants' actions.

In the case of *State v. District Court, Fourth Judicial District, supra*, this court specifically recognized that presentation of a claim to the State Board of Examiners is not an adequate remedy at law:

> "The attorney general, on the other hand, argued that the plaintiffs have a remedy by presenting their claim to the State Board of Examiners and that, if dissatisfied by the action of the Board of Examiners, they may appeal to the Legislature.
>
> "Does such a right constituting a plain, speedy and adequate remedy at law so as to make it improper for a court of equity to issue an injunction, the effect of which will be to force the road commission to abandon the projects or institute proceedings for condemnation and assessment of compensation?
>
> "We are of the opinion that where private property is taken or damaged for public use, as alleged in the complaint in the injunction suit, without any agreement with the owner for compensation, and without any proceedings for assessment in the manner provided by the statute relating to its eminent domain, a court of equity may properly take jurisdiction where the only remedy remaining to the landowner is to present a claim to the Board of Examiners." *Id.* at 507.

The Constitution of this State grants to its citizens the protection of insured compensation when their property is taken for public use. This court cannot deprive the citizens of this State of the injunctive remedy which is the only remedy available to enforce this right.

We therefore respectfully urge that the decision of the lower court be deversed and that the right to the injunctive remedy to compel eminent domain proceedings be preserved.

POINT III

PLAINTIFF'S COMPLAINT AS AMENDED AND SUPPLEMENTED STATES A CLAIM UPON WHICH RELIEF CAN BE GRANTED FOR TRESPASS.

Plaintiff's Complaint as supplemented (R. 26-28) states a claim upon which relief can be granted for trespass and in substance alleges as follows: On or about December 1, 1971 and on each day thereafter during the construction of the viaduct, the State of Utah, through its agent and contractor, Weyher, unlawfully and without consent or permission, trespassed on plaintiff's premises and directed the public traffic and heavy construction machinery over plaintiff's property.

As a result of this trespass and directing the public traffic and construction machinery over plaintiff's property, plaintiff's improvements have been knocked down, electrical wires and wiring have been destroyed, cars and heavy construction machinery of defendants, their agents and employees have been parked upon said property and ruts and paths have been cut in the hard surface of the premises thereby irreparably damaging said prop-

erty for its previous suitable commercial purposes.

The lower court, by dismissing plaintiff's Supplemental Complaint, has precluded plaintiff from presenting evidence of defendant's repeated trespass and the damages resulting therefrom to a jury.

It is universally recognized that the State acting through its agents cannot construct a viaduct without exercising reasonable care to avoid unecessary injury to the adjoining property. Certainly the Complaint as amended and supplemented states a cause of action against defendant, Weyher.

The court's attention is invited to the discussion found in Volume 6 of Nichols on Eminent Domain, Section 28.31, pages 664-668 wherein is outlined the general principles governing damages resulting from the State's or its contractors' failure to exercise reasonable care to avoid unnecessary injury to adjoining property while exercising their powers of eminent domain:

> When a corporation, municipal or private, has complied with all the formal requirements necessary to effect a valid taking of land by eminent domain, but constructs or maintains its works without exercising reasonable care to avoid unnecessary injury to the adjoining property, it is no defense to an action at common law for damages for such injury that there is an adequate remedy provided by law for the assessment of damages resulting from the laying out and construction of such works, or even that such damages have been assessed and paid. The statutory

authority is to construct the works with reasonable care not to inflict unnecessary injury upon private property, and the statutory proceeding is for the damages which will naturally and inevitably result from the construction and operation of the works in such a manner. A corporation which acts negligently and causes unnecessary and avoidable injury to private property, when sued as a wrong-doer, cannot justify under the statute which authorized it to exercise eminent domain, and is liable to the same extent that it would be if the statute had never been enacted. In other words, the delegation of the power of eminent domain does not carry with it absolution from liability for negligence in the ordinary forms of civil actions. Even when the statute provides a remedy in the broadest language, such remedy will not be held to be exclusive unless expressly made so. The right of every landowner to recover by the usual processes of law for tortious damages to his land is important, and will not be held to have been taken away by the legislature in any instance unless the language of the statute has no other reasonable meaning.

When damage is inflicted upon private land by the negligence of a public service corporation, whether the damage is the result of the deliberate act of the corporation itself or is due to the momentary negligence or disregard of private rights by one of its agents or employees, it has never been doubted that the liability of the corporation is to be determined upon the same principles that are applied in the case of a corporation engaged in a purely private business; but the liability of municipal corporations for negligence is subject to such peculiar limitations,

> some of which are not always clearly unde stood, that a rather extended analysis of t subject is necessary and will be taken up in subsequent chapter. *Id.* at 664-668.

The court's attention is further invited to 27 A Jur 2d Section 480, pages 413-415; and 2 ALR 2d 66 "Damage To Private Property Caused By Negligen Of Government Agents As 'Taking', 'Damage' O 'Use' For Public Purposes In Constitutional Sense, and the numerous cases cited therein which support th above principle.

It is therefore abundantly clear that the lower cou erred in dismissing plaintiff's Supplemental Complain thereby denying plaintiff his day in court on the issue o defendants' trespass.

CONCLUSION

To deny plaintiff the right to the issuance of a injunction would render meaningless the constitutiona guarantees found in Article I, Section 22 of the Stat Constitution and reaffirmed by this court in the cases o *State v. District Court, Fourth Judicial District*, 9 Utah 384, 78 P.2d 502 (1938) and *Dooly Block v. Sal Lake Rapid Transit Co.*, 9 Utah 31, 33 P. 229 (1893).

It is well established that the immunity of the Stat does not bar this action since there has been an unlawfu

"taking" of plaintiff's property and property rights, and the action was commenced and heard prior to the commencement of the construction.

We therefore respectfully request a reversal of the order of lower court dismissing plaintiff's Complaint as amended and supplemented and a determination that the facts and pleadings present a circumstance in which a preliminary injunction could have been issued.

Respectfully submitted,

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