

2005

James Ivers, Katherine G. Havas, P. and F. Food Services v. Utah Department of Transportation : Brief of Appellee

Utah Court of Appeals

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ORIGINAL

IN THE UTAH COURT OF APPEALS

JAMES IVERS; KATHERINE G.
HAVAS; and P and F FOOD SERVICES,

Defendants/Appellants,

v.

UTAH DEPARTMENT OF
TRANSPORTATION,

Plaintiff/Appellee.

BRIEF OF APPELLEE

Court of Appeals Case No.

20050246-CA

Appeal from the Second Judicial District Court
In and for Davis County, State of Utah

Judge Michael Allphin
Civil No. 020700665

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ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED
FILED
JUN 17 2005
APPELLATE COURTS

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☒ Table of Authorities

☒ Jurisdictional Statement (**Mandatory for Appellant**)

☒ Statement of Issues & Standard of Review (**Mandatory for Appellant**)

1. Citation to record showing issue preserved in Trial court; **or**
2. Statement of grounds for seeking review of issue not preserved in Trial Court

☒ Constitutional or Statutory Provisions

☒ Statement of Case (**Mandatory for Appellant**)

☒ Statement of Facts

☒ Summary of Argument

☒ Argument

☒ Conclusion

☒ Signature of counsel of record OR party if Pro Se

☒ Proof of Service

☒ Addendum: Findings of fact; memorandum decision; final order; Court of Appeals opinion when Petition for Certiorari is granted (**Mandatory for Appellant**)

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ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED

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Plaintiff/Appellee.

BRIEF OF APPELLEE

Court of Appeals Case No.

20050246-CA

JURISDICTIONAL STATEMENT

Jurisdiction is proper in this case under Utah Code Ann. § 78-2-2(3)(j) (West 2004). The Utah Supreme Court has jurisdiction under said provision, and has transferred this appeal to the Utah Court of Appeals pursuant to Utah Code Ann. § 78-2-2(4). The Utah Court of Appeals has jurisdiction under Utah Code Ann. § 78-2a-3(2)(j).

PARTY IDENTIFICATION

The Appellants in this appeal are James Ivers, Katherine G. Havas, and P & F Food Services. They are referred to herein as “Arby’s.” Appellee is the Utah Department of Transportation and is referred to herein as “UDOT.”

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Are severance damages available for Arby’s diminished access to and from U.S. 89, where the elevation and widening of U.S. 89 did not take place upon land taken from Arby’s, but within UDOT’s existing right-of-way?

2. Are severance damages available where Arby's reasonable access to and from U.S. 89 was preserved via access points to the north and south of the new frontage road constructed on property taken from them?

3. Are severance damages available for Arby's alleged losses of view and visibility, where the elevation and widening of U.S. 89 within UDOT's existing right-of-way caused the alleged loss, and not the frontage road constructed on the land taken from Arby's?

DETERMINATIVE LAW

Utah Code Ann. § 78-34-10 (West 2004):

The court, jury or referee must hear such legal evidence as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:

. . . .

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

(3) if the property, though no part thereof is taken, will be damaged by the construction of the proposed improvement, the amount of such damages;

(4) separately, how much the portion not sought to be condemned, and each estate or interest therein, will be benefitted, if at all, by the construction of the improvement proposed by the plaintiff. If the benefit shall be equal to the damages assessed under Subdivision (2) of this section, the owner of the parcel shall be allowed no compensation except the value of the portion taken; but if the benefit shall be less than the damages so assessed, the

former shall be deducted from the latter, and the remainder shall be the only damages allowed in addition to the value of the portion taken. . . .

STATEMENT OF THE CASE

A. Nature of the Case

Arby's is a restaurant located in Farmington, Davis County, Utah at the northwest corner of U.S. 89 and Shepard Lane. UDOT undertook a reconstruction project of U.S. 89 that was long overdue, and in the process of doing so took a portion of Arby's property along the east side to construct a new frontage road. The frontage road was necessary to preserve reasonable access to Arby's from U.S. 89 and from Arby's to U.S. 89, along with reasonable access to all of the other businesses and residences in the area. U.S. 89 was elevated directly to the east and southeast of Arby's and widened, all within the existing right-of-way already possessed by UDOT. No land taken from Arby's was used to elevate or widen U.S. 89. It was only used to construct the frontage road that now runs immediately to the east of Arby's.

In a ruling dated May 22, 2003, UDOT's Motion in Limine was granted with regard to the issue of whether severance damages were available for Arby's diminished access to and from U.S. 89 and its alleged loss of view and visibility. UDOT maintains that the trial court's ruling that severance damages should be precluded from a jury trial is correct and should be affirmed by this Court.¹

B. Course of Proceedings

UDOT filed a Motion in Limine and Arby's filed a Motion for Summary Judgment on the issues of: (1) whether Arby's could seek severance damages for diminished access

¹ A copy of the trial court's May 22, 2003 ruling is attached as Addendum A.

to and from U.S. 89; (2) whether Arby's could seek severance damages for alleged loss of view and visibility; and (3) whether Arby's could seek damages for inability to comply with local zoning ordinances, all of which were a result of the elevation and widening of U.S. 89. The trial court concluded that Arby's could not seek severance damages for diminished access or loss of view and visibility, but could seek damages for inability to comply with local zoning ordinances.

The trial court certified its ruling under Rule 54(b) of the Utah Rules of Civil Procedure at Arby's request, and over the objections of UDOT, which prompted Arby's to file an appeal. This court, upon a *sua sponte* motion, dismissed the appeal on the basis that the trial court's order was ineligible for certification because the issues that would be heard on appeal were not all of the issues remaining in the case. The parties then undertook mediation to settle the zoning issue, which was successful. In said mediation UDOT agreed to settle the zoning issue for the sum of \$56,250, in addition to the \$48,250 already paid for the actual taking. (R. 241). After mediation, the parties stipulated to a final judgment, dated February 22, 2005, which allowed Arby's to pursue this appeal.

C. Disposition of Trial Court

A final judgment was entered by the trial court on February 22, 2005.

D. Statement of Facts

The trial court entered its May 22, 2003 ruling based upon the following undisputed facts:

1. Arby's is located on the northwest corner of what was the intersection of

Shepard Lane and U.S. 89 in Farmington, Utah. (R. 72).

2. The size of the Arby's commercial site is approximately 0.416 acres. (R. 76).
3. UDOT condemned a 0.048 acre portion of Arby's property in fee. (R. 11).
4. The 0.048 acres of Arby's condemned property was used to construct a one-way frontage road immediately parallel to the newly elevated and widened U.S. 89. None of the land taken from Arby's was used to widen U.S. 89. (R. 152)
5. The Shepard Lane/U.S. 89 intersection has been eliminated and U.S. 89 has been elevated creating an underpass allowing traffic to travel east-west on Shepard Lane underneath the elevated highway. (R. 151).
6. As a result of the project, access to Arby's from U.S. 89 can now be had from access points approximately one-half mile to the north and one-half mile to the south of Arby's to the new frontage roads constructed for the project. (R. 152).
7. Access to Arby's from Shepard Lane remains unchanged. (R. 152).
8. The purpose of eliminating the Shepard Lane/U.S. 89 intersection and thus elevating and widening U.S. 89 was to decrease the number of accidents in the area due to the nature of the intersection. (R. 152).

9. It should be noted that there are two other cases where properties adjacent to Arby's and across U.S. 89 from Arby's have been denied the same relief in their respective trial courts that Arby's is seeking in this case.² Moreover, there is an appellate

²Copies of both trial court rulings are attached as Addenda B and C.

court case where the rulings in Harvey were upheld last year.³

SUMMARY OF ARGUMENT

Damages, if any, resulting from the closure of the Shepard Lane/U.S. 89 intersection and the elevation and widening of U.S. 89 are damages suffered generally by all property owners in the area of the condemned property, are consequential damages and are not compensable. All of Arby's neighbors have suffered the same diminished access. Severance damages, which are compensable, are limited to damages to the remaining property *caused* by a taking of a portion of the property or improvements *constructed on that property*. The taking of a portion of Arby's property did not cause the closure of the intersection, and reasonable access to and from U.S. 89 and Shepard Lane has been preserved via the new frontage road. There is no "property right" in a particular route of access or to a volume of daily traffic flow directly past the property; accordingly, no damages are appropriate for loss of perfect access or a decrease in the flow of traffic past Arby's from U.S. 89. Thus, evidence of consequential damages allegedly due to the closure of the intersection, loss of perfect access, and a decrease in flow of daily traffic past the property were properly excluded.

Moreover, claims for severance damages for losses of view and visibility are limited to circumstances in which a structure violates some right appurtenant to the abutting property or the structure inflicts some special and peculiar injury. Arby's is only

³A copy of Intermountain Sports, Inc. v. Dep't of Transp., 2004 UT App 405; 512 Utah Adv. Rep. 40; 2004 Utah App. Lexis 460 is attached as Addendum D.

entitled to damages for loss of appurtenant rights if the structure causing the loss is constructed on property taken from Arby's. The structure causing Arby's alleged loss of view is the newly elevated U.S. 89, which was widened and elevated entirely within UDOT's existing right-of-way. In addition, Arby's can obtain damages if the structure causes a "special and peculiar injury" or, in this case, a special and peculiar loss of view. However, unless the "special and peculiar injury" results from such an actual physical taking, or the taking of some of the few appurtenant rights recognized in Utah, an award of severance damages for such injuries would be contrary to Utah's eminent domain statutes, which maintain that "special and peculiar" injuries or damages must be the result of the severance of a piece of property or construction of improvements on the severed property. The alleged damages claimed by Arby's are the result of the elevation and widening of a U.S. highway within its own right-of-way, not from the property severed from Arby's, which was used to construct the new frontage road.

ARGUMENT

- I. THE DAMAGES CLAIMED TO RESULT FROM CLOSURE OF THE U.S. 89/SHEPARD LANE INTERSECTION NOT LOCATED ON ARBY'S PROPERTY ARE NOT COMPENSABLE AND EVIDENCE OF SUCH DAMAGES, IF ANY, WAS PROPERLY EXCLUDED BY THE TRIAL COURT.**
- A. Arby's Claim to Severance Damages is Limited to Damages Caused by the Taking of a Portion of Their Property or by Construction of an Improvement on the Portion Taken.**

Severance damages have been defined by the Utah Supreme Court as "those caused by taking a portion of the parcel of property where the taking or the construction

of the improvement *on that part* causes injury to that portion of the parcel not taken.” Utah Dep’t of Transp. v. D’Ambrosio, 743 P.2d 1220, 1221 (Utah 1987) (emphasis in original). The court also noted that “[t]he general rule is that damages attributable to the taking of others’ property and the construction of improvements thereon are not compensable. Such damages suffered generally by all the property owners in the area are deemed consequential. Id.; see State Road Comm’n v. Stranger, 21 Utah 2d 185, 442 P.2d 941 (Utah 1968). These rules were upheld and expanded upon by the Utah Supreme Court’s ruling in the seminal case on this issue and all other issues that remain in this case, State of Utah v. Harvey Real Estate, 57 P.3d 1088 (Utah 2002).⁴ Harvey involved the same expansion of U.S. 89 in Davis County, though the property is north of the area in which Arby’s is located. In Harvey, direct access from U.S. 89 to old U.S. 89 (also known as the Old Mountain Road) was closed and substituted with a frontage road system. The landowners in Harvey argued that they were entitled to present evidence of alleged severance damages in trial due to loss of access to U.S. 89, along with a couple of other issues that will be discussed in depth later in this brief. The basis of the landowner’s argument was Utah Code Ann. § 78-34-10 (1998), which gives landowners the right to present evidence of damages caused by the construction improvements made on a piece of severed property.

In its decision in Harvey, the Utah Supreme Court stated in reference to this

⁴ A copy of the Utah Supreme Court’s decision in Harvey is attached as Addendum E.

provision, “[i]t does not give the landowner the right to present evidence of damages caused by other facets of the construction project. Were the opposite true, a landowner would be entitled to present evidence unrelated to the taking.” Id. at 1090. The Court also noted that “evidence of damage caused by both the severance alone and construction on the severed property may be presented.” Id. at 1091. Ultimately, the Court concluded that the landowners in Harvey had not shown that any damage they may have sustained by the closure of the intersection had been caused by the severance of its land. Id. The landowners in Harvey sought to establish a causal connection between severance damages they claimed resulted from the U.S. 89 project as a whole and the taking of their property. They did so by arguing that the closure of the Highway 89/Old Mountain Road intersection was made possible only by the taking of the Harveys’ property. Id. The Court concluded such was not the case because UDOT could have closed the Highway 89/Old Mountain Road intersection independent of the taking. Id. Furthermore, the Court noted, “[t]he taking may be somewhat related to the closure, but it did not cause the closure, nor did it cause the damages that Harvey claims as a result of the closure.” Id.

In this case, the trial court concluded correctly when it stated,

[s]imilar to Harvey, where the devaluation of property arose from loss of access to Highway 89, the loss of value Defendants claim will arise from loss of access to Highway 89/Shepard Lane intersection is a result of loss of the public’s access to Arby’s from Highway 89 and does not flow from either the taking of 0.048 acres of the Defendants’ property or from the nature of the construction on that part of property.

Addendum A at 6.

Arby’s has sought to distinguish this case from Harvey based upon the fact that

Arby's is a commercial entity located within a commercial area, whereas the Harveys' property is located in a non-commercial area. The Supreme Court's decision in Harvey made absolutely no distinction between commercial and non-commercial entities with regard to whether severance damages were more or less appropriate for commercial as opposed to non-commercial entities. In fact, in State v. Rozelle, 120 P.2d 276, 277 (Utah 1941), the Utah Supreme Court made no such distinction when it denied severance damages to the owner of a gasoline station for loss of business.

Likewise, from a policy point of view, such a distinction is very problematic. If this court chose to distinguish this case from Harvey based upon the differences between commercial and non-commercial entities, implying essentially that commercial entities are entitled to greater damages than non-commercial entities, then presumably each time UDOT planned a project to widen a road or highway along which both commercial and non-commercial properties would be affected, they would need to apply two different sets of legal rules to the parties, one for the commercial properties and another for the non-commercial properties. Arby's is arguing that they should be treated differently than the Harveys, in fact better than the Harveys merely because they happen to operate a commercial venture upon their property. Such a result would be anathema to basic constitutional principles that state the government should not treat a party differently than a similarly situated party unless the government has a compelling reason for doing so, and that result is narrowly tailored to meet that compelling interest, and no other interest.

E.g., Grutter v. Bollinger, 539 U.S. 306, 326-27 (2003).

Such would not be the case in this situation. The government would have no compelling reason for treating differently commercial and non-commercial entities that are along the same highway, dealing with same construction project and the same diminished access. If the value of the their property has been reduced by virtue of a construction project undertaken on property taken from the property owner, then the entities should be paid for the decreased value regardless of their status as either a commercial or non-commercial entity. The reality is that in both this case and Harvey, the impact upon the property was not a result of the property taken directly from the landowners.

The trial court in this case further noted that the Defendants' claim that the property taken from them was more integral to the reconstruction and, thus, the causal connection between the taking and the damage to the property is more direct, was misplaced. In Arby's appellate brief they refer to the property taken from them for construction of the frontage road as being part and parcel of the elevation and widening of U.S. 89. Br. of App. at 16. But, as the trial court recognized, "[d]efendants seem to misconstrue the causal connection issue by focusing on the need for the taking rather than focusing on the actual cause of the damage, which was the loss of access to their property. . . ." Addendum A at 7.

Finally, with regard to the severance damages claim, the well-established common law rule is that severance damages "may be made for any diminution in the value of [an owner's condemned land], as long as these damages were *directly caused by the taking*

itself and by the condemnor's use of the land taken." 26 Am. Jur. 2d, *Eminent Domain* § 368 (1996) (emphasis added). Any severance damages alleged by Arby's resulted indirectly because they resulted not from the land taken from them by UDOT, but from the elevation and expansion of U.S. 89. Arby's thus cannot show severance damages ensued directly from UDOT's taking because the taking was used to construct the frontage road, which preserved their reasonable access, though it was diminished.

B. Arby's is Not Entitled to Compensation for Loss of Perfect or Convenient Access or for a Decrease in the Flow of Daily Traffic Past the Property.

The Utah Supreme Court held that "there can be no recovery from the State for damages where the construction of the highway or the erection of structures within the public right-of-way impair or adversely affect the convenience of access of an abutting owner." Bailey Service and Supply Corp. v. State Road Comm'n, 533 P.2d 882, 883 (Utah 1975). In Harvey the Supreme Court noted that neighbors of the Harveys whose property was not taken would suffer with the exact same diminished access to U.S. 89 by the public to their business and would not be entitled to seek compensation because they would not have had any property taken by UDOT. Harvey, 57 P.3d at 1091.

The public still has reasonable access to Arby's from Shepard Lane and from access exits located approximately one-half mile to the north and one-half mile to the south of Arby's. Moreover, in the recent settlement of the local zoning issues between the two parties, UDOT agreed to help Arby's get signs put up at each access point to let motorists know that if they want to eat at Arby's, they need to exit U.S. 89 at those points. (R. 242). Those signs are now up and function to make people aware of the fact that if

they want to get a sandwich at Arby's, they need to exit because it is located just off of the frontage road along U.S. 89.

Arby's access is all the more reasonable in light of the fact that Arby's never enjoyed direct access to U.S. 89 in the first place. Their direct ingress and egress access remains, as it was prior to the taking, on Shepard Lane. The property taken from Arby's just prior to the U.S. 89 reconstruction project was actually used to construct only a frontage road. The elevation and widening of U.S. 89 took place entirely within UDOT's right-of-way along Highway 89. There is no dispute by UDOT that Arby's has experienced less convenient access to its property, but they are not entitled to perfect access. Any property owner is only entitled to reasonable access to and from his property, in other words, to ingress and egress. Harvey, 57 P.3d at 1092. The access to Shepard Lane is precisely the same as it was before the taking, and though direct access from U.S. 89 to Shepard Lane has been eliminated, vehicles can still reach Arby's from the new frontage road via the two access points north and south of Arby's.

Appellants mention a traffic study they had done that allegedly demonstrates a reduction in daily trip traffic to Arby's by approximately 40% after the elevation of U.S. 89 was completed. Br. of App. at 6. Inclusion of this information in Appellant's brief is inappropriate and should be disregarded by this Court. This traffic study was not received into evidence by the trial court, and UDOT was never asked by Arby's to make an admission that this study should be admitted into evidence. UDOT has not had an opportunity to cross-examine the engineering firm that did the study, nor has UDOT made

a study of its own. Thus, because the study is not part of the facts entered into evidence, it should not be considered as an issue by this Court as a part of this appeal. State by and Through Road Comm'n v. Larkin, 495 P.2d 817, 820-21 (Utah 1972). Moreover, attributing any or all alleged traffic reduction, and by implication depreciation of commercial value, to the elevation of U.S. 89 is misplaced. Just prior to or at about the time the U.S. 89 reconstruction project was undertaken, K-Mart, the anchor store in the complex, went out of business leaving Arby's and its neighbor Goodyear without a major commercial anchor. UDOT contends that the loss of an anchor store can severely impact a fast food restaurant's business and could devalue the location commercially. Thus, to attribute any loss of traffic flow or loss of business solely to diminished access from U.S. 89 to Shepard Lane is misleading. The reality is that we will never know which has had a greater impact on Arby's - the diminished access or the loss of K-Mart to the complex.

Finally, as the trial court noted, the actual cause of any damage to Arby's was a result of possible customers' diminished access from U.S. 89, which all of Arby's neighbors have suffered equally. (R. 155). Arby's is only entitled to seek severance damages for damages incurred from severed land taken by UDOT. Again, as the severed land taken from Arby's was used to construct a frontage road, which preserved their access to and from U.S. 89, and their customers' access to their establishment from U.S. 89, there is no question that Arby's has retained reasonable access. Apparently, Arby's maintains that the only access that can be considered reasonable is the access they enjoyed before the U.S. 89 construction. In reality, Arby's is seeking the exact same

damages the Harveys were seeking, i.e., damages resulting from diminished access.

Utah's eminent domain statutes are only designed to compensate the landowner for their loss of property rights. From a policy perspective, a landowner could conceivably believe that there were several types of damages stemming from a road construction project, some of which could occur several miles from the owner's actual property. Permitting a landowner to present evidence of such distant damages could result in verdicts that would prevent the state from ever undertaking any road projects. All of the commercial property owners in the same area as Arby's have experienced the same less convenient access to and from U.S. 89 in some form or another. Arby's is merely seeking to collect money for that less convenient access, which the law does not permit, because a portion of their property was taken to construct a frontage road.

C. Arby's Claim to Severance Damages for Losses of View and Visibility is Limited to Circumstances in Which a Structure Violates Some Right Appurtenant to the Abutting Property or the Structure Inflicts Some Special and Peculiar Injury.

1. Arby's is Only Entitled to Damages for Loss of Appurtenant Rights if the Structure Causing the Loss is Constructed on Property Taken From Arby's.

The Utah Supreme Court held that in order to claim severance damages for loss of air, light and view, an owner of property must show that "the structure violates some right appurtenant to the abutting property or otherwise inflicts some special and peculiar injury." Utah State Road Comm'n v. Miya, 526 P.2d 926, 928-29 (Utah 1974). Arby's claims it has suffered a loss of view from its property, which UDOT readily acknowledges is an appurtenant right to which Arby's is entitled. However, as the Utah

Supreme Court makes clear in Harvey, “where an appurtenant right is severed from the property, under section 78-34-10 damages may be awarded for the losses caused by the severance of the right.” Harvey, 57 P.3d at 1091.

Arby’s has suffered a taking at UDOT’s hands, and the improvement constructed on that taking is a frontage road. Arby’s has experienced no loss of view as a result of the construction of the frontage road on the property severed from them. If they have suffered a loss of view, it is the result of the elevation of U.S. 89, which was undertaken entirely within UDOT’s right-of-way. Appellants are correct when they state that Miya makes no mention of the requirement that the structure be built upon property taken before an abutting property owner could seek compensation for loss of view. However, the reality is that Arby’s and Miya are distinguishable because in Miya part of the landowner’s property was taken to construct the viaduct that resulted in the loss of view, whereas in Arby’s the loss of view is the result of the elevation of U.S. 89, which took place on property not taken from Arby’s.

Moreover, on the issues of compensation for loss of appurtenant rights and “special and peculiar injury,” Harvey clarifies what is unclear in Miya, holding that loss of appurtenant rights is not compensable unless the public improvement structure causing the loss of the appurtenant right is constructed on property taken from the landowner. Harvey, 57 P.3d at 1091-92. This requirement is in line with the predominant view throughout the country. “Although there is limited authority to the contrary, the predominant view is that the loss of view from a landowner’s property is not compensable

unless the public improvement has been constructed on property taken from the landowner by eminent domain.” 45 Am. Jur. *Proof of Facts* 3d 519 §16 (2002). It is thus readily apparent that Harvey embraces the predominant view, foreclosing Arby’s from presenting evidence of severance damages resulting from an alleged loss of view.

2. Arby’s is Only Entitled to Damage Compensation if They Can Show that the Structure Inflicts Some “Special or Peculiar Injury.”

The trial court recognized the fact that Harvey clarified the “special and peculiar injury” language in Miya as well. (R. 157-58). The trial court also noted, “[t]he court’s reasoning in Harvey that owners of neighboring properties to the condemnee, who would not be entitled to compensation, would be similarly impacted by the closure of the intersection is also relevant in considering the obstruction of view to Defendants’ property.” Id. With regard to what Miya had to say about “special and peculiar injury,” the Harvey court stated:

We have never explained what we meant in Miya by this language. To the extent that it suggests that a landowner may recover severance damages without either a physical taking or the taking of the few appurtenant rights that this court has recognized, it appears inconsistent with section 78-34-10 because, as noted above, this section requires that damages be caused by the severance of the property or the construction of improvements on the severed property.

Harvey, 57 P.3d at 1092. The Harvey decision went on to establish, “[u]nless the “special and peculiar injury” results from such a taking, an award of severance damages for such injuries would be contrary to the statute.” Id. Thus, Harvey clarifies Miya by holding that “special and peculiar” injuries or damages must be the result of the severance of the property or construction of improvements on the severed property. Id.

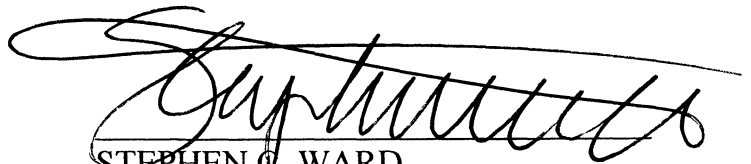
For the foregoing reasons, UDOT respectfully asks this Court to affirm the judgment of the trial court.

STATEMENT REGARDING ORAL ARGUMENT AND PUBLISHED OPINION

Both oral argument and a published opinion are appropriate in this matter due to the weighty issues in dispute between the parties, all of which UDOT believes must be affirmed by this Court.

Respectfully submitted this 17 day of June, 2005.

MARK L. SHURTLEFF
Attorney General

A handwritten signature in black ink, appearing to read 'Stephen C. Ward', written over a horizontal line.

STEPHEN C. WARD
Assistant Attorney General
Attorneys for UDOT

CERTIFICATE OF MAILING

I hereby certify that two copies of the foregoing BRIEF OF APPELLEE, were
mailed, postage prepaid, this 17th day of June, 2005, to:

DONALD J. WINDER
WINDER & HASLAM, P.C.
175 West 200 South, Suite 4000
P.O. Box 2668
Salt Lake City, Utah 84110-2668



Secretary

ADDENDA

Addendum ‘A’

IN THE SECOND DISTRICT COURT OF DAVIS COUNTY
STATE OF UTAH

UTAH DEPARTMENT OF
TRANSPORTATION,

Plaintiff,

vs

JAMES IVERS, KATHERINE G HAVAS,
P and F FOOD SERVICES (Tenant), and
ZIONS CREDIT CORPORATION,

Defendants

**RULING ON PLAINTIFF'S
MOTION IN LIMINE AND ON
DEFENDANTS' MOTION FOR
PARTIAL SUMMARY
JUDGMENT**

Case No 020700665

Judge Michael Allphin

The above entitled matter having come before the Court on Plaintiff's Motion in Limine and Defendants' Motion for Partial Summary Judgment, and the Court having reviewed the Motions, and the Objections thereto, and the Replies thereto, and the Court being fully advised in the premises enters the following findings of fact, and rules as follows

BACKGROUND

The matter before the Court concerns a taking of private property by the Utah Department of Transportation to construct a new frontage road to U S Highway 89 near Farmington, Utah Plaintiff filed a Complaint on December 20, 2002 Plaintiff's Motion in Limine was filed on March 14, 2003 Defendants' Memorandum in Opposition to the Plaintiff's Motion in Limine

and in Support of Defendants' Motion for Partial Summary Judgment was filed on April 1, 2003. Defendants' Motion for Partial Summary Judgment and Request for Oral Argument was also filed on April 1, 2003. Plaintiff's Response to Defendants' Motion for Partial Summary Judgment and Reply to the Defendants' Response to the Plaintiff's Motion in Limine was filed on April 14, 2003. Defendants' Reply Memorandum in support of Defendants' Motion for Partial Summary Judgment was filed on May 1, 2003. Notices to Submit for Decision and Requests for Oral Argument were filed by Plaintiff and Defendants on May 7 and May 9 respectively.

FINDINGS OF FACT

The Court finds the following facts relevant to the Court's Ruling:

1. The Utah Department of Transportation (UDOT) plans to eliminate the intersection of Shepard Lane and Highway 89 by elevating Highway 89 over Shepard Lane to decrease the number of accidents in the intersection..
2. UDOT seeks to condemn 0.048 acres of Defendants' property in fee and a temporary easement of 0.001 acres of Defendants' property.

3. The property is currently leased to P and F Food Services and is occupied by an Arby's fast food restaurant. The lease will likely terminate as a result of the taking of Defendants' land.
4. The 0.048 acres of condemned land will be used to construct a frontage road to U.S. Highway 89 and will not be elevated itself.
5. Direct access to Defendants' property from Highway 89 will be cut off as a result of the construction. Access from the highway will then exist at points that are one-half mile away from Defendants' property and will be circuitous. Access to Defendants' property from Shepard Lane will remain unchanged.
6. A Farmington City ordinance requires a landscaped strip not less than 10 feet in width to be maintained along property lines.

ANALYSIS

Plaintiff's Motion in Limine was to preclude evidence of severance damages or loss in market value to the Defendants' remaining property caused by the taking of the land described above and the highway reconstruction project. Defendants' Motion for Partial Summary Judgment was to secure an order allowing Defendants to present evidence of severance damages caused by the reconstruction of Highway 89. In regards to takings, U.C.A. 78-34-10 provides in part the following:

The court, jury or referee must hear such legal evidence as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess: (2) if the property sought to be condemned constitutes only a part of a larger parcel, the

damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned and the construction of the improvement in the manner proposed by the plaintiff.

The Utah Supreme Court has held that Section 78-34-10 gives a landowner the right to present evidence of damages caused by the severance alone or the construction of the improvement made on the severed property, but that it does not give the landowner the right to present evidence of damages caused by other facets of the construction project. State v. Harvey Real Estate, 57 P.3d 1088, 1090 (Utah 2002).

The Defendants support their Motion for Partial Summary Judgment and oppose Plaintiff's Motion in Limine by arguing that (1) reasonable access to defendants' property will be eliminated by the new construction, reducing the fair market value of the remaining property; (2) the change in grade of U.S. Highway 89, which takes away Arby's eastern view and ability to be viewed by potential customers, is compensable; (3) the inability to comply with city zoning ordinances will also impact the fair market value of the property; (4) and the lease agreement among the defendants may be terminated due to the impact of the condemnation. The Court agrees with Plaintiff that termination of the lease agreement between the Defendants during these proceedings does not bear on the issue of severance damages. The possible termination of the lease does not, of itself, affect the fair market value of Defendants' property or the ability of the property to produce rental income in the future. Defendants' other arguments are each discussed below.

1. Loss of Value from Diminished Access .

Defendants contend that reasonable access to defendants' property will be eliminated by the new construction, thereby reducing the fair market value of the remaining property. Plaintiff

(UDOT) properly relies on State v. Harvey Real Estate to support its position against Defendants' argument. In that case, Harvey Real Estate owned approximately 160 acres of land that abutted Highway 89, a major transportation route, on its western border. Similarly, approximately 85 feet of the northern boundary of the property abutted Old Mountain Road, which intersected with Highway 89 directly adjacent to the property's northwest corner. The Harvey property had direct access to Old Mountain Road at its northwest corner along the approximately 85 feet of frontage. From 1947 until 1999, the Harvey property also had access to Highway 89 through a wide-gated agricultural entrance approximately 1,000 feet to the south of the intersection. In 1999, UDOT closed the intersection and determined to build a frontage road that completely separated the Harvey property from Highway 89, eliminating direct access to the property from the highway by condemning a portion of the Harvey property. UDOT filed a Motion in Limine to preclude Harvey from presenting evidence at trial that the closure of the intersection would substantially decrease the value of the remaining property. The Utah Supreme Court affirmed this Court's holding granting the motion because Harvey could not show that "any damage sustained by the closure of the intersection [had] been caused by the severance of its land." State v. Harvey Real Estate, 57 P.3d 1088, 1091. The court pointed out that Harvey was merely "seeking damages for devaluation of its property as a result of loss of access" to Highway 89 and that owners of neighboring properties may be similarly impacted by the closure of the intersection and would not be entitled to seek compensation. *Id.* at 1091. Other cases decided by the Utah Supreme Court have addressed the causal connection between the severance and the damage, see State v. Rozzelle, 120 P.2d 276, 277 (Utah 1941) (holding that the loss must "flow from either the taking of the strip of condemnee's land or from the nature of

the construction upon that strip"); Utah Dep't of Transp. v. D'Ambrosio, 743 P.2d 1220, 1222 (Utah 1987) (holding that "[s]everance damages are those caused by the taking of a portion of the parcel of property where the taking or the construction of the improvement *on that part* causes injury to that portion of the property not taken"), and a landowner's right of access to his property, *see* Hampton v. State, 445 P.2d 708, 710-711 (Utah 1968) (holding that the right of reasonable access does not include "any right in and to existing public traffic on the highway, or any right to have such traffic pass by one's abutting property").

Similar to Harvey, where the devaluation of property arose from loss of access to Highway 89, the loss of value Defendants claim will arise from the reconstruction project on the Highway 89/Shepard Lane intersection is a result of loss of the public's access to Arby's from Highway 89 and does not flow from either the taking of 0.048 acres of Defendants' property or from the nature of the construction on that part of property. Neighbors around Arby's whose property is not taken will suffer the same loss of access by the public to their businesses and will not be entitled to seek compensation. The public still has available routes that provide reasonable access to Arby's from Shepard Lane itself and also from exits from Highway 89 located one-half mile from Arby's. Because reasonable access to Arby's exists, Defendants cannot say the damage to their property resulting from decreased traffic was caused by the *severance* of their land and are therefore precluded from presenting evidence of devaluation of their property resulting from the diminished access to their property.

Defendants seek to distinguish Harvey from the present matter on the grounds that Defendants' property is used for commercial purposes and is located in a commercial area. However, Defendants' cite no cases supporting the distinction between commercial property and

other types of property. In fact, the court in State v. Rozzelle, 120 P.2d 276, 277 (Utah 1941) made no distinction with commercial property when it denied severance damages to the owner of a gasoline station for loss of business. Defendants also claim that the property taken from them is more integral to the reconstruction project and therefore the causal connection between the taking and the damage to the property is more direct. But Defendants seem to misconstrue the causal connection issue by focusing on the need for the taking rather than focusing on the actual cause of the damage, which was the loss of access to their property as explained above.

2. Loss of View from Highway

Article I, section 22 of the Utah Constitution provides that "[p]rivate property shall not be taken or damaged for public use without just compensation." Defendants allege that the change in grade of U.S. Highway 89, which takes away Arby's eastern view and the ability of potential customers to view Arby's property and signs, is compensable. When part of a parcel of land has been acquired by eminent domain, some jurisdictions have allowed the jury to consider evidence of reduced market value of the remaining land caused by an obstruction of view from the owner's property while other jurisdictions have precluded it and denied compensation for obstruction of view. See generally Michael A. Rosenhouse, Annotation, Eminent Domain: Compensability of Loss of View from Owner's Property--State Cases, 25 A.L.R. 4th 671 (1981). Those jurisdictions that have allowed compensation for obstruction of view have rested their decision on the theory that owners of property own an easement of view from their property that can only be taken with just compensation or on a showing that the fair market value of the property has decreased as a result of the taking. See Utah State Rd. Comm'n v. Miya, 526 P.2d 926, 929 (Utah 1974); Bramson v. Berea, 293 NE2d 577 (Ohio 1971).

In Miya, the Utah Supreme Court held that an easement of view is a property right that cannot be taken without just compensation even if the obstruction of view is caused by a proper highway use (some jurisdictions that recognize an easement of view nevertheless deny recovery when the view is obstructed by a proper highway use, 2A Nichols on Eminent Domain § 6.11[2], 6-180 (3d ed. 1997)). Miya, 526 P.2d at 929. The court in Miya also hints that "special and peculiar" injuries, apart from recognized property rights, suffered by landowners may be compensable. Id. Plaintiff argues that Defendants' loss of view does not fit under the category of "special and peculiar" injury and is therefore not compensable as severance damages. However, the damage caused by the obstruction of view need not fit into the "special and peculiar" category of Miya since an easement of view is a compensable, appurtenant property right in and of itself. See Id.

Miya is distinguishable, however, from the case at bar in that the loss of visibility in Miya arose from an elevated highway built within the existing right-of-way on the land taken from the condemnee. Because the loss of view in the case at bar arises from construction on property not taken from Defendants, although some property was taken from Defendants, this Court's view is that the loss in value to the property occasioned by the obstruction of view is not compensable. "Where the loss of visibility results from an improvement of or on land that was not taken from the claimant, such as on an abutting highway or on land taken from another, most courts have found loss of visibility not compensable." Tracy A. Bateman, Annotation, Eminent Domain: Compensability of Loss of Visibility of Owner's Property, 7 A.L.R. 5th 113 (1992); see also People ex rel. Dep't of Pub. Works v. Wasserman, 50 Cal. Rptr. 95 (1st Dist. 1966) (recognizing the settled rule of an easement of reasonable view, the court held that any impairment of the view

of the landowner's property was not a compensable item of severance damages since the improvement causing such loss of view was not located on the property taken from the landowners); People ex rel. Dep't of Pub. Works v. Becker, 69 Cal. Rptr. 110 (4th Dist. 1968) (refusing to grant severance damages when the obstruction of view was not caused by the improvement to the property taken); 8,960 Square Feet v State, DOT & Public Facilities, 806 P2d 843, 846 (1991 Alaska) (holding that "a property owner has no right to an unobstructed line of vision to his property from anywhere off of his property, absent an easement of some sort"); Filler v. Minot, 281 NW2d 237 (ND 1979) (holding that although landowners were allowed compensation for loss of right of view from their property, that principle did not extend to create a compensable right to be viewed from the abutting highway). Furthermore, the Supreme Court of Utah, in Harvey, held that Section 78-34-10 of Utah Code Annotated "gives a landowner the right to present evidence of damages caused by the construction of the improvement made *on the severed property*." Harvey, 57 P.3d at 1090 (emphasis added). The court's reasoning in Harvey that owners of neighboring properties to the condemnee, who would not be entitled to compensation, would be similarly impacted by the closure of the intersection is also relevant in considering the obstruction of view of Defendants' property. Defendants' neighbors will suffer the same loss of visibility to their own property as Defendants themselves. Because Defendants do not allege a loss of visibility of their property from construction done on land taken from them, they are precluded from introducing evidence of a decline in the market value of their property caused by loss of visibility.

3. Devaluation Resulting from Zoning Requirements

Defendants argue that the inability to comply with city zoning ordinances will also impact the fair market value of their property. An existing zoning ordinance is generally held to be a proper matter for consideration in a suit for the condemnation of property for the purpose of determining the actual market value of land in measuring damages. See State by Rd. Comm'n v. Jacobs, 397 P.2d 463 (Utah 1964); see also In re Old Riverhead Rd. CR 31 in Southhampton, Suffolk County, N.Y., 264 N.Y.S.2d 162 (N.Y. Spec. Term 1965) (awarding severance damages to a landowner in the amount required to bring the remaining land into conformance with zoning laws, the violation of which resulted from the government's taking of a portion of his property); People ex rel Dep't Pub. Works. v. Investors Diversified Servs., Inc., 68 Cal. Rptr. 663 (2d Dist. 1968) (holding that the total effect of the local zoning laws must be considered in arriving at the appropriate measure of compensation in an eminent domain action).

Defendants allege that the taking of their property in this case will adversely impact the fair market value of the property due to an ordinance of Farmington City that requires a ten-foot green space around parking and service areas. Such diminution in value caused by the necessitated reconstruction to bring the remaining property into conformance with the city ordinance subsequent to the taking is properly classified as severance damages, and evidence thereof should not be precluded in court.

RULING


Summary judgment is granted when there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c). The court

must examine the evidence in "a light most favorable to the party opposing summary judgment." Hunt v. Hunt, 785 P.2d 414, 415 (Utah 1990). Based on the foregoing analysis, Defendants' Motion for Partial Summary Judgment is granted only to the extent that evidence of severance damages resulting from any costs required to bring Defendants' property into conformance with local city ordinances, the nonconformance of which are caused by the taking of Defendants' property, will be properly admissible.

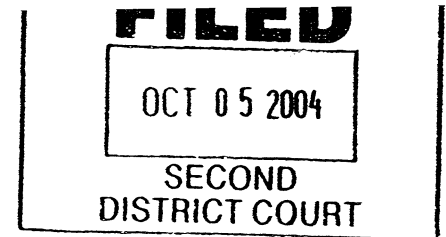
In accordance with the decision above on Defendants' Motion for Partial Summary Judgment, Plaintiff's Motion in Limine is granted in part and denied in part. The Motion in Limine is granted insofar that evidence tending to show a decline in the market value of Defendants' property caused by the redirection of traffic over Shepard Lane and any resulting loss in business arising from the same shall be precluded. Similarly, evidence of loss of visibility of Defendants' property caused by construction not on Defendants' property and that tends to reduce its market value shall be precluded. Plaintiff's Motion in Limine is denied insofar that evidence of severance damages arising from any costs required for conformance to city ordinances after the taking has occurred that are caused by the taking is admissible.

Dated May 22, 2003.

BY THE COURT:


MICHAEL ALLPHIN
DISTRICT COURT JUDGE

Addendum ‘B’



IN THE SECOND DISTRICT COURT, DAVIS COUNTY
STATE OF UTAH

UTAH DEPARTMENT OF
TRANSPORTATION,

Plaintiff,

vs.

JAMES R. KIDDER, Trustee of the James r.
Kidder Trust; THE GOODYEAR TIRE &
RUBBER COMPANY (Lessee); and BURT
BROTHERS TIRE & SERVICE, INC.
(Lessee),

Defendants.

**RULING ON THE PLAINTIFF'S
MOTION IN LIMINE**

Case No. 020700664

Judge MICHAEL G. ALLPHIN

This matter is before the Court on the plaintiff's Motion in Limine that seeks to exclude evidence of loss in value to the defendants' remaining property due to changes to the intersection at Highway 89 and Shephard Lane. The Court reviewed the moving and responding papers and for the reasons set forth below, grants the plaintiff's Motion. The defendants are barred from presenting evidence of damages that are not directly caused by the taking of about .027 acres of their property. Stated more plainly, evidence showing a decline in their property's market value

due only to loss of direct access from Highway 89, obstruction of the view from the highway, or evidence of loss in business due solely to the change in the intersection is precluded

BACKGROUND

In December 2002, the plaintiff filed a complaint to condemn about .027 acres of the defendants' property to construct a new frontage road. There is a Goodyear Tire store on the remaining property.

The defendants' property lies on the northwest corner of the intersection of U.S. Highway 89 and Shephard Lane in Davis County. Highway 89 runs approximately north-south, while Shephard Lane runs east-west.

Before the change to Highway 89, the intersection was at grade and cars traveling on the highway could turn onto Shephard's Lane. Additionally, before the improvements, cars headed westbound on Shephard Lane could either turn right and enter the defendants' property or turn left and enter the highway.

After the improvements, Highway 89 and Shephard Lane will no longer intersect, the highway will span over Shephard Lane and there will be no direct access to Shephard Lane from Highway 89. Instead, Shephard Lane will remain at grade and pass under the highway.

After the improvement, highway traffic traveling southbound or northbound and wishing to travel on Shephard Lane, will have to exit the highway ½ mile north or south of Shephard Lane, respectively. Shephard Lane traffic heading eastbound or westbound and wishing to travel north or south on Highway 89, respectively, will need to travel on the frontage road for about ½ mile until it merges with the highway.

The only improvement made to the property taken by the plaintiff was construction of the frontage road. The plaintiff used none of the defendants' condemned property to construct the new Highway 89 overpass. The restructuring of the intersection in general will impair the Highway 89 access and impair the view of all property owners in the area.

The parties dispute the evidence of severance damages that defendants may present. Neither party disputes that the defendants may properly introduce evidence of loss in value to the remaining property directly caused by the plaintiff's taking of .27 acres of land to construct the frontage road. The defendants, however, argue that the restructuring of the Highway 89/Shephard Lane intersection diminished the value of their remaining property and that the loss in value is compensable under Utah Code § 78-34-10. The plaintiff argues that § 78-34-10 bars the evidence which the defendants seek to introduce, namely, evidence of diminished value to their land caused by the construction of an improvement on land not theirs.

RULING

The underlying purpose of our eminent domain statutes, e.g. § 78-34-10, is to compensate the property owner only for his loss of property rights—no more, no less. *State v. Harvey Real Estate, Ltd. P'ship*, 2002 UT 17, ¶¶ 10, 57 P.3d 1088. That section "does not give the landowner the right to present evidence of damages caused by other facets of the construction project." *Id.*

Utah Code § 78-34-10 states:

The court, jury or referee must hear such legal evidence as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:

...

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

Per section 78-34-10, condemnees may only present evidence of severance damages directly related to the construction or improvement occurring on the severed property. The Supreme Court in *State v. Harvey Real Estate ("Harvey")*, recently reaffirmed the meaning of severance damages as "'those caused by the taking of a portion of the parcel of property where the taking or construction of the improvement *on that part* causes injury to *that portion of the property not taken.*'" *Harvey*, 2002 UT 17, at ¶¶ 11 (quoting *Utah Dep't. of Transp. v. D'Ambrosio*, 743 P.2d 1220, 1222 (Utah 1987)) (emphasis added). This statement comports with other rulings affirming the same principle of law. See e.g. *Three D Corp. v. Salt Lake City*, 752 P.2d 1321, 1325 (Utah 1988) (holding that the "erection of a permanent structure within a public highway of such character as to rank as proper highway use, even if it diminishes the value of abutting property, is not in and of itself a damage in the constitutional sense [and is not compensable]."); *D'Ambrosio*, 743 P.2d at 1221 (holding that "[t]he general rule is that damages attributable to the taking of others' property and the construction of improvements thereon are not compensable"); *State by Road Comm'n. v. Rozelle*, 120 P.2d 276, 276 (Utah 1941) (holding that "loss of business to a filling station on condemnee's land due to change in highway could not be considered in ascertaining value of condemnee's land after condemned strip had been taken, since such loss did not flow from the [nature of construction on strip taken].")

Both the plaintiff and the defendants rely on the *Harvey* opinion to support their positions. The defendants attempt to differentiate the *Harvey* opinion by noting several factual distinctions between the defendants and the *Harvey* condemnees. In the Court's view, defendants are splitting hairs in attempting to distinguish *Harvey* from the current matter; in the

end, though the facts in *Harvey* might not be the same, *Harvey*'s legal principles are still applicable.

Regardless, the facts and arguments in *Harvey*, are in fact very similar to those in this matter. In *Harvey*, there was a taking, it did involve improvements on land off condemnee's property which limited access to the highway, and the condemnee was "'seeking damages for devaluation of its property as a result of loss of access' to Highway 89." *Harvey*, 2002 UT 17 at ¶¶ 12 (quoting appellant's briefs). The *Harvey* condemnee attempted to introduce expert testimony showing that the closure of the intersection would substantially devalue its remaining property because of the loss of access¹. The *Harvey* court affirmed the trial court's ruling which found that the *Harvey* defendant was not entitled to show damages caused by the closing of the intersection as they were not damages caused directly by the taking.

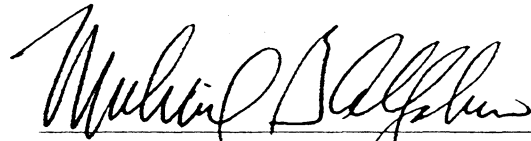
The defendants' proposed evidence regarding property devaluation and obstruction of view, considers those damages which are merely consequential—that is, suffered by all adjoining property owners. The *Harvey* court reiterated that absent any special or peculiar damages, "'there can be no recovery from the State for damages because the construction of a highway may impair or adversely affect the convenience of access to property.'" *Id.* at ¶¶ 14 (quoting *Holt v. Utah State Rd. Comm'n*, 511 P.2d 1286, 1286 (Utah 1973)). Also, absent any special or

¹ Our high court has also held that though property rights include the right of access, that right "does not include the right to travel in any particular direction from one's property or upon any particular part of the public highway right-of-way Nor does the right of ingress or egress to or from one's property include any right in and to existing public traffic on the highway, or any right to have such traffic pass by one's abutting property." *Hampton v. State*, 445 P.2d 708, 710-11 (Utah 1968).

peculiar damages to the defendants' appurtenant rights (right to light, air, view, etc.), those consequential damages are not compensable under § 78-34-10. *See id.* at ¶¶ 13-15.

It is not enough that the frontage road alone was constructed on condemned land; in order for the defendants to show evidence of devaluation due to the actual construction of the overpass, that improvement must have occurred either wholly or partly on condemned land owned by the defendants. This did not occur and therefore the evidence the defendants seek to introduce must be excluded.

Dated September 30th, 2004.


DISTRICT COURT JUDGE
MICHAEL G. ALLPHIN

Addendum ‘C’

JUL 29 2004

SECOND
DISTRICT COURT

IN THE SECOND DISTRICT COURT, DAVIS COUNTY
STATE OF UTAH

UTAH DEPARTMENT OF
TRANSPORTATION,

Plaintiff,

vs.

SMITH'S FOOD KING PROPERTIES,
INC., a Utah corporation, and SMITH
MANAGEMENT CORPORATION, nka
SMITH'S FOOD AND DRUG CENTERS,
INC.; AETNA LIFE INSURANCE
COMPANY; BOYER SHOPPING CENTER
ASSOCIATES; ONE BANK TRUST
PLAZA; and PJ UTAH, L.L.C.,

Defendants.

**RULING ON PLAINTIFF'S MOTION IN
LIMINE**

Case No. 030700021

Judge DARWIN C. HANSEN

This matter is before the Court on plaintiff's Motion in Limine. Both parties decided to forego oral argument on the matter and requested the Court enter a ruling based solely on the pleadings. The Court reviewed the moving and responding papers and for the reasons set forth below, grants plaintiff's Motion in Limine. Defendants are barred from presenting evidence of damages that are not a result of the taking of a portion of defendants' property. Specifically, evidence showing a decline in their property's market value caused only by improvements off the property taken, i.e. changes to the intersection at Highway 89 and Shephard Lane, is precluded.

Ruling on Plaintiff's Motion in Limine



VD11746000

Defendants are also foreclosed from showing evidence demonstrating a loss in business originating solely from the intersection's closure.

BACKGROUND

Plaintiff filed a Complaint January 2003 to acquire approximately 3/4 of an acre of defendants' property to construct a new frontage road. There is a Smith's Food and Drug Store located on the remaining property.

The Smith's property lies on the northeast corner of the intersection of U.S. Highway 89 and Shephard Lane in Davis County. Before plaintiff began making the current improvements to the intersection, the intersection was at grade and cars could make left and right turns off Highway 89 onto Shephard Lane and vice versa. Additionally, cars traveling west on Shephard Lane could turn right and immediately enter the parking lot of the Smith's property, and cars heading eastbound could turn left into the parking lot.

After the improvements, Highway 89 and Shephard Lane will no longer intersect; the highway will span Shephard Lane and there will be no direct access to Shephard Lane from Highway 89. Instead, Shephard Lane will remain at grade and pass under the highway. Southbound traffic on Highway 89 wishing to exit onto Shephard Lane will have to exit on a frontage road about a half-mile north of Shephard Lane. Traffic traveling on Shephard Lane wishing to travel Highway 89 in a southbound direction will have to access a frontage road which will merge onto the highway some half-mile to the south. Northbound traffic traveling on Highway 89 and wishing to exit onto Shephard Lane will have to exit onto a frontage road a half-mile south of Shephard Lane. Traffic on Shephard Lane wishing to travel on Highway 89 in a

northbound direction will have to access the frontage road on the east and travel approximately a half-mile before merging onto Highway 89.

The only improvement made to the property taken by plaintiff was construction of the frontage road. Plaintiff used none of defendants' condemned property to construct the new Highway 89 overpass. The restructuring of the intersection in general will impair the Highway 89 access of all property owners in the area.

RULING

This dispute concerns the amount of just compensation to be paid in this case, specifically, what evidence of severance damages may be presented by defendants. Neither party disputes that defendants may properly introduce evidence of loss in value to the remaining property directly caused by plaintiff's taking of land to construct the frontage road. Defendants, however, argue that the restructuring of the Highway 89/Shephard Lane intersection resulted in a loss of value to their remaining property as a result of the change in access to the intersection. They argue that the loss in value due to change in access is compensable under section 78-34-10 and that they are entitled to present evidence of those severance damages. Plaintiff argues that no taking or improvement related to the intersection closure occurred on defendants' condemned land, and therefore any change in access is an indirect, consequential damage suffered by all property owners in the area and non-compensable under section 78-34-10. In the Court's view, what defendants seek to introduce here is evidence of damages caused by the construction of the improvement on land that is not theirs—something repeatedly barred by our courts.

Utah Code § 78-34-10 states in part:

The court, jury or referee must hear such legal evidence as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:

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

According to the plain language of section 78-34-10, condemnees may only present evidence of severance damages directly related to the construction or improvement occurring on the severed property. The Supreme Court in *State v. Harvey Real Estate, Ltd. P'ship*, 2002 UT 17, 57 P.3d 1088, recently reaffirmed the definition of severance damages by stating, "'severance damages are those caused by the taking of a portion of the parcel of property where the taking or construction of the improvement on that part causes injury to that portion of the property not taken.'" *Id.* at ¶¶ 11 (quoting *Utah Dep't. of Transp. v. D'Ambrosio*, 743 P.2d 1220, 1222 (Utah 1987)). This statement comports with other rulings affirming the same principle of law. *See e.g. Three D Corp. v. Salt Lake City*, 752 P.2d 1321, 1325 (Utah 1988) (holding that the "erection of a permanent structure within a public highway of such character as to rank as proper highway use, even if it diminishes the value of abutting property, is not in and of itself a damage in the constitutional sense [and is not compensable]."); *D'Ambrosio*, 743 P.2d at 1221 (holding that "[t]he general rule is that damages attributable to the taking of others' property and the construction of improvements thereon are not compensable"); *State by Road Comm'n. v. Rozelle*, 120 P.2d 276, 276 (Utah 1941) (holding that "loss of business to a filling station on condemnee's land due to change in highway could not be considered in ascertaining value of condemnee's

land after condemned strip had been taken, since such loss did not flow from the [nature of construction on strip taken].")

When viewing the language of section 78-34-10 together with the clear statements of the law in *Harvey* and other opinions dealing with severance damages, it is apparent that defendants may not present evidence of loss in value to their remaining property due to the restructuring of the Highway 89/Shephard Lane intersection.

Both plaintiff and defendants rely on the *Harvey* opinion to support their positions.

Defendants attempt to differentiate the *Harvey* opinion, however, by stating *Harvey* did not involve a taking and did not involve impairment or alteration of the condemnee's access to the highway.¹ Defendants' reading of the matter, however, is incorrect. In *Harvey*, there clearly was a taking, it did involve improvements on land off condemnee's property which limited access to the highway, and the condemnee did complain that the limited access devalued his property. See *State v. Harvey Real Estate, Ltd. P'ship*, 2002 UT 17 at ¶¶ 5-7. Indeed, the facts of *Harvey* are almost identical to those in this case. In *Harvey*, the Utah Department of Transportation ("UDOT") closed the Highway 89/Old Mountain Road intersection in Davis County, cutting off access to the highway from Old Mountain Road. UDOT also condemned a portion of the *Harvey* defendant's land to construct a frontage road along the highway. The *Harvey* defendant sought to introduce expert testimony showing that the closure of the intersection would substantially devalue its remaining property because of the loss of access. The *Harvey* court affirmed the trial

¹ Defendants state: "*Harvey Real Estate* was simply another "no-take" case because the public improvement being constructed on the property did not impair or alter his access to Highway 89 since the Court held he had no access in the "before" condition. The severance damages sought in *Harvey Realty* arose from a "no-take" and were properly disallowed."

court's ruling that the *Harvey* defendant was not entitled to show damages caused by the closing of the intersection as they were not damages caused directly by the taking.²

Like the condemnees in *Harvey*, defendants seek to introduce evidence of loss in value to their property due to the change of the intersection. Whatever damages that might arise from that change in access are what the *Harvey*, *Three D*, *D'Ambrosio*, and *Rozelle* opinions consider merely consequential damages, suffered by all adjoining property owners and not compensable under 78-34-10. Although there was a taking of a portion of defendants' land, the improvement they complain devalues their land did not occur on the condemned tract. The improvement they complain of is the change to the intersection, which occurred on another's land. Even if plaintiff had not taken defendants' land for the frontage road, it still could have closed the intersection independently of the taking. As in *Harvey*, the taking of defendants' land for the frontage road may be somewhat related to the intersection's alteration, but the taking itself did not cause the intersection's alteration, nor did it directly cause the damages of which defendants complain. In order for defendants to show evidence of devaluation due to the intersection improvements, the actual improvement or change in intersection must have occurred either wholly or partly on condemned land owned by defendants. This did not occur and therefore the evidence defendants seek to introduce must be excluded.

Defendants also put forth certain statements from the *Three D* opinion in support of their argument. They cite to *Three D* for the proposition that "'substantial and material impairment of

² Defendants argue that the result in *Harvey*, precluding evidence of severance damages, was based in part on the condemnees' loss of a right-of-way. This is an incorrect reading of the opinion. Though the *Harvey* court dealt with abandonment, that issue was really irrelevant to the severance damages issue.

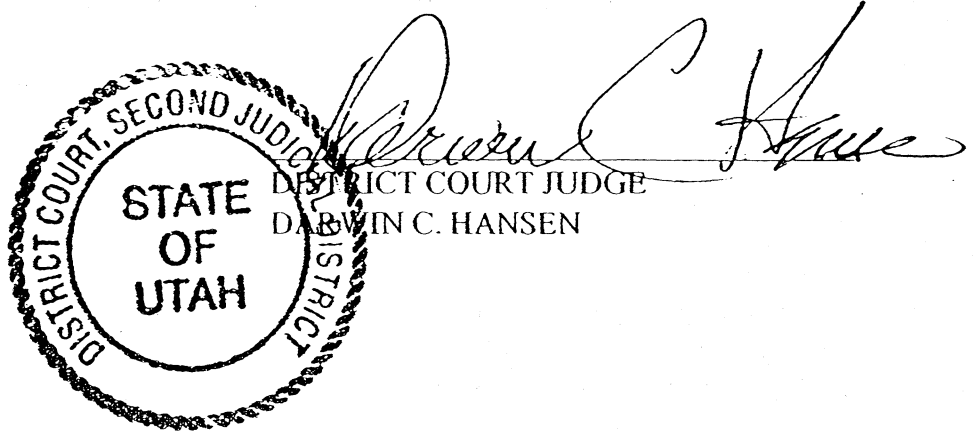
the plaintiff's right of access can constitute a compensable taking "" *Three D Corp* , 752 P 2d at 1324 (quoting *Hampton v State Road Comm'n* , 445 P 2d 708, 712 (Utah 1968)) The *Three D* court did state that rule of law, but a full reading of the opinion will reveal that the *Three D* opinion comports entirely with the cases previously mentioned The *Three D* court, basing its analysis partly on the opinion in *Utah State Road Comm'n v Miya*, 526 P 2d 926, 929 (Utah 1974), noted that the *Miya* court clearly differentiated between "structures in the public right of way constructed under the exercise of state police powers which incidentally diminish property values but do not impair property rights or pose 'peculiar injury,' and those state actions which substantially diminish property value by impairing appurtenant property rights or causing 'peculiar injury' "" The *Three D* and *Miya* court both held that there might be a taking in the second situation, but that the first situation did not constitute a taking *Three D*, 752 P 2d at 1325, *Miya*, 526 P 2d at 929

Also, in attempting to harmonize precedents involving alleged loss of value due to change in access, the *Three D* Court identified three general principles *Three D*, 752 P 2d at 1325-26 The second principle is applicable here Under that principle, there is governmental action not involving a taking, but merely interfering with an owner's access to property, in that case the Court stated the "the owner is *not* entitled to compensation so long as the owner still has reasonable access "" *Id* (emphasis in original) The principles stated in *Three D* comport with the previously stated principles found in other opinions and do not change the conclusion of this Court

The Court's conclusion complies with the underlying purpose of 78-34-10 which is to compensate the property owner only for his loss of property rights See *State v Harvey Real*

Estate, Ltd. P'ship, 2002 UT 17 at ¶¶ 10. That section "does not give the landowner the right to present evidence of damages caused by other facets of the construction project." *Id.* Were that so, the landowner could present evidence unrelated to the taking and defeat the purpose of the eminent domain statutes. *Id.*

Dated July *24*, 2004.



Addendum ‘D’

Intermountain Sports, Inc., Plaintiff and Appellant, v. Department of Transportation and Murray City, Defendants and Appellees.

COURT OF APPEALS OF UTAH

2004 UT App 405; 512 Utah Adv. Rep. 40; 2004 Utah App. LEXIS 460

Case No. 20031029-CA

November 12, 2004, Filed

Notice:

THIS OPINION IS SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTER.

Editorial Information: Prior History

Third District, Salt Lake Department. The Honorable William B. Bohling.

Disposition

Affirmed.

Counsel

B. Ray Zoll, Murray, and John Martinez, Salt Lake City, for Appellant.
Mark L. Shurtleff and Randy S. Hunter, Salt Lake City, for
Appellees.

Judges: Before Judges Billings, Davis, and Greenwood.

Opinion

Opinion by: BILLINGS

BILLINGS, Presiding Judge:

P1 Intermountain Sports, Inc. (Intermountain) appeals the trial court's grant of Utah Department of Transportation's (UDOT) motion for judgment on the pleadings pursuant to rule 12(c) of the Utah Rules of Civil Procedure. Intermountain argues that the trial court erred by granting UDOT's motion because Intermountain has alleged facts sufficient for both its inverse condemnation and its uniform operation of laws claims. We affirm.

BACKGROUND

P2 Intermountain owned and operated a recreational vehicle sales business located at 4225 South 500 West in Murray, Utah, near the 4500 South off-ramp from Interstate 15 (I-15). Intermountain's business was accessible only from 500 West and not directly accessible from either I-15 or 4500 South.

P3 From approximately July 1997 to May 2001, UDOT conducted a massive reconstruction of I-15 (I-15 reconstruction). During the I-15 reconstruction, UDOT periodically closed both the 4500 South off-ramp and 4500 South to eastbound and westbound traffic. However, UDOT did not perform work on 500 West, block or disrupt traffic on 500 West, or block direct access to Intermountain's business premises on 500 West.

P4 Intermountain filed a complaint alleging six causes of action against UDOT, two of which are relevant to this appeal. First, Intermountain alleged that the I-15 reconstruction, and specifically, the closure of the 4500 South off-ramp and 4500 South, blocked Intermountain's "easement of access" to its business premises and that this constituted a "taking" under the Takings Clause of the Utah Constitution. In particular, Intermountain asserted that by "taking" its "easement of access," UDOT (1)

"substantially and materially impaired [Intermountain's] right of access to the I-15 off-ramp at 4500 South and to 4500 South Street as well as [Intermountain's] customers' right of access to 4500 South Street and [Intermountain]", (2) substantially diminished the value of Intermountain's property, and (3) damaged Intermountain's private property interest for a public use without just compensation

P5 Second, Intermountain alleged that access from I-15 to its property during the I-15 reconstruction involved a circuitous 2.5-mile loop making it difficult for potential customers driving on I-15 to reach Intermountain. Intermountain claimed that UDOT constructed this circuitous loop so that other businesses received the benefit of direct access to 4500 South off-ramp traffic and that UDOT refused to offer Intermountain a similar benefit, which violated the Utah Constitution's Uniform Operation of Laws provision.

P6 UDOT filed a motion for judgment on the pleadings pursuant to rule 12(c) of the Utah Rules of Civil Procedure. The trial court granted the motion ruling that Intermountain failed to state a claim for either inverse condemnation or violation of uniform operation of laws. Intermountain appeals.

ISSUES AND STANDARD OF REVIEW

P7 Intermountain argues that the trial court erred by granting UDOT's motion for judgment on the pleadings. "When reviewing a grant of a motion for judgment on the pleadings, this court accepts the factual allegations in the complaint as true, we then consider such allegations 'and all reasonable inferences drawn therefrom in a light most favorable to the plaintiff.'" *Arndt v. First Interstate Bank of Utah, N.A.*, 1999 UT 91, P2, 991 P.2d 584 (citation omitted). "We affirm the grant of such motion only if, as a matter of law, the plaintiff could not recover under the facts alleged." *Id.* (alteration in original) (citation omitted).

ANALYSIS

I. Inverse Condemnation

P8 Article I, section 22 of the Utah Constitution provides, "Private property shall not be taken or damaged for public use without just compensation." Utah Const. art. I, § 22. "Under Utah law, 'the takings analysis has two principal steps. First, the claimant must demonstrate some protectable interest in property. If the claimant possesses a protectable property interest, the claimant must then show that the interest has been taken or damaged by government action.'" *View Condo Owners Ass'n v. MSICO, L.L.C.*, 2004 UT App 104, P35, 90 P.3d 1042 (quoting *Strawberry Elec. Serv. Dist. v. Spanish Fork City*, 918 P.2d 870, 877 (Utah 1996)). Thus, in order to state an inverse condemnation claim, Intermountain must allege in its complaint a protectable property interest that has been taken or damaged by UDOT.

P9 Intermountain's complaint repeatedly characterizes its relevant property interest as an "easement of access to the I-15 southbound off-ramp to 4500 South and to 4500 South Street." We agree with the trial court that temporary denial of access to property does not constitute a taking. See *Rocky Mountain Thrift Stores, Inc. v. Salt Lake City Corp.*, 784 P.2d 459, 465 (Utah 1989) ("The mere interference with access to an owner's premises [is] not a 'damaging' or 'taking' within the meaning of article I, section 22 of Utah's constitution.")

P10 In both Intermountain's memorandum in opposition to UDOT's motion for judgment on the pleadings and in its briefs on appeal, Intermountain asserts that its protectable property interest is the right to use its land for a commercial enterprise. Regardless of how Intermountain characterizes its complaint, what Intermountain is claiming is the right to a particular route of ingress and egress to and from Intermountain and the right to have traffic flow in some particular pattern past its premises. It is well established that while property owners have a right of *reasonable access* to and from their property, that right

does not include the right to travel in any particular direction from one's property or upon any

particular part of the public highway right-of-way Nor does the right of ingress and egress to or from one's property include any right in and to existing traffic on the highway, or any right to have such traffic pass by one's abutting property

State v Harvey Real Estate, 2002 UT 107, P14, 57 P 3d 1088 (alteration in original) (quotations and citations omitted), *see also Utah State Road Comm'n v Miya*, 526 P 2d 926, 928 (Utah 1974) (holding that while the rights of access, light, and air are easements appurtenant to the land of an abutting owner on a street, there is "no property right to a free and unrestricted flow of traffic past [a property owner's] premises, and any impairment or interference with this flow does not entitle the owner to compensation"), *Hampton v State Road Comm'n*, 21 Utah 2d 342, 445 P 2d 708, 711 (1968) (holding that a property owner's right of ingress and egress to and from his property and the abutting public highway does not "include any right in and to existing public traffic on the highway, or any right to have such traffic pass by one's abutting property"), *State Road Comm'n v Rozzelle*, 101 Utah 464, 120 P 2d 276, 277 (1941) (McDonough, J, concurring) ("Diminution in value of the realty caused by the loss of the flow of traffic to or past defendant's place of business is not compensable ")

P11 While "the kinds of property subject to the [eminent domain] right [are] practically unlimited," *Farmers New World Life Ins Co v Bountiful City*, 803 P 2d 1241, 1244 (Utah 1990) (second, third, and fourth alterations in original) (quotations and citation omitted), we are unwilling to adopt the view that a business has a protectable property interest in the mere hope of future sales from passing traffic or that the rerouting of traffic constitutes a compensable taking under article I, section 22 of the Utah Constitution *See Strawberry Elec Serv Dist v Spanish Fork City*, 918 P 2d 870, 878 (Utah 1996) ("To create a protectable property interest, a contract must establish rights more substantial than a unilateral expectation of continued privileges ")

P12 Intermountain does not allege that UDOT performed reconstruction work on 500 West, blocked or disrupted traffic on 500 West, or blocked direct access to its business from 500 West Because Intermountain does not have a protectable property interest in an "easement of access" to I-15 or 4500 South and because Intermountain was accessible from 500 West during the I- 15 reconstruction, Intermountain has not stated an inverse condemnation claim Therefore, we hold that Intermountain has failed to state a claim for inverse condemnation

II Uniform Operation of Laws

P13 Intermountain argues that the trial court erred by dismissing its denial of uniform operation of laws claim UDOT argues that Intermountain's complaint fails because (1) the uniform operation of laws clause is not a self-executing constitutional provision, and (2) even if the complaint properly stated a claim, monetary damages are not available as a remedy under the framework set forth in *Spackman v Board of Education*, 2000 UT 87, 16 P 3d 533 We hold that the uniform operation of laws clause of the Utah Constitution is self-executing but that under the circumstances presented in this case, monetary damages are not available

P14 Article I, section 24 of the Utah Constitution provides "All laws of a general nature shall have uniform operation " Utah Const art I, § 24 In *Spackman*, our supreme court provided guidance for determining whether a particular constitutional clause is self-executing and whether monetary damages are an available remedy for a violation of a self- executing constitutional provision *See* 2000 UT 87 at P1 The court explained that "a self-executing constitutional clause is one that can be judicially enforced without implementing legislation " *Id* at P7

P15 The uniform operation of laws provision is self-executing because (1) it is presumptively "mandatory and prohibitory" under article I, section 26 of the Utah Constitution and there is nothing in the text that indicates otherwise, Utah Const art I, § 26 ("The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise "), *see also Spackman*, 2000 UT 87 at PP11, 15 , (2) it has been judicially defined and enforced many times

without implementing legislation, see *Spackman*, 2000 UT 87 at PP12, 16, see also *Pinetree Assocs v Ephraim City*, 2003 UT 6, P17, 67 P 3d 462, and (3) the historical context in which the framers adopted the clause shows that they intended to constitutionalize existing concepts, like equal protection and due process, that did not require implementing legislation. See *Spackman*, 2000 UT 87 at P13, *Malan v Lewis*, 693 P 2d 661, 669 (Utah 1984) (holding that the uniform operation of laws and equal protection clauses "embody the same general principle persons similarly situated should be treated similarly, and persons in different circumstances should not be treated as if their circumstances were the same")

P16 The Utah Constitution does not provide monetary damages for violations of constitutional provisions except for the takings clause. See *Spackman*, 2000 UT 87 at P20. "To ensure that damage actions are permitted only 'under appropriate circumstances,'" our supreme court has held "that a plaintiff must establish the following three elements before he or she may proceed with a private suit for damages" for a constitutional violation. *Id.* at P22 (quoting Restatement (Second) of Torts § 874A cmt. d, at 303). Accordingly, Intermountain must have alleged facts sufficient to establish the following three elements to survive UDOT's motion for judgment on the pleadings:

P17 First, Intermountain must establish that it "suffered a 'flagrant' violation of [its] constitutional rights." *Id.* at P23 (citation omitted). Thus, Intermountain must have alleged that UDOT "violated 'clearly established' constitutional rights 'of which a reasonable person would have known.'" *Id.* (citations omitted). Intermountain stated in its complaint that UDOT violated article I, section 24 of the Utah Constitution by

arbitrarily and capriciously providing other businesses with direct and beneficial access to 4500 South Street and by configuring such access so as to direct traffic flow to those businesses, south of [Intermountain's property] and north and west of [Intermountain's property], while at the same time refusing to offer such accommodations to [Intermountain] who paid substantial taxes to the City and State and who relied on the City and UDOT's representations.

It is questionable whether Intermountain alleged a "flagrant" violation of its constitutional rights. We need not decide, however, as Intermountain has failed to meet the other two elements.

P18 Second, Intermountain "must establish that existing remedies [do] not redress [its] injuries." *Spackman*, 2000 UT 87 at P24. This "requirement is meant to ensure that courts use their common law remedial power cautiously and in favor of existing remedies." *Id.* It is not at all clear from the allegations in the complaint that existing remedies could not have redressed Intermountain's injuries. Under the transportation regulations of the Utah Administrative Code, Intermountain should have exhausted its administrative remedies prior to seeking judicial review. See Utah Admin. Code R907-1-15 ("Persons must exhaust their administrative remedies in accordance with [the Administrative Procedures Act], prior to seeking judicial review"), *Patterson v American Fork City*, 2003 UT 7, P18, 67 P 3d 466 (holding that the plaintiffs' "bald assertion that the exhaustion requirement does not apply to state constitutional claims is not persuasive").

P19 Utah Administrative Code R907-1-3 provides for the commencement of appeals of UDOT actions by a member of the public. See Utah Admin. Code R907-1-3. Intermountain asserts in its complaint that in reliance on statements from UDOT officials that its "concerns would be taken into consideration," it did not "pursue action against UDOT" and has only now been able to determine its ascertainable damages, making its claims ripe for adjudication. However, this does not provide a legitimate reason to "relieve a party seeking judicial review of the requirement to exhaust any or all administrative remedies." Utah Code Ann. § 63-46b-14(2)(b)(i), (ii) (2003) (providing that a party may seek judicial review instead of exhausting administrative remedies only when "(i) the administrative remedies are inadequate, or (ii) exhaustion of remedies would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion"). In addition, Intermountain is not entitled to sit on its rights while it accrues damages when it had notice that other businesses

allegedly received accommodations it did not, arguably in violation of the uniform operation of laws provision

P20 Third, Intermountain has not established that "equitable relief, such as an injunction, was and is wholly inadequate to protect [its] rights or redress [its] injuries " *Spackman*, 2000 UT 87 at P25 (emphasis added) Intermountain could have sought an injunction to enjoin UDOT's purported discriminatory actions While the completion of the I-15 reconstruction makes equitable relief pointless today, Intermountain has not established that an injunction was wholly inadequate to protect its rights or redress its injuries at the time of the I-15 reconstruction See *id* at P24

P21 Accordingly, we hold that Intermountain may not proceed with a private suit for damages for UDOT's alleged violation of article I, section 24 of the Utah Constitution

CONCLUSION

P22 We hold that the trial court did not err by dismissing Intermountain's complaint Intermountain has failed to state a claim for inverse condemnation and it cannot demonstrate that a private suit for damages is available for UDOT's alleged violation of article I, section 24 of the Utah Constitution Accordingly, we affirm

Judith M Billings,

Presiding Judge

P23 WE CONCUR

James Z Davis, Judge

Pamela T Greenwood, Judge

Footnotes

Footnotes

1 Even if we were to accept Intermountain's characterization of its property interest, it does not help Intermountain Intermountain's unilateral expectation of future business falls short of the types of contractual property rights which our supreme court has described as protected See *Bagford v Ephraim City*, 904 P 2d 1095, 1099 (Utah 1995) In *Bagford*, the court ruled that the plaintiffs' loss of business from competition with Ephraim City's municipal garbage collection was not property within the meaning of the Utah Constitution's Takings Clause See *id* The court stated,

to create a protectable property interest, a contract must establish rights more substantial in nature than a mere unilateral expectation of continued rights or benefits Thus, a contract that is terminable at the will of either party does not by itself give rise to a protectable property interest because the mere expectation of benefits under such a contract does not give the promisor a legally enforceable right against a promisee to provide future service and therefore does not by itself provide a basis for compensation for loss of future business

Id

Addendum ‘E’

*This opinion is subject to revision before final
publication in the Pacific Reporter.*

IN THE SUPREME COURT OF THE STATE OF UTAH

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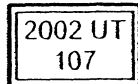
State of Utah and its Agency
the Utah Department
of Transportation,
Plaintiff and Appellee,

v

Harvey Real Estate,
a limited partnership,
Defendant and Appellant

Nos. 20001149 and 20010005

FILED
November 5, 2002



Second District, Davis County
The Honorable Michael G. Allphin

Attorneys

Mark L. Shurtleff, Att'y Gen., Steven F. Alder, Asst. Att'y Gen., Salt Lake City, for plaintiff
Robert E. Mansfield, Todd D. Weiler, Craig R. Kleinman, Salt Lake City, for defendant

LOWE, Justice

INTRODUCTION

1 We granted a petition for interlocutory appeal filed by defendant Harvey Real Estate, a limited partnership, to review the trial court's determination that defendant was not entitled to introduce certain evidence in an eminent domain proceeding. We also granted a cross-petition filed by plaintiff Utah Department of Transportation (UDOT) to review the trial court's ruling that UDOT had abandoned a perpetual right-of-way it had over part of the Harvey property.

BACKGROUND

2 Harvey Real Estate owns approximately 160 acres of vacant land in Davis County, Utah. Until 1999, the west edge of the property abutted Highway 89, a major transportation route. Approximately 85 feet of the north edge of the property abuts Old Mountain Road. The intersection of these two roads lies directly adjacent to the property's northwest corner.

¶3 Through the years, Highway 89 has undergone several expansions designed to compensate for increases in traffic. Several of these expansions have resulted in the condemnation of portions of the Harvey property by UDOT or its predecessor, State Road Commission of Utah. In 1936, pursuant to a condemnation proceeding, Harvey's predecessor in title granted the State Road Commission a perpetual right-of-way over a section of the property abutting Highway 89 (the right-of-way). The stated purpose of the right-of-way was to grant UDOT a "perpetual Right-of-way for highway purposes," and for many years the land was used accordingly. In a 1947 condemnation action, the State Road Commission acquired fee title to most, but not all, of the land subject to the 1936 easement. The State Road Commission later erected a fence a fixed distance from the centerline of the highway separating the fee title property from the property that remained subject to the 1936 right-of-way. This fence has remained in place, and UDOT has not used the strip of property still subject to the right-of-way since about 1951. The strip has been used by Harvey and others for grazing and other private purposes.

¶4 The Harvey property has direct access to Old Mountain Road at the northwest corner of the property along approximately 85 feet of frontage. In 1947, Highway 89 was made a limited access highway where it bordered the Harvey property. Therefore, from that year until 1999, the property's only direct access to Highway 89 was through a single wide, gated agricultural entrance approximately 1,000 feet to the south of the intersection.

¶5 In 1999, in order to decrease the number of accidents on Highway 89, UDOT closed the Highway 89/Old Mountain Road intersection, thus cutting off access to Highway 89 from Old Mountain Road. UDOT ~~also~~ determined to build a frontage road from the intersection to the Cherry Hill interchange, which is approximately .5 miles south of the intersection. The frontage road completely separates the Harvey property from Highway 89, eliminating direct access to the property from the highway.

¶6 Accordingly, this condemnation action was brought in 1999 by UDOT to acquire approximately 1.36 acres of the Harvey property which UDOT needed to construct the frontage road from the intersection to the Cherry Hill interchange. Believing that it still owned a right-of-way over the remaining strip of the 1936 right-of-way, UDOT did not seek to condemn it. Harvey contested the existence of the right-of-way, arguing that the State had abandoned it when the State separated the right-of-way from the highway by means of a fence. After a hearing on the matter, the trial court concluded as a matter of law that UDOT's predecessor, the State Road Commission, had "abandoned all right to future use and all ownership in the Balance of the 1936 Right-Of-Way and discontinued using that property for highway purposes" and that, consequently, Harvey owned the strip free of any right-of-way held by UDOT.

¶7 Thereafter, UDOT filed a motion in limine seeking to preclude Harvey from presenting expert testimony at trial that the closure of the Old Mountain Road/Highway 89 intersection will substantially decrease the value of the remaining Harvey property. The trial court granted the motion. It concluded that evidence of alleged damages from the intersection closure was not admissible because any damages sustained by Harvey were not the result of the loss of land to be used in building the frontage road and thus did not qualify as severance damages. We granted Harvey's interlocutory appeal and UDOT's cross-appeal.

ANALYSIS

¶8 Harvey contends that the trial court erred and contravened Utah Code Ann. § 78-34-10 (1996) in not allowing it to present evidence of the damages it will sustain from the closure of the Highway 89/Old Mountain Road intersection. UDOT, in its cross-appeal, asserts that the trial court erred by ruling that the remaining strip of the 1936 right-of-way had been abandoned by UDOT and its predecessor. We address each issue in order.

I. SEVERANCE DAMAGES

A.

¶9 Section 78-34-10 provides in part:

The court, jury or referee must hear such legal evidence as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:

...

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

The trial court ruled that under this section Harvey could not present evidence of any damage caused by the closure of the Highway 89/Old Mountain Road intersection because the closure was not caused by the severance of Harvey's property. Harvey argues against this result, contending that by limiting the evidence of severance damages to "those harms flowing only from the actual taking itself," the trial court ignored the statutory language allowing Harvey to present evidence of damages stemming from "the construction of the improvement in the manner proposed." We disagree.

¶10 Section 78-34-10 gives a landowner the right to present evidence of damages caused by the construction of the improvement made on the severed property. It does not give the landowner the right to present evidence of damages caused by other facets of the construction project. Were the opposite true, a landowner would be entitled to present evidence unrelated to the taking. For example, where property was taken for a multi-mile-length road construction project, a landowner would be entitled to present evidence of all damages conceivably stemming from the road construction, even those damages attributable to construction occurring miles away. This would defeat the purpose of our eminent domain statutes, which are designed to compensate the landowner only for his loss of property rights. Contrary to Harvey's argument, this interpretation does not render any part of section 78-34-10 meaningless; evidence of damage caused by both the severance alone and construction on the severed property may be presented.

¶11 We held essentially the same in Utah Department of Transportation v. D'Ambrosio, 743 P.2d 1220, 1222 (Utah 1987), although we did not reference section 78-34-10(2). There we stated that "[s]everance damages are those caused by the taking of a portion of the parcel of property where the taking or the construction of the improvement on that part causes injury to that portion of the property not taken." (Emphasis added.) Our holding today also accords with the well-established common law principle that severance damages "may be made for any diminution in the value of [an owner's non-condemned land], as long as those damages were directly caused by the taking itself and by the condemnor's use of the land taken." 26 Am. Jur. 2d Eminent Domain § 368 (1996) (emphasis added); see also 8A Nichols, Eminent Domain § 16.02[1] (3d ed. 2002) (stating "severance damages may be defined as damages or diminution in the value of the remainder resulting from the taking of a portion of a tract of land" (emphasis added)). We have explicitly adopted this principle in Utah. See City of Hildale v. Cooke, 2001 UT 56, ¶ 3 & n. 1, 28 P.3d 697 (stating "severance damages may occur where a partial taking to a parcel of land causes harm to the portion of the property not condemned" (emphasis added)); State by Rd. Comm'n v. Stanger, 21 Utah 2d 185, 186, 442 P.2d 941, 942 (1968) ("[S]everance damages were those suffered by a devaluation of the owner's property not taken, the causa causa causans of which was the actual taking of a part of a unit of property, the whole of which he previously owned.").

¶12 Harvey has not shown that any damage sustained by the closure of the intersection has been caused by the severance of its land. Indeed, it recognizes that it is "[s]eeking damages for devaluation of its property as a result of loss of access" to Highway 89. Harvey seeks to establish a causal connection between its alleged damages and the taking by arguing that the closure of the Highway 89/Old Mountain Road intersection was made possible only by the taking of Harvey's property, the inference being that the taking caused the closure. UDOT could have chosen to close the intersection independently of the taking, however. The taking may be somewhat related to the closure, but it did not cause the closure, nor did it cause the damages that Harvey claims as a result of the closure. As the trial court correctly observed, owners of neighboring properties may be impacted by the closure of the intersection but they, likewise, would not be entitled to seek compensation.

B.

¶13 Harvey attempts to avoid this result by relying on our opinion in Utah State Road Commission v. Miya, 526 P.2d 926, 928-29 (Utah 1974), where we held that rights of

access, light, and air are easements appurtenant to the land of an abutting owner on a street; they constitute property rights forming part of the owner's estate. These substantial property rights . . . may not be taken away or impaired without just compensation.

We stated that in order to recover for such a taking, an owner must show that "the structure violates some right appurtenant to the abutting property or otherwise inflicts some special and peculiar injury." *Id.* As with other takings, where an appurtenant right is severed from the property, under section 78-34-10 damages may be awarded for the losses caused by the severance of the right.

¶14 Harvey argues that it is entitled to relief under *Miya* because it is being "deprived of access." While we recognized in *Miya* that the right of access is an appurtenant right, this right

"does not include the right to travel in any particular direction from one's property or upon any particular part of the public highway right-of-way Nor does the right of ingress or egress to or from one's property include any right in and to existing public traffic on the highway, or any right to have such traffic pass by one's abutting property."

Hampton v. State, 21 Utah 2d 342, 346-47, 445 P.2d 708, 710-11 (Utah 1968) (quoting *State ex rel. State Highway Comm'n v. Meier*, 388 S.W.2d 855, 857, 859, 860 (Mo. 1965). The interest protected simply entails the "right of ingress and egress to and from . . . property and the abutting public highway." *Id.* at 711. Harvey's property may be accessed through both the new frontage road and Old Mountain Road; consequently, its right of access has not been denied. The right does not extend so far as to guarantee a property owner that his property will be accessed through specific intersections or that the roads accessing his property will be easily accessed from other thoroughfares. See, e.g., *Holt v. Utah State Rd. Comm'n*, 30 Utah 2d 4, 511 P.2d 1286, 1286 (1973) (stating "the law has long been established in this State that under those circumstances there can be no recovery from the State for damages because the construction of a highway may impair or adversely affect the convenience of access to property"), overruled in part on other grounds by *Colman v. Utah State Land Bd.*, 795 P.2d 622, 632 (Utah 1990)). Thus, UDOT has not "taken" Harvey's right of access, and Harvey is not entitled to recover severance damages on that theory.

¶15 Harvey also contends that under *Miya* he is entitled to severance damages because he has suffered a "special and peculiar injury." We have never explained what we meant in *Miya* by this language. To the extent that it suggests that a landowner may recover severance damages without either a physical taking or the taking of the few appurtenant rights that this court has recognized, it appears inconsistent with section 78-34-10 because, as noted above, this section requires that damages be caused by the severance of the property or the construction of improvements on the severed property. § 78-34-10. Unless the "special and peculiar injury" results from such a taking, an award of severance damages for such injuries would be contrary to the statute. As a practical matter, where a taking has occurred an owner would not need to rely on the "special and peculiar injury" he has suffered because he could recover directly for the taking itself. Accordingly, the trial court did not err in refusing to allow Harvey to prove section 78-34-10 damages on this ground.

II. ABANDONMENT

¶16 UDOT contends that the trial court erred in determining that it had abandoned its right-of-way over the remaining strip subject to the 1936 condemnation when it constructed a fence separating the strip from the highway. It asserts that our statutes have consistently required that portions of a highway may be abandoned only by affirmative formal action by a public authority with authority to do so. We agree.

¶17 Section 36-1-3 of Utah Code Ann. (1943) provided: "All highways once established must continue to be highways until abandoned by order of the board of county commissioners of the county in which they are situated or other competent authority." This statute has remained essentially unchanged since 1951, the year the remaining strip was fenced off. See Utah Code Ann. § 72-5-105 (1999) (stating "[a]ll public highways once established shall continue to be highways until abandoned or vacated by order of the highway authorities having jurisdiction . . ."). These statutes unambiguously establish that all public highways remain as such unless they are officially abandoned or vacated by order of the proper authority. They make no allowance for any other type of abandonment or vacation. *Western Kane County Special Serv. Dist. No. 1 v. Jackson Cattle Co.*, 744 P.2d 1376 (Utah 1987).

¶18 In the instant case, once the land was dedicated to highway use by way of the 1936 right-of-way, it could not be abandoned or revert back to its owners without an official order of a competent authority. Harvey has failed to establish that such an order was made. Consequently, the trial court erred in ruling that UDOT had abandoned its

right-of-way

¶19 Harvey endeavors to avoid this outcome by urging us to apply common law rules concerning the abandonment of easements. This we cannot do. Our statute controls and makes no distinction between highways where the public holds fee title or only a right-of-way as here. To the extent that it is inconsistent with common law property principles, it preempts them.

CONCLUSION

¶20 The trial court correctly ruled that Harvey was not entitled to prove damages caused by the closing of the intersection. The trial court erred by ruling that UDOT had abandoned its right-of-way over the remaining strip of the 1936 condemnation.

¶21 Affirmed in part, reversed in part.

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¶22 Chief Justice Durham, Associate Chief Justice Durrant, Justice Russon, and Justice Wilkins concur in Justice Howe's opinion.