

The Record

Intermountain Commercial

The Salt Lake Times

Tuesday, February 9, 2010

Salt Lake City, Utah

SECOND DISTRICT COURT / PROPERTY CONDEMNATION

Third high-court go-round for condemnation case?

"If the condemning agency takes private property that is essential to the agency's project and uses that property in a way that interferes with the property owner's right of view, then the property owner is entitled to severance damages."

— Don Winder

Donna K. W. Johnson

Don Winder of Winder & Counsel argued the same property condemnation case twice before the Utah Supreme Court. Both times the high court sent it back to the Second District. Now Winder is bracing for another district court proceeding. But he may have to go back to the Supreme Court a third time depending on how events play out.

Winder's clients run an Arby's in Davis County. It is located at what was the former intersection of Shephard Lane and U.S. Highway 89. "It's up by Cherry Hill," he says.

The Utah Department of Transportation (UDOT) redesigned the intersection to reduce the number of accidents. They widened the highway and raised the roadbed 40 feet, taking a slender strip from Arby's for the frontage road. UDOT paid Arby's \$48,250 for its property. It later paid Arby's another \$56,250 for Arby's inability to comply with local zoning ordinances after completion of the project.

Customers can only get to Arby's from Shephard Lane. Before the project, Shephard Lane intersected directly with Highway 89. "Now, to get onto Shephard Lane," Winder says, "you have to get off the highway a mile north or a mile south. They put up those little signs on the highway saying 'Food at Next Exit: Arby's,' and Arby's raised their signage to a height of 60 feet. But it's still not like being accessible at a stoplight. According to my clients' records, they now have only about half of the business they had before the highway project was completed. We claimed severance damages from UDOT in Second District Court."

Winder explains severance damages: "The general condemnation law says the state can take private property if it's for a purpose that benefits the public good. But there is an exception to the condemnation rule. If the condemning agency takes private property that is essential to the agency's project and

uses that property in a way that interferes with the property owner's right of view, then the property owner is entitled to severance damages."

Winder says rights of visibility and view were hotly debated concepts: "We asked: Is visibility the ability of customers to see your business? Does view have more to do with the owner's perspective?"

Second District Court Judge Michael Allphin essentially gutted Arby's case by prohibiting Arby's from presenting evidence related to loss of view and visibility. "The trial court said UDOT can do what they want with their own property," Winder says. "Judge Allphin said UDOT took only a strip from the business and didn't even use it to elevate the highway. We appealed."

The Utah Court of Appeals affirmed the trial court's ruling, and Arby's took the case to the Utah Supreme Court. The Supreme Court noted that no Utah court had ever considered whether property owners have protected rights of visibility. The Supreme Court concluded that they do not. But, the high court added, Utah law does protect property owners' rights regarding loss of view.

"The Supreme Court agreed with us in part and UDOT in part," Winder says. "They said that if the strip of property UDOT took was essential to the highway project, we were entitled to damages for loss of view, but not for loss of visibility. We went back to the district court to determine whether the strip of land was essential to the project and if so, to determine damages for loss of view."

Back in the trial court, Winder says, UDOT admitted that the condemned land was essential to the project. But they also claimed for the first time that in a 20-year old deed, the property's previous owners granted the state rights of view and visibility. That, UDOT argued, meant Arby's had no legal standing to sue for damages at all. "The trial court chastised UDOT for not bringing this argument up in the first place," Winder

says. "But they said that even though UDOT was late, they were also right. They dismissed our case again. We appealed again, and wound up before the Supreme Court for the second time."

In its second review of the case, the Supreme Court ruled that the trial court exceeded the Supreme Court's directions when it allowed UDOT to amend its argument. Once UDOT admitted that the taken land was essential to the project, the Supreme Court ruled, all the district court had to do was de-

termine and award Arby's damages. The Supreme Court sent the case back to the trial court for this determination.

"Now," Winder says, "we're set for trial on April 13. If there is a third Supreme Court hearing, it will center on the definition of loss of view. We claim it means the landowner can't sell the land for as much as they could have before. The elevated highway limits the uses to which you can put the property. No one would want to put up a fast-food or other similar business on it. We're pretty certain UDOT will disagree."