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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 Respondents

IN THE SUPREME COURT OF THE STATE OF UTAH

ANDERSON INVESTMENT CORPORATION,

Plaintiff-Appellant,

-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. LA VAUN COX, FRANCIS FELTCH, ROSS H. PLANT, and WAYNE S. WINTERS; and WEYHER CONSTRUCTION COMPANY,

Defendants-Respondents.

Case No. 12832

BRIEF OF RESPONDENTS

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

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IN THE SUPREME COURT OF THE STATE OF UTAH

ANDERSON INVESTMENT CORPORATION,
Plaintiff-Appellant,
-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. LA VAUN COX, FRANCIS FELTCH, ROSS H. PLANT, and WAYNE S. WINTERS; and WEYHER CONSTRUCTION COMPANY,
Defendants-Respondents.

Case No. 12832

BRIEF OF RESPONDENTS

NATURE OF THE CASE

This is an appeal from the equitable decision of the lower court, directed to the conscience of the court, denying plaintiff-appellant's complaint for injunctive relief.

DISPOSITION IN THE LOWER COURT

Plaintiff's complaint for injunctive relief, enjoining the Road Commission of the State of Utah as a governmental entity and as individuals, together with Weyher Construction

Company, the State's contractor, from construction of the North Temple Viaduct in Salt Lake City, was dismissed upon the motion of defendants.

RELIEF SOUGHT ON APPEAL

The respondents seek a ruling of this Court, sustaining the judgment of the lower court as being within its sound discretion and in accordance with law.

STATEMENT OF FACTS

Respondents accept as substantially correct the Statement of Facts as it appears in appellant's brief, except for the few matters hereinafter stated by way of amendment or clarification.

At hearing on plaintiff-appellant's Order to Show Cause on November 16, 1971, the State and the individually-named defendants stipulated that if this Court, after reviewing the authorities cited by the respective parties and conducting any further hearing it deemed advisable, were to rule that if informed at the time of the hearing as fully as after the complete review it would have issued an injunction, then the parties would treat the case as though injunction had issued for purposes of further proceeding and not claim advantage by reason of delay. It was not supposed that the defendants would waive their respective rights of appeal to this Court on the question of the injunction (R. 155-156). The stipulation as interpreted by the court (R. 153-154) was that intended by the defendants. At the time of the Order to Show Cause hearing, the parties agreed that neither would claim advantage while the Court reviewed the authorities and that

the bid-letting and construction should, therefore, get under way immediately without legal or equitable hindrance (R. 154).

ARGUMENT

POINT I

THE COURT CORRECTLY RULED THAT THE DAMAGES, IF ANY, SUFFERED BY THE PLAINTIFF-APPELLANT WERE NON-COMPENSABLE AS THE REASONABLE EXERCISE OF THE POLICE POWER OF THE STATE (damnum absque injuria).

It is well established in the law of this State and throughout the several jurisdictions that not all damages resulting from highway improvements are compensable. (*Springville Banking Co. v. Burton,* 10 U.2d 100, 349 P.2d 157; *Utah Road Commission v. Hansen,* 14 U.2d 305, 383 P.2d 917; *State v. Parker,* 13 U.2d 65, 368 P.2d 585; *Rayburn v. State of Arizona,* 378 P.2d 496; *State v. Meier,* 388 S.W.2d, 855). This is particularly so where, as in this case, the highway improvement is built completely within the State's right of way. No real estate was taken from the appellant and the evidence adduced by it on hearing before the lower court clearly established that reasonable access to North Temple Street from appellant's property was planned. (R. 143). Such reasonable access has in fact been provided.

Although appellant is incorrect when it asserts that the State stipulated that appellant had in fact suffered damage (R. 148), for purposes of hearing before the lower court, the State did agree that appellant may be able to produce admissible evidence that it had so suffered. The real issue of

law upon which this case was disposed of in the court below, and which we respectfully suggest is equally dispositive here, is not whether appellant has been damaged in any degree but whether or not the type of damage it may have suffered is compensable under the law. We suggest that appellant errs when it assumes that all it need do to succeed is to show that it sustained some damage. (*State v. Rozzelle,* 101 Utah 464, 120 P.2d 276; *People v. Symons,* 357 P.2d 451.)

Appellant's action is grounded on the theory that the State has interfered with its "Rights of access, ingress, egress, light, air and view and for the depreciation of its property and subjecting plaintiff, its guests and business visitors to unreasonable and excessive noise, smoke and dust, and for loss of plaintiff's business, and for changing grade on North Temple Street in front of plaintiff's premises." (R. 97-102) These items will be categorized and discussed below but it should be observed that practically every case cited hereinafter is equally applicable on the broad question of each category.

ACCESS, INGRESS, EGRESS

The State concedes that appellant has a right of reasonable access to the highway system abutting its property, both ingress and egress, for its own, as opposed to public use. Such rights as appellant may thus have acquired in North Temple Street are limited to reasonable access for itself and not unobstructed access along its whole boundary with the street for itself and the public generally. *Hampton v. State Road Commission,* 21 U.2d 342, 445 P.2d 708; *State v. Meier,* supra; *Nichols on Eminent Domain,* §5.72[1] at 115; *City of Phoe-*

nix v. Wade, 428 P.2d 450. To the extent that appellant's access has been in any manner or degree interferred with, the record before the lower court clearly justifies the conclusion of that court that it constitutes a reasonable exercise of police power. Here, as in the case of *Springville Banking Co. v. Burton,* supra, "access has not been denied. Interfered with, it is true, but . . . to no unreasonable extent." (R. 143) Appellant may still move into and out of its property from North Temple Street and may utilize the system of public streets provided. The erection of raised concrete dividers in our highways, which have the effect of controlling access to abutting property owners without unreasonably interfering therewith, has been long recognized by this Court and other jurisdictions as a reasonable exercise of the police power for which the abutters were not entitled to compensation. *Springville Banking Co. v. Burton, Hampton, v. State,* supra; Nichols on Eminent Domain, §5.72. In terms of access the erection of the viaduct on North Temple Street is not substantially or materially different than the erection of a raised divider. Indeed, on this point, the viaduct may be properly considered to be a divider since the effect on access is identical.

The lower court has determined that there is no unreasonable interference with the appellant's access and that such interference as has occurred is within the police power of the State so to do. In this case such a finding was well within the prerogative of the court and sustained by the evidence adduced by appellant. In *City of Phoenix v. Wade,* supra, at 454, the Arizona Supreme Court stated:

> "Material impairment of access cannot be fixed by abstract definition. It must be found in each case upon the basis of the factual situation. While certain

> rules have been set forth in various decisions which have considered the nature and scope of this right, each case must be considered on its own right. *The determination of whether such material impairment has been established must be reached as a matter of law. The extent of such impairment must be fixed as a matter of fact. The trial court must rule as a matter of law whether the interference of access constitutes a destruction or material impairment.*" (Emphasis added.)

Appellant was permitted to and did present all of the evidence before the lower court which it deemed desirable (R. 149). Through the State's chief structural engineer, appellant elicited the facts as to the existing and contemplated access to its property after construction of the viaduct. The court was fully informed, therefore, as to the facts and thus properly ruled as a matter of law that the proposed construction did not constitute a destruction or material impairment to appellant's access and that the interference therewith constituted a valid exercise of police power.

CHANGE OF GRADE, LOSS OF BUSINESS, DEPRECIATION

The record establishes that in order to claim a "change of grade" as appellant seeks to do here, it must ignore the 17½+ right of way remaining in front of its property on North Temple Street, and assume that the viaduct structure is built directly on its property line. This flies in the face of the record (R. 135).

The evidence adduced on behalf of appellant in the court below shows that there will not be (and in fact there is not) a substantial change in grade as to North Temple Street from appellant's property (R. 131). On the contrary, while it is

contemplated that the curb lines will be moved back to the existing sidewalk line, the location of the sidewalk remains the same (R. 130-131). It follows, therefore, that except as to the viaduct to which appellant has never acquired any direct right of access, there has been no change of grade. In *Troiano v. Colorado Department of Highways,* Colo. 463 P.2d 448, the same conditions essentially existed. In that case Mrs. Troiano sought damages because of the construction of the viaduct over the street abutting her property. The nature of the damages for which she sought to recover were substantially identical with those claimed in this proceeding. We respectfully suggest that the opinion enunciated in that case by the Colorado Supreme Court is highly persuasive on the issues raised in this case because it is made on very nearly identical facts. Mrs. Troiano asserted some claims for relief which are not included by appellant in this case. At page 451, the Colorado court said:

> "* * * In states which have decided this issue not provided for by specific legislation, the authorities hold that where access to an abutting road remains essentially unimpaired, the building of a viaduct over the road does not constitute a compensable change of grade. (Citing cases)"

Colorado concluded that the building of a viaduct and roadway did not constitute a change in grade and cited with approval a Missouri case, *Kansas City v. Berkshire Lumber Co.,* 393 S.W.2d 470, where it is stated at 474:

> "* * * Appellant retains its previously existing right of access to previously established Truman Road and in turn to the city's streets and highway system. The legal status of such right has in no way been altered by the erection of the viaduct. Admittedly

> appellant does not have direct access from its property to the viaduct roadway. However, the viaduct roadway does not actually abut appellant's property and appellant never did have any right of direct access to such roadway."

After discussing other authorities, the Colorado court concluded at 452:

> "In our view the elevated portion of I-70 constitutes a new highway on a new location to which Mrs. Troiano has no existing or after acquired property rights. Plaintiff's property abuts East 46th Avenue, and there has been no significant change in the grade of East 46th Avenue causing plaintiff impairment of access to her property."

With reference to the allegation of loss of business, it should be sufficient to observe that appellant presented no evidence whatsoever to support such a claim. However, for sake of argument, if it be considered that appellant may have been able to establish such a loss, it remains a non-compensable item under the well established law of this and other jurisdictions. *State v. Parker, State v. Meier,* supra. It is too well settled to require extensive citation that abutting owners do not have and cannot acquire property rights to the traffic passing in front of their premises. Nevertheless it is worthy of note that in a real attempt to limit the loss to appellant and other land owners in the vicinity, the State has at some substantial expense after public hearing designed and built an off-ramp directly to the corner of appellant's property. (R. 142-143). In an equity proceeding such as this, the good faith efforts of the State to limit non-compensable damage is pertinent and significant.

Generally, on the question of loss of business, as well as the other claimed elements of damage by appellant, the Arizona case of *Rayburn v. State,* 378 P.2d 496, contains well reasoned and compelling language demonstrating why such loss is not recoverable in an action such as this. Therein the court stated at 498:

> "* * * The cases are virtually unanimous in holding that an owner is not entitled to compensation when the traffic flow on an abutting street is converted from two-way traffic to one-way only, * * *; or when a traffic divider or island is constructed on the abutting street, * * *."

After observing that the cases cited by appellant were not in point, the Arizona court went on to say, quoting initially from other cases, at 499:

> " ' "The benefits which come and go from the changing currents of travel are not matters in respect to which any individual has any vested right against the judgment of the public authorities." If the public authorities could never change a street or highway without paying all persons along such thoroughfares for their loss of business, the cost would be prohibitive. The highways primarily are for the benefit of the traveling public, and are only incidentally for the benefit of those who are engaged in business along its way. They build up their businesses knowing that new roads may be built that will largely take away the traveling public. This is a risk they must necessarily assume.' "

The cases cited elsewhere in this brief are equally determinative of the issue of depreciation of property. The Supreme Court of Colorado in *Troiano v. Colorado Highway Department,* supra, at 453 and 454, considered the matter and after observing that: "This factor is hardly separable from circuity

of route," quoted from a New Mexico case, *Board of County Comrs. of Santa Fe County v. Slaughter,* 49 N.M. 141, 158 P.2d 859:

> "* * * obviously, the landowner's claim must rest or fall upon a decision whether she has a vested right in the flow of public travel, which once came by her door, but for which now, for the convenience of the general public, a shorter and more convenient route has been opened and is being employed. We hold she has no such right."

To urge that in a situation such as this an abutting owner is entitled to recover for depreciation of property is to assert that the State may be and is estopped from making any improvement of a public right of way without the consent of the abutters. No citation of law is necessary to establish the long and firmly held rule that estoppel will not lie as against the sovereign.

LIGHT, AIR AND VIEW

This Court has consistently held that interference with light, air, etc., was not compensable, where, as here, there was no physical invasion upon the land of the property owner. *State v. Parker,* 13 U.2d 65, 368 P.2d 585, and cases cited therein. The rationale for this holding is well enunciated in *Weir v. Palm Beach County,* 85 So.2d 865, and quoted at length in *Nichols on Emiment Domain,* § 5.72 at 166:

> "The owner of property abutting a public way has a right of ingress to and egress from his property as well as a right to enjoy the view therefrom. However, these are rights which are subordinate to the underlying right of the public to enjoy the public way to its fullest extent as well as the right of the public to have the

way improved to meet the demands of public convenience and necessity. If the improvement for the benefit of the public interferes with the pre-existing means of ingress and egress and view enjoyed by the individual property owner, without an actual physical invasion of the land of the property owner, then again we have a situation where the invidual right is subordinate to the public good and any alleged damage suffered is *damnum absque injuria.* This is so for the simple reason that one who acquires property abutting a public way acquires it subject and subordinate to the right of the public to have the way improved to meet the public need."

At page 153 of the cited reference, Nichols says:

> "As a right to light and air from adjoining premises can arise in this country only from actual grant, in the absence of a grant compensation based on the existence of such a right cannot be recovered."

Justice Henriod, in *State v. Parker,* supra, in referring to the same type of alleged damages, stated: "On numerous occasions we have held that such damage is not recoverable because of the State's immunity." Appellant has conceded that on the question at issue, the State has not waived its immunity. (R. 117). In view of the consistent and insistent dissents of Justice Wade on the issue of sovereign immunity, it is particularly significant, we suggest, that the Legislature did not see fit to alter the historical and well established sovereign immunity of the State in these particulars when it subsequently enacted what is now known as the Governmental Immunity Act.

We have heretofore referred to the decision of our neighboring state of Colorado in the recent (1970) case of *Troiano v. Colorado Department of Highways,* supra. We suggest that

this case is and should be highly persuasive on the issues raised herein because it is made on very nearly identical facts. Practically every element of damage claimed by the appellant herein was alleged and urged by Mrs. Troiano (see page 450 of cited case). The Colorado court discussed the various elements of damage which is detailed and noted at page 449:

> "The trial court held that the damages claimed by plaintiff were non-compensable. The court ruled the highway construction was a valid exercise of the police power and that the claimed damage was not different in kind from that suffered by the general public. In our view the judgment of the trial court should be affirmed."

On the issue of loss of view, the Colorado court said at page 455:

> "One other claimed special and unique damage is the loss of view. There are two types of view with regard to the motel property. One is the view from the highway looking toward the property. Mrs. Troiano has complained that the traveling public on I-70 can no longer see her motel since it is below the viaduct. With the majority view holding that a property owner has no right to have the traveling public pass his property, logically it would be inconsistent to say that a property owner has a right to have the traveling public afforded a clear view of his property.
>
> "The other kind of loss of view — loss of view from the property caused by the construction of this viaduct, also is not compensable. * * * In the same category is the claim for damage because of the *loss of light, air and ventilation.* Most courts, in similar cases, hold that any loss attributable to these items constitute general damages and not specific damages."

In *People v. Symons,* 357 P.2d 451, wherein the appellants sought to recover for damages arising from, among other things, "change in neighborhood (from quiet residential area), loss of privacy, loss of view, noise, fumes, and dust from freeway, loss of access over area occupied by freeway, . . ." The Supreme Court of California observed, at 454:

> "* * * It is manifest, then, that the crucial question here is whether the defendants, whose property was taken for purposes other than the construction of the freeway itself, are entitled to compensation, as severance damages, for those impediments to the property resulting from the objectionable features caused by the maintenance and operation of the freeway proper on lands other than those taken from the defendants."

That court answers the "crucial question" by stating:

> "It is established that when a public improvement is made on property adjoining that of one who claims to be damaged by such general factors as change of neighborhood, noise, dust, change of view, diminished access and other factors similar to the damages claimed in the instant case, there can be no recovery where there has been no actual taking or severance of the claimant's property."

As to appellant's claim to a right to recover damages from the State, in the instant case, for interference with its light, air and view, it is apparent that it seeks to burden the State with liability in excess of that which it may hope to impose on private abutting owners. Within the scope of zoning ordinances, appellant's private neighbors could lawfully erect skyscrapers or unsightly (in the subjective view) buildings which would have the effect of adversely affecting appellant's

light, air and view without hope of compensation. Is it seriously to be contemplated that our constitutional drafters or our legislators actually intended such an anomaly? We respectfully submit that to pose the question is to answer it.

California, in *State v. Symons,* supra, addressed itself to this question when it stated, at 455:

> "* * * The Courts have not authorized a recovery under article I, section 14 of our state Constitution where there would be no recovery for damages caused by the construction of an improvement if undertaken by a private citizen on adjoining property. * * * Yet, the defendants seek to accomplish just that in the instant case. To thus enlarge the scope of the state's liability under article I, section 14 would impose a severe burden on the public treasury and, in effect, place an embargo upon the creation of new and desirable roads."

As they relate to the issues before this Court, the constitutions of Colorado, California and Arizona are substantially identical to our own, requiring compensation for property taken or damaged for a public use. (Colorado, Art. II, Sec. 15; California, Art. I, Sec. 14; Arizona, Art. II, Sec. 17.)

If the appellant is entitled to recover for the consequential damage which it alleges and urges before this Court, the abutting property owners all along both sides of the viaduct are without doubt entitled to recover also. Extending this to the multiple improvements made annually by the Utah State Road Commission and the State Highway Department, it is readily discernible that the consequences foreseen by Justice Henriod in *Springville Banking Co. v. Burton,* supra, at 159, must nat-

urally follow. "Highways would remain unmarked because of the prohibitive cost involved in payment of damages to owners on both sides, . . ."

The respondents are not insensitive to the fact that mere cost alone cannot and should not be determinative. Our law is not ungenerous in providing for just compensation to those whose property, as opposed to rights in property and to the unobstructed enjoyment thereof (of necessity subject to the public interest), is taken. Nevertheless, in order to accomplish the greatest public good at the least private injury, the law and the courts have properly and of necessity recognized that in areas such as those now before this Court, no compensation is or should be required. The language of the Court in *Springville Banking Co. v. Burton* is again appropriate, convincing and, we respectfully suggest, the binding law of this jurisdiction when it treats the question of compensability for the erection of raised dividers as follows:

> "In this area of the freeway, citizens must yield to the common weal, albeit injury to their property may result. We espouse the notion that if the sovereign exercises its police power reasonably and for the good of all the people, when constructing highways, consequential damages such as those alleged here, are not compensable."

The quoted language from *Springville Banking Co. case,* we respectfully suggest, is applicable to all areas of damages claimed by the appellant in this proceeding.

Appellant does not allege that the construction of the viaduct is improperly programmed or in any manner a violation of the public interest. On the contrary, it admits that the viaduct should and must be built (R. 154).

NOISE, SMOKE AND DUST

The case of *Hurst v. Highway Department of the Stat of Utah,* 16 U.2d 153, 397 P.2d 71, is dispositive of appellant claim for damages resulting from noise, smoke and dust. I that case the issue involved the operation of a gravel pit nea plaintiff's home in Orem, Utah. The trial court dismissed th Highway Department from the case. Justice Crockett, writin the prevailing opinion said:

> "In regard to the argument that the trial court' action permits an arbitrary invasion of the plaintiffs right to the enjoyment of their home without affordin them a remedy, it is to be observed that no one has an absolute rights, but they are all conditioned upon th rights of others. Everyone in a well-ordered society mus make some concessions of his individual rights and de sires in deference to the common good and in recom pense for all of the other rights and protections accord ed him by the entire structure of law."

Upon the clear weight of authority, and consistent with reasoned analysis, we respectfully suggest to the Court that every single element of damage which appellant seeks to re cover in this proceeding has been heretofore, and should now be finally, declared to be non-compensable in circumstances such as those existing in this case by reason of governmental immunity and the valid exercise of the police power of the State.

POINT II

THE DOOLY BLOCK CASE AND FOURTH JUDICIAL DISTRICT COURT CASES ARE DISTINGUISHABLE FROM THE INSTANT CASE AND THE HOLDINGS IN THOSE CASES ARE NOT INCONSISTENT WITH THE DECISION OF THE LOWER COURT.

Appellant relies heavily on the case of *Dooly Block v. Salt Lake Rapid Transit Co.,* 9 Utah 31, 33 P. 229 (1893), in support of its contention that it is entitled to recovery in the instant case. It must be noted that the *Dooly Block case* dealt with the proposed use of an established roadway for a purpose inconsistent with its use as a roadway. The court in the *Dooly Block case* stated:

> "* * * The right of municipalities to grant franchises to private corporations for the construction and operation of street railways, when empowered by the legislature so to do, is not now, it seems, an open question, *although streets were originally not designed for that purpose, but were mostly confined to the right of public travel in the ordinary modes."* (Emphasis added.) 9 Utah at 38, 39.

It is clear from the facts of the above cited cases that the proposed use in that case was for the construction of a non-highway related facility, to wit: A double-track railroad and its appurtenances and that said facility was constructed and operated by a private corporation. Respondents take the position that the State may alter the existing roadway, when it does so to facilitate its use as a roadway, without incurring liability for damages which may result from such alterations as long as it does not unreasonably impair an established right of the abutting owners resulting in a legally compensable damage

to said owners, although the same or similar alteration for non-highway use may result in a compensable damage to abutting owners. Since the *Dooly Block case* involves alteration for a non-highway related use by a private corporation, it is respondents' contention that this case is not in point in the instant case.

This position was taken by the United States Supreme Court in the case of *Louisa Sauer v. City of New York,* 206 U.S. 536, 27 S.Ct. 686, 51 L.Ed. 1170 (1907). In interpreting the case of *Story v. Railway Co.,* 98 N.Y. 122, 43 Am. Rep. 146 (1882), a case which was relied on in the *Dooly Block case,* the U.S. Supreme Court stated:

> "* * * The decision [in the Story case] rested upon the view that the erection of an elevated structure for railroad purposes was not a legitimate street use. 'There is no change,' said Judge Danforth (p. 156), 'in the street surface intended; but the elevation of a structure useless for general street purposes, . . .
>
> " 'The question here presented,' said Judge Tracy (p. 174, Am. Rep. p. 156), 'is not whether the legislature has the power to regulate and control the public uses of the public streets of the city, but whether it has the power to grant to a railroad corporation authority to take possession of such streets and appropriate them to uses inconsistent with and destructive of their continued use as open public streets of the city.' "
> 206 U.S. at 550.

The U.S. Supreme Court then found in the *Sauer case*:

> "* * * The difference between a structure erected for the exclusive use of a railroad and one erected for the general use of the public was sharply defined [in cases interpreting the Story and related cases]. It was only the former which the court had in view. That the structure was elevated, and for that reason affected access, light, and air, was an important element in the

> decisions, but it was not the only essential element. The structures in these cases were held to violate the landowners' rights, not only because they were elevated and thereby obstructed access, light, and air, but also because they were designed for the exclusive and permanent use of private corporations."
> 206 U.S. at 552.

The court then went on to find that when streets are improved for purposes necessary for continued use as streets and related uses and such improvements result in a restriction of an abutting owner's rights to access, light, and air, the cases involving improvements for railroad and other non-railroad purposes would not apply. To support this proposition, the court cited the case of *Talbot v. New York & H. R. Co.,* 151 N.Y. 155, 45 N.E. 382, a case which held that an abutting property owner could not recover damages resulting from the construction of a public bridge.

> "* * * with inclined approaches and a guard wall, to carry travel over a railroad, although the structure impaired the access to his land."
> 206 U.S. at 554.

It is respondents' contention that the same distinction made by the U.S. Supreme Court in the *Sauer case* between that case and the *Story case* clearly applies in distinguishing the instant case and the *Dooly Block case.* In the *Dooly Block case* as in the *Story case* the improvement in the roadway which impaired the property owner's rights was a private railroad improvement and its appurtenances. In the instant case the improvement is a viaduct used to carry motor vehicles safely along a portion of the existing road system. The State is updating a portion of its roadway system, not to have it subverted to some other use inconsistent with highway travel but to facili-

tate safer and more free movement of motor vehicle travel on that portion of the roadway. This clearly is not only a use consistent with the proposed use of the roadway but one which is desirable and necessary, nor is the improvement for the use of a private corporation or company but for the use and benefit of the public.

Appellant has stated that the lower court, by dismissing its Complaint, overruled the case of *State v. Fourth Judicial District Court,* 94 Utah 384, 78 P.2d 502 (1938) (App. Brief, p. 6). It is important to note that although appellant alleges that the *Fourth District Court case* is "identical on the facts to plaintiff's case," (App. Brief, p. 6), such is not the case. In the *Fourth Judicial District Court case* it was alleged that the construction by the State would:

1. "darken and dampen the street in front of plaintiff's properties;"
2. "prevent continuous travel on Center street past the properties of the plaintiffs, except over the proposed viaduct."
3. "that the interurban railway tracks now located in the middle of the street will be moved 22.2 feet north to a line in close proximity to plaintiffs' properties."

94 Utah at 388.

In the instant case it is inconceivable that the structure constructed by the State will "darken or dampen plaintiff's property" since, as the court can take judicial notice of, the sun in this area of the country is almost always to the south and east or west, depending on the time of day, and the structure in question is to the north of appellant's property. It

would be unlikely that any darkening of appellant's property could result from the State's construction. The appellant has not alleged that it will dampen its property.

The appellant in the instant case will have "continuous travel" on the portion of North Temple directly in front of its property, which, after the taking, will remain a one-way right-of-way 17 feet in width. (R 135, 136).

In the instant case no railway tracks will be relocated closer to appellant's property. If this were the case, the rule laid down in the *Dooly Block case* might apply.

The *Fourth Judicial District Court case* is not only distinguishable on its facts but there are also other important distinctions to be made between that case and the instant case which render it inapplicable in deciding the case at bar. First to be noted is that most of the opinion in the *Fourth Judicial District Court case* is dicta. The holding of the case is that an injunction will not lie against the State Road Commission.

Secondly, it is to be noted that in the *Fourth Judicial District Court case* there is no indication that a hearing was held and evidence adduced to determine whether or not the construction by the State would give rise to a compensable damage. In the instant case appellant was afforded the opportunity to put on any and all evidence it deemed necessary in an attempt to show there would be a compensable damage resulting from the proposed construction by the State. There was testimony taken and exhibits admitted into evidence and a scale model of the proposed structure made available for the lower court to examine (R. 129-148).

Thirdly, the finding of the lower court was that no compensable injury resulted from the proposed construction by the State (R. 17). Respondents respectfully submit that nowhere in the *Fourth Judicial District Court case* does it hold that in all cases where there is an impairment of access, light, air, and view, an abutting property owner is entitled to compensation for damages which may result.

Fourth, subsequent cases and at least one law review article dealing with the *Fourth District Court case* have either overruled the rationale expressed in the dicta of that case or expressed an opinion that the ruling no longer would apply. (See *Hjorth v. Whittenburg,* 121 Utah 324, 241 P.2d 907 (1952); Robert S. Campbell, Jr., *The Limited Access Highway — Some Aspects of Compensation,* 8 Utah L. Rev. 12 (1962).

For the above stated reasons it is respectfully submitted to this Court that the two cases relied on by appellant (*Dooly Block* and *Fourth Judicial District Court*) are not controlling nor even persuasive in deciding the instant case.

POINT III

THE TRIAL COURT PROPERLY DISMISSED THE PLAINTIFF'S SUPPLEMENTAL COMPLAINT FOR TRESPASSING IN CONNECTION WITH THIS PROCEEDING.

The State does not argue that it may trespass upon the private property of its residents with impunity. Indeed, the respondents may, in a proper case, be accountable for damages for trespass as may any other entity. However, in respect to this action, there is no such "proper case."

It should first be observed that the dismissal of the Supplemental Complaint was sought by the appellant for the obvious purpose of expediting this appeal, and, it is asserted, to acquire, hopefully, some psychological advantage in its principal case (R. 9-10). The original order of dismissal prepared by the appellant sought to dismiss the Supplemental Complaint although the court specifically reserved the action for trespass in notifying the parties that it was otherwise granting the respondents' motion to dismiss (R. 19-21). In order to comply with the notification of the court, counsel prepared and submitted the amended order (R. 15-18) specifically reserving the action alleged in the Supplemental Complaint and setting a date for submission of an Answer or other pleading by the State and the contractor-defendant. Within the time so specified, each party defendant pleaded to the Supplemental Complaint and thereafter plaintiff-appellant drafted and filed its consent to proceed without further notice. (R. 9-10). Appellant should not be heard to complain of its success. In any event, the dismissal was proper because the appellant was in possession of the premises upon which trespass was alleged only by tenant and not in person. Damages, if any, resulting were payable to the tenant in possession and not to the appellant.

Certainly, the tenant in possession was an indispensable party and the appellant was not entitled to relief which it may subsequently be determined properly belonged to the tenant. It is conceded that the record does not reflect directly that the State's allegations concerning tenant in possession is correct. However, the conduct of the appellant in seeking ruling with-

out argument must be taken as a concession on this point. Certainly, the appellant has not denied this allegation and respondents have asserted it as a fact.

The State has sought to determine what, if any, damages accrued to the appellant and/or his tenant in possession at the time of the alleged trespass. Counsel for the appellant has been advised that the State was (and in fact it remains) prepared to reach an accord on this matter by a minimal showing by the appellant. In any event, there is no basis in law or in equity for consideration of the Supplemental Complaint in connection with the remainder of this proceeding. Respondents respectfully urge that the question of the Supplemental Complaint should be considered apart from the main thrust of appellant's action.

CONCLUSION

The issuance of the injunctive relief sought by the appellant would have been improper under the developed law of this jurisdiction because the alleged damages sought to be recovered by the appellant are clearly non-compensable as a result of the reasonable and valid exercise of the police power. The facts of this case do not justify recovery even under the law of the several authorities cited by appellant, since the facts in those cases are clearly distinguishable.

The lower court permitted the appellant to present all the evidence it deemed desirable. After a thorough review of the authorities cited by the respective parties, and a full consideration of the evidence presented, the court granted the de-

fendants' motion to dismiss. The judgment of the lower court is, we respectfully submit, entitled to due deference by this honorable court under well established rules of review.

It is respectfully suggested that the law of the State on the matter now before this Court is too well established and settled to afford any basis for the relief sought by the appellant and the judgment of the lower court should be sustained.

Respectfully submitted,

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