UIdaho Law
Digital Commons @ UIdaho Law

Idaho Supreme Court Records & Briefs

12-18-2009

Curtis-Klure PLLC v. Ada Cty. Highway Dist. Appellant's Brief Dckt. 36647

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs

Recommended Citation
"Curtis-Klure PLLC v. Ada Cty. Highway Dist. Appellant's Brief Dckt. 36647" (2009). *Idaho Supreme Court Records & Briefs*. 3443.
https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/3443

This Court Document is brought to you for free and open access by Digital Commons @ UIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIdaho Law. For more information, please contact annablaine@uidaho.edu.

IN THE SUPREME COURT OF THE STATE OF IDAHO

CURTIS-KLURE, PLLC, dba MAPLE GROVE DENTISTRY, and JACK D. KLURE, D.D.S.,

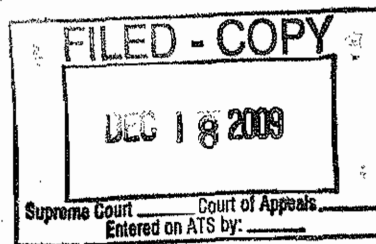
Appellants.

vs.

ADA COUNTY HIGHWAY DISTRICT,

Respondent.

Docket No. 36647



APPELLANT'S BRIEF

Appeal from the District Court of the Fourth Judicial District of

the State of Idaho, in and for the County of Ada

The Honorable Deborah A. Bail, District Judge, Presiding

Martin C. Hendrickson
GIVENS PURSLEY LLP
601 W. Bannock Street
P.O. Box 2720
Boise, Idaho 83701
Attorneys for Appellants

Mary V. York
HOLLAND & HART LLP
101 S. Capitol Boulevard, Suite 1400
P.O. Box 2527
Boise, Idaho 83701
Attorneys for Respondent

TABLE OF CONTENTS

I. STATEMENT OF THE CASE 1

II. COURSE OF THE PROCEEDINGS BELOW 1

III. STATEMENT OF FACTS 3

IV. ISSUES PRESENTED ON APPEAL 7

V. ARGUMENT 8

A. Maple Grove is Entitled to Business Damages Under Idaho Code Section 7-711. 8

B. As an equal partner, Dr. Curtis' ownership of the Property is sufficient to support Maple Grove's entire claim for business damages under Idaho Code section 7-711. 9

C. Maple Grove is entitled to its business damages because it was located on land owned by Dr. Curtis that adjoins the Condemned Property which was owned by Dr. Curtis. . 11

D. ACHD's Purchase of Dr. Curtis's Property was a Taking 12

E. Maple Grove's Interest in the Property Was Taken by ACHD 14

F. Maple Grove is Entitled to Recover Business Damages Reasonably Caused by the Taking, Including Relocation Costs 20

G. Maple Grove is Entitled to Recover Its Attorney Fees on Appeal if it Prevails in the Action 21

VI. CONCLUSION 21

TABLES OF AUTHORITIES

Cases

A.W. Duckett & Co. v. U.S., 266 U.S. 149, 151 (1924) 18, 19, 20
Ada County Highway District v. Acarrequi, 105 Idaho 873, 673 P.2d 1067 (1983) 8, 24
City of McCall v. Seubert, 142 Idaho 580, 584, 130 P.3d 1118, 1122 (2006). 9, 10, 11, 12, 13, 17, 23, 24
Fuddy Duddy's v. State Dept. of Transp., 950 P.2d 773 (Nevada 1997)...................................... 15
Lanning v. City of Monterey, 226 Cal.Rptr. 258, 262 (Cal.Ct.App. 1986)................................... 15
Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992).. 18
P.C. Management, Inc. v. Page Two, Inc., 573 N.E.2d 434, 437 (Ind.App. 1991) 15
Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 321 (2001).. 17, 18
Tulare Lake Basin Storage Dist. v. U.S., 49 Fed. Cl. 313, 318 (2001)... 18
Vincent v. Redev. Auth., Etc., 487 A.2d 1024, 1025 (Pa.Commw.Ct. 1985)................................ 16
Winn-Dixie Stores, Inc. v. Dept. of Transp., 839 So.2d 727 (Fla.App.2 dist., 2003) 21, 22

Statutes

Idaho Code § 40-2004.. 1, 2, 3
Idaho Code § 7-707... 16
Idaho Code § 7-711.................................. 1, 2, 3, 5, 6, 7, 9, 10, 11, 12, 13, 14, 17, 22, 23, 24, 25
Idaho Code § 7-718... 8, 24

Other Authorities

29A C.J.S. Eminent Domain § 150 (2004) 9
7 Nichols on Eminent Domain § G6.02[1] (3d ed. 1981)... 14

Rules

I.R.C.P. Rule 54(d)(1)(B) 8, 24

Constitutional Provisions

Idaho Const. art. I, § 14; U.S. Const. amend. V 17

I. STATEMENT OF THE CASE

Curtis-Klure, PLLC, dba Maple Grove Dentistry and Jack D. Klure, D.D.S. (together "Maple Grove") appeal from the district court's dismissal of their lawsuit against the Ada County Highway District ("ACHD"). Maple Grove claims business damages from ACHD under Idaho Code § 7-711(2) based upon the taking of real property that ACHD needed for its Ustick Road widening project in Boise.

II. COURSE OF THE PROCEEDINGS BELOW

Maple Grove filed its Complaint against ACHD on September 14, 2007, seeking declaratory relief and damages. R., p. 7. Maple Grove alleged that it was entitled to declaratory judgment that it was a qualifying business under Idaho Code § 7-711(2) and could therefore recover its business damages resulting from ACHD's acquisition of property for a public purpose, and that it was entitled to a jury trial to determine the amount of those damages. Maple Grove further claimed that it was entitled to recover its relocation expenses under Idaho Code § 40-2004.

In response to the Complaint, ACHD filed a motion to dismiss, arguing that Maple Grove improperly combined its request for declaratory relief with a claim for damages, and that Maple Grove failed to follow the proper administrative procedures with regard to its claim under Idaho Code § 40-2004. R., p. 13. The district court, in a Decision and Order dated February 19, 2008, denied the motion to dismiss as to Maple Grove's claims for declaratory relief and damages under Idaho Code § 7-711(2) and granted the motion as to the claim under Idaho Code § 40-2004. R., p. 31. During argument on the motion to dismiss, the parties debated whether the

action was properly described as one for inverse condemnation. In the Decision and Order, the trial court did not address the issue but observed that it had "questions about whether the Plaintiffs have a compensable interest and a right to recover under I.C. § 7-711 . . . ." R., p. 41.

In order to address those questions, on August 11, 2008, Maple Grove filed a motion for partial summary judgment, seeking a ruling from the district court as to Maple Grove's right to recover damages as a qualifying business under Idaho Code § 7-711. R., p. 43. Maple Grove also argued that, to the extent that it was required to establish the elements of an inverse condemnation claim in order to recover, it could do so by virtue of its leasehold interest in portions of the property acquired for public use.[1] ACHD argued in opposition that Maple Grove did not have a right to bring an action for damages under Idaho Code § 7-711(2) because such a claim could only be made in the context of an eminent domain or inverse condemnation action. R., p. 46. ACHD also argued that Maple Grove did not possess a property interest sufficient to support an inverse condemnation claim, and that no taking of any property occurred because ACHD was able to negotiate a purchase of the real property with the landowner. *Id.*

In a Decision and Order dated January 22, 2009, the district court denied Maple Grove's motion for summary judgment holding that Maple Grove did not possess a property interest that was the subject of a taking, and that Maple Grove was not entitled to business damages under Idaho Code § 7-711(2) because the property was acquired by ACHD via purchase. R., p. 98.

---

[1] Maple Grove also amended its Complaint in order to state an inverse condemnation claim in addition to the statutory claim for business damages under Idaho Code § 7-711(2). R., p. 73.

Pursuant to a motion by ACHD, the district court entered judgment against Maple Grove on February 10, 2009. R., p. 113.

Maple Grove filed its Motion for Reconsideration of Decision and Order and for Withdrawal of Judgment on February 24, 2009. R., p. 117. Following briefing and oral argument, the district court granted the motion for withdrawal of the February 10, 2009 judgment (R., p. 137), denied the motion for reconsideration (R., p. 139), and, on May 20, 2009, entered a Final Judgment in favor of ACHD, dismissing all of Maple Grove's claims with prejudice (R., p. 141). Maple Grove timely filed its Notice of Appeal on July 1, 2009. R., p. 145. Maple Grove appeals the trial court's decisions concerning its claim for damages under Idaho Code § 7-711(2).[2]

III. STATEMENT OF FACTS

Jack D. Klure D.D.S. ("Dr. Klure") and Thomas R. Curtis, D.D.S. ("Dr. Curtis.") owned and operated Maple Grove Dentistry as equal partners. R., Exh. 6, ¶¶ 1-2. Pursuant to a lease agreement between Dr. Curtis and Maple Grove (the "Maple Grove Lease"), Maple Grove leased an office building and real property located at 3224 North Maple Grove Road, Boise, Idaho for its dental practice from Dr. Curtis. R., Exh. 6, ¶ 4. Maple Grove operated the dental practice at that location for more than ten (10) years before Ada County Highway District ("ACHD") acquired the property. R., Exh. 6, ¶ 5.

In late 2005, ACHD moved forward with a construction project to widen Ustick Road between Five Mile Road and Cole Road (the "Project"). R., Exh. 7, ¶ 17. Completion of the

[2] Maple Grove does not appeal the trial court's dismissal of its claim for relocation costs under Idaho Code § 40-2004.

Project required ACHD to acquire private property along Ustick Road, including a strip of property adjacent to the office building where Maple Grove was located. R., Exh. 7, ¶ 20-22. Until the Project, Dr. Klure and Dr. Curtis intended to practice at the Maple Grove location until they retired. R., Exh. 9, ¶ 4. The facility was state of the art, with six fully equipped patient rooms. R., Exh. 9, ¶ 5. However, it was apparent to Dr. Curtis and Dr. Klure that the Project would result in the Maple Grove location being unsuitable for a dentistry practice due to the traffic being very close to the building and the new configuration of the lanes and driveways. R., Exh. 9, ¶¶ 2, 3 and 6. Both Dr. Curtis and Dr. Klure decided to relocate their practices based upon the changes to the location caused by the Project. R., Exh. 6, ¶¶ 7-8; R., Exh. 9, ¶ 4.

In June of 2007, Dr. Curtis entered into a settlement agreement with ACHD (the "ACHD/Curtis Settlement"). R., Exh. 6, ¶ 8. To facilitate the ACHD/Curtis Settlement, ACHD acquired more real property than it needed to complete the Project. The ACHD/Curtis Settlement provided just compensation for Dr. Curtis' fee interest in the property and settled all of Dr. Curtis' claims arising from Dr. Curtis' fifty percent (50%) interest in Maple Grove, including a claim for business damages under Idaho Code § 7-711. *Id.*

Dr. Klure did not benefit from the ACHD/Curtis Settlement. In fact, the ACHD/Curtis Settlement specifically excluded all claims by Dr. Klure and his fifty percent (50%) interest in Maple Grove. *Id.* Maple Grove continued to operate in its original location until Dr. Klure relocated his practice in April of 2007 and Dr. Curtis relocated his practice in June of 2007. R., Exh. 7, ¶¶ 62-64.

Maple Grove's leasehold interest in the property was terminated upon ACHD's acquisition of the property. R., Exh. 6, ¶ 4. According to the Maple Grove Lease, the Premises consisted of the lands and improvements located on Lot 19 Block 1 of Fairbanks Subdivision, according to the official plat thereof, filed in Book 55 of Plats at page 4987-4988, Records of Ada County Idaho. *Id.*, Art.2.1 and Exh. A.

Article 14.1 of the Maple Grove Lease states in relevant part:

> 14.1 Entire or Substantial Taking. If the entire Premises, or so much thereof as to make the balance not reasonably adequate for the conduct of Tenant's business, notwithstanding restoration by Landlord hereinafter provided, shall be taken under the power of eminent domain, this Lease shall automatically terminate as of the date on which condemning authority takes title or possession, whichever first occurs.

Correspondingly, Article 14.4 of the Maple Grove Lease states:

> 14.4 Sale Under Threat of Condemnation. A sale by Landlord of the Premises either under threat of condemnation or while condemnation proceedings are pending, shall be deemed a taking under the power of eminent domain for all purposes of this section.

ACHD appropriated the property when it entered into the ACHD/Curtis Settlement. Section B.1 of the ACHD/Curtis Settlement provides:

> ACHD shall pay Curtis the sum of One Million Ninety Five Thousand and No/100ths Dollars ($1,095,000.00) as just compensation and in full, complete and final settlement of any and all claims by Curtis, including their interest in [Maple Grove], and any and all damages suffered by Curtis, including their interest in [Maple Grove], of any kind or nature arising out of or relating in any way to the Project and/or to ACHD's acquisition of the aforementioned real properties described in Exhibits A, B and C hereto, and including necessary construction easements associated with the Project.

R., Exh. 6, ¶ 8. In exchange for this payment Dr. Curtis agreed to convey the property to ACHD. *Id.*, section G. ACHD's acquisition of the property terminated Maple Grove's leasehold estate.

Under the terms of the Maple Grove Lease, Dr. Curtis, as the landlord, was entitled to any award for the taking of all or part of the property. However, Article 14.3 of the Maple Grove Lease specifically states that:

> 14.3 Awards. Any award for any taking of all or any part of the Premises under the power of eminent domain shall be the property of Landlord, whether such award shall be made as compensation for diminution in value of the leasehold or for the taking of the fee; **provided that nothing contained herein, however, shall be deemed to preclude [Maple Grove] from obtaining and keeping, or to give Landlord any interest in, any award to [Maple Grove] for loss of or damage to [Maple Grove's] trade fixtures and removable personal property or for damage for cessation or interruption of [Maple Grove's] business, or for relocation costs or for the portion of such award as is allocable to leasehold improvements constructed or paid for by [Maple Grove].**

(Emphasis added.)

The ACHD/Curtis Settlement correctly compensated Dr. Curtis for, among other things, his fee simple interest in the property (including the real property actually used in the Project) and that part of Maple Grove's business damages attributable to his ownership interest in Maple Grove. In exchange, ACHD took possession of the property. However, this all occurred without Dr. Klure receiving compensation for his portion of Maple Grove's business damages.

Maple Grove attempted to negotiate a settlement with ACHD for the damage to Dr. Klure's interest in Maple Grove but ACHD refused to compensate Maple Grove for any damages the Project caused Dr. Klure or his interest in Maple Grove. R., Exh. 6, ¶ 11.

IV. ISSUES PRESENTED ON APPEAL

1. Whether Maple Grove is a qualifying business entitled to recover business damages under Idaho Code § 7-711(2).

2. Whether a taking of property occurred that triggered application of the business damages provisions of Idaho Code § 7-711(2).

3. Whether a taking of any property interest of Maple Grove occurred in connection with the Project.

4. Whether Maple Grove can recover its relocation costs under Idaho Code § 7-711(2).

5. Whether the district court erred in denying Maple Grove's motion for partial summary judgment and its motion for reconsideration, and by entering judgment in favor of ACHD and dismissing Maple Grove's claims with prejudice.

6. Whether Appellant is entitled to attorneys fees pursuant to Idaho Code § 7-718, I.R.C.P. Rule 54(d)(1)(B) and *Ada County Highway District v. Acarrequi,* 105 Idaho 873, 673 P.2d 1067 (1983).

V. ARGUMENT

A. Maple Grove is Entitled to Business Damages Under Idaho Code § 7-711.

The Idaho Legislature has provided for the compensation of certain business owners that are damaged by the taking of property for public uses. Idaho Code § 7-711(2) entitles any person or entity meeting its requirements to recover business damages. That statute requires the fact finder to ascertain and assess:

> [T]he damages to any business qualifying under this subsection having more than five (5) years' standing which a taking of a portion of the property and the construction of the improvement in the manner proposed by the plaintiff may reasonably cause.

Idaho Code § 7-711(2).

The Legislature's decision to require the payment of damages to qualifying businesses is independent of the right to receive compensation for a taking. The business damages provision was at issue in *City of McCall v. Seubert,* wherein this Court stated:

> . . . [T]he City's argument that an interest in remaining on the land sufficient to claim business damages must be proven by a written lease or agreement attempts to import a requirement into the statute that does not exist. **A business need only meet the statutory requirements of I.C. § 7-711 in order to make a claim for damages resulting from the taking of the underlying property.** "The right to receive business damages . . . resulting from a taking of land is strictly a statutory right . . . ." 29A C.J.S. Eminent Domain § 150 (2004).

City of McCall v. Seubert, 142 Idaho 580, 584, 130 P.3d 1118, 1122 (2006) (emphasis added).

The *Seubert* court analyzed section 7-711's statutory requirements to entitlement to business damages. The business must be on the property being taken for more than five years. *Seubert,* 130 P.3d at 1122. Once the duration of the business' occupancy has been established:

> There are two independent ways to qualify under I.C. § 7-711(2): '[T]he business must be owned by the party whose lands are being condemned *or* be located upon adjoining lands owned or held by such party.'

Seubert, 130 P.3d at 1122.

In this case, Maple Grove clearly satisfies the five year standing requirement where it operated on the Property for over ten years. There is simply no requirement that Maple Grove must prove a taking of its property in order to recover under the statute. Instead, all that is necessary is that Maple Grove proves that it qualifies under the explicit terms of the statute. In fact, Maple Grove qualifies for business damages under both prongs of section 7-711(2).

B. As an equal partner, Dr. Curtis' ownership of the Property is sufficient to support Maple Grove's entire claim for business damages under Idaho Code § 7-711.

To qualify for business damages, "[t]he business must be owned by the party whose lands are being condemned . . . ." Idaho Code § 7-711(2). An award for the full amount of a business's damages is appropriate under this statute where a majority owner of the business also owns the property being condemned. *Seubert,* 130 P.3d at 1122-1123.

In *Seubert,* one of the individual defendants was the majority shareholder of Valley Asphalt & Paving, Inc. ("Valley"). When the government brought its eminent domain action, Valley intervened as a party to the action and asserted claims for business damages. *Seubert,* 130 P.3d at 1121. This Court upheld the district court's decision to award Valley business

damages over the government's argument that Valley had no legally compensable interest in the property.

The *Seubert* court specifically held that Valley satisfied the first prong of Idaho Code § 7-711(2) which requires the business to be owned by the party whose property is being condemned. This Court said:

> Valley satisfies the first prong of I.C. § 7-711(2) that allows compensation to be paid to a business 'owned by the party whose lands are being condemned.' Valley is effectively owned by Seubert as Cherie Seubert is the majority owner of Valley and thereby controls the corporation. * * * Valley [] clearly meet[s] the requirements of I.C. § 7-711 and therefore, [is] entitled to make a claim for business damages.

130 P.3d at 1122-1123. This Court did NOT restrict recovery to only Mrs. Seubert's interest in Valley, but instead held that Valley, as a separate legal entity, was entitled to make an independent claim for any business damages it suffered as a result of the condemnation.

In this case, Dr. Curtis and Dr. Klure are equal partners in Maple Grove. Dr. Curtis stands in the shoes of Mrs. Seubert as a party that owned both the property being condemned and a controlling interest in the entity seeking business damages. Dr. Klure stands in the same position as Valley's minority shareholders. The *Seubert* court held that the award for Valley's business damages was appropriate. Since Maple Grove is owned by the party whose lands were condemned it is entitled to business damages under Idaho Code § 7-711(2). ACHD recognized this entitlement when it settled Dr. Curtis's claim for business damages in the ACHD/Curtis Settlement. Now, Dr. Klure is entitled to his portion of those damages which were specifically excluded from the ACHD/Curtis Settlement.

C. Maple Grove is entitled to its business damages because it was located on land owned by Dr. Curtis that adjoins the Condemned Property which was owned by Dr. Curtis.

Businesses that are located on: (1) land adjoining the condemned piece of property; and (2) on land owned by the condemnee; qualify for business damages under the second prong of Idaho Code § 7-711(2). *Seubert*, 130 P.3d at 1123.

Clearwater Concrete, Inc. ("Clearwater") was another intervenor in *Seubert* that was awarded business damages by the trial court. The Idaho Supreme Court upheld Clearwater's claim under the second prong of Idaho Code § 7-711(2). *Seubert,* 130 P.3d at 1122-1123. Clearwater's business was located on Seubert's property. *Seubert,* 130 P.3d at 1121. After the condemnation, Clearwater was located on a remaining portion of Seubert's property which was adjacent to the condemned property. *Seubert,* 130 P.3d at 1123. Accordingly, this Court held that "Clearwater clearly meet[s] the requirements of I.C. § 7-711 and therefore, [is] entitled to make a claim for business damages." *Seubert,* 130 P.3d at 1123.

Here, Maple Grove was located on land owned by Dr. Curtis. The land upon which Maple Grove was located is adjacent to the property used in the Project. The property actually used in the project was also owned by Dr. Curtis. Therefore, Maple Grove is entitled to recover the full amount of its business damages.

Dr. Klure and Maple Grove have demonstrated that Maple Grove satisfies both prongs of Idaho Code § 7-711(2). Therefore, the trial court erred by denying Maple Grove's motion for partial summary judgment and by dismissing Maple Grove's claim for business damages.

Instead, the trial court should have held that Maple Grove is a qualifying business under Idaho Code § 7-711(2) and permitted it to prove its business damages reasonably caused by the Project.

D. ACHD's Purchase of Dr. Curtis's Property was a Taking.

The trial court held that Maple Grove cannot prove an entitlement to business damages under Idaho Code § 7-711(2) because ACHD purchased the property from Dr. Curtis. Maple Grove concedes that no taking took place with regard to any of the purchased property that was not actually used in connection with the Project. However, focusing only on the property along Ustick Road that was actually used for the Project, which is currently part of Ustick Road and the sidewalk, and which adjoins the property where Maple Grove operated, it is plain that a taking of Dr. Curtis's property occurred.

While there is no Idaho case law addressing the issue, courts from other jurisdictions and other authorities are unequivocal in stating that a negotiated purchase of property that is used by a governmental entity for a public purpose is considered a taking. This issue generally arises in connection with the rights of a lessee in the condemned property.

> A deed in lieu of condemnation is treated at a "condemnation proceeding" in most instances, even though a formal lawsuit is not filed. Thus, a lease termination clause that is triggered by a condemnation proceeding is also triggered by conveyance of the property by deed in lieu of condemnation. . . . Property acquired amicably in lieu of condemnation is treated as though it were taken through an eminent domain proceeding, entitling the affected party to relocation costs.

7 Nichols on Eminent Domain § G6.02[1] (3d ed. 1981).

The Nevada Supreme Court addressed this issue in *Fuddy Duddy's v. State Dept. of Transp.,* 950 P.2d 773 (Nevada 1997), which involved a claim by a tenant following the sale of the property to the state transportation department. In that case, the tenant argued that the acquisition of the property by the government was not a taking because it occurred via negotiated purchase, which meant that the lease was not terminated pursuant to its condemnation clause. After citing cases from several other jurisdictions, the court held:

> We are persuaded by the above authorities and conclude that a purchase made under the threat of condemnation is the same as a judicial condemnation. This was not a sale on the open market. The Board of Directors of NDOT adopted a resolution authorizing and directing NDOT to acquire the Deebs' property on Industrial Road, including that leased by Eliades. The negotiation between NDOT and the Deebs appears to be a good faith effort to agree on the amount of compensation. Therefore, we conclude that the district court did not err in concluding that the condemnation clauses terminated Eliades' leases.

Id, 950 P.2d at 775. See also *P.C. Management, Inc. v. Page Two, Inc.*, 573 N.E.2d 434, 437 (Ind.App. 1991) ("We are persuaded by out-of-state authority that a conveyance in lieu of actual condemnation of real property constitutes a condemnation proceeding because it indicates an intention to acquire the property by condemnation and is tantamount to a taking under the power of eminent domain."); *Lanning v. City of Monterey*, 226 Cal.Rptr. 258, 262 (Cal.Ct.App. 1986) (Affirmed trial court's finding that sale of property to city was the essential equivalent of its exercise of eminent domain); *Vincent v. Redev. Auth., Etc.*, 487 A.2d 1024, 1025 (Pa.Commw.Ct. 1985) (events culminating in a conveyance by deed in lieu of condemnation constituted a "condemnation proceeding").

Furthermore, ACHD's general counsel admitted that "[b]y reaching the settlement agreement with Dr. Curtis for the purchase of his Property, ACHD accomplished its goal of acquiring property by agreement, rather than through condemnation." R.., Exh. 7, ¶ 52.

While ACHD ultimately acquired the property via negotiated purchase, this was not a sale on the open market. The property was not for sale prior to the Project. Maple Grove intended to remain in its original location and would have done so were it not for the Project. The only reason the sale occurred was because of the Project and ACHD's statutory duty to negotiate for property needed for a public purpose. Idaho Code § 7-707(7). Holding otherwise places the right of a business to recover damages under Section 7-111(2) in the hands of the governmental entity and the property owner. The government would be motivated to over pay for the real property in order to avoid having to compensate the business. This result would frustrate the intent of the Idaho Legislature.

The determination that the portion of Dr. Curtis's real property that was actually needed for the Project was the subject of a taking by ACHD triggers the business damages provisions of Idaho Code § 7-711(2). Because there was a taking of that portion of Dr. Curtis's property, Maple Grove is entitled to recover its business damages, and the trial court erred when it dismissed Maple Grove's claim.

E. Maple Grove's Interest in the Property Was Taken by ACHD

Pursuant to this Court's decision in *Seubert*, Maple Grove is not required to prove a taking of its property interest in order to establish a right to business damages under Idaho Code § 7-711(2). However, assuming *arguendo* that such a showing is necessary, the undisputed facts

in the record prove that a property interest of Maple Grove was the subject of a taking as a result of ACHD's acquisition of real property for the Project.

Both the Idaho Constitution and United States Constitution require the government to give just compensation for private property taken for public uses. Idaho Const. art. I, § 14; U.S. Const. amend. V. The plain language of these constitutional provisions require:

> [T]he payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation.

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 321 (2001).

There is a long standing distinction between the rules used to analyze physical takings as compared to those used to analyze regulatory takings.

> A physical taking occurs when the government's action amounts to a physical occupation or invasion of the property, including the functional equivalent of a practical ouster of the [owner's] possession.

Tulare Lake Basin Storage Dist. v. U.S., 49 Fed. Cl. 313, 318 (2001) (internal quotations omitted).

> When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof. Thus, compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, even though that use is temporary.

Tahoe-Sierra Preservation Council, Inc., 535 U.S. at 322. This categorical duty to compensate for a physical taking arises "no matter how minute the intrusion, and no matter how weighty the public purpose behind it." *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1015 (1992).

When the government takes a fee simple interest in property, it also takes any lesser interests in the property taken. *A.W. Duckett & Co. v. U.S.*, 266 U.S. 149, 151 (1924). Any arrangement the government may make with a property owner concerning compensation for the property taken, does not affect a tenant's right to be compensated for its leasehold interest. *A.W. Duckett & Co.*, 266 U.S. at 151. ACHD's appropriation of the property that it needed for the Project terminated Maple Grove's leasehold estate. The fact that this appropriation occurred via the ACHD/Curtis Settlement as opposed to a judicial condemnation proceeding is of no moment. ACHD has taken Maple Grove's leasehold estate without paying the full measure of just compensation for it.

As to trial court's conclusion that there was no taking of Maple Grove's property interest because ACHD did not need any portion of the property leased by Maple Grove for the completion of the project, we need only look to the settlement agreement that ACHD entered into with Dr. Curtis. Therein, it states:

> **WHEREAS, in connection with the Project, ACHD needs to acquire a portion of each of the Office Parcel**, Parcel 45 and Parcel 44; and
>
> WHEREAS, ACHD has offered to purchase Curtises' interest in the Properties as a settlement and accommodation of all of Curtis' claims, both as an owner of the properties and as a fifty percent

> (50%) member of Curtis-Klure. This settlement is intended to resolve and forever extinguish any all claims and disputes between ACHD and Curtis, including their interest in Curtis-Klure."

R., Exh. 6, ¶ 8 (emphasis added). The legal description of the "Office Parcel" referenced in the ACHD/Curtis Settlement is exactly the same as the description of the property leased by Maple Grove – Lot 19, Block 1 of Fairbanks Subdivision. Thus, ACHD clearly stated in the ACHD/Curtis Settlement that it did in fact need a portion of the "Office Parcel" in connection with the Project.

Further, even though the real property that ACHD needed for the Project did not include the actual building occupied by Maple Grove, the property taken by ACHD and actually used for the Project included property rights held by Maple Grove under the lease. Lot 19 is part of Fairbanks Subdivision and therefore subject to the rights and obligations under the Declaration of Covenants, Conditions and Restrictions for Fairbanks Subdivision. Lot 16 of that subdivision consists of the common areas and parking lot for the office buildings in the subdivision. Pursuant to those declarations, "Said Lot 16 is reserved for open area, landscaping, driveways and parking areas, public utilities, fire and police protection access, drainage, irrigation, trash receptacles and other uses appurtenant to the office buildings located on Lot 17 through 20, Block 1." R., Exh. 8, ¶ 2. This is also reflected in the Code of By-Laws of Maple Grove Professional Owners Association, Inc. "Each owner of all or any portion of Lots 17, 18, 19, and 20 in the said FAIRBANKS SUBDIVISION shall have a permanent nonexclusive easement to use the Office Building Common Area [previously defined as Lot 16, Block 1] for purposes of

ingress and egress from and to adjacent public streets, for automobile parking purposes, for utilities, and for trash receptacles, all subject to Rules and Regulations promulgated by this corporation as hereafter provided." *Id.*, ¶ 3.

It is clear from the materials submitted by ACHD that ACHD did in fact need to physically occupy portions of Lot 16 in order to complete the road widening project, and it is undisputable that portions of Lot 16 are presently paved as part of Ustick Road and its sidewalk. Those portions of Lot 16 were, therefore, taken for a public use. By taking portions of Lot 16, ACHD took a property interest that was appurtenant to Lot 19, which was leased by Maple Grove.

This is similar to the claim addressed by the court in *Winn-Dixie Stores, Inc. v. Dept. of Transp.*, 839 So.2d 727 (Fla.App.2 dist., 2003). In that case, the Florida Department of Transportation condemned a portion of a shopping center including some of the parking space. Winn-Dixie leased space in the shopping center and asserted that it was entitled to a portion of the settlement agreement proceeds between the department and the shopping center owner for the taking of its leasehold interest in the condemned property. *Id.* at 728. The shopping center owner argued that Winn-Dixie's leasehold interest did not include the parking area that was taken. The lease described the premises as only the building and the land on which it stood. The court rejected that argument.

> The lease, taken as a whole, contemplates a leasehold interest of the common areas of the shopping center. First, the lease refers to the leased premises as the "store building and related improvements." "Related improvements" include the specifications for the parking area which require a minimum ratio

> of 4.85 parking spaces per 1,000 square feet of building area. Second, the terms of the Lease indicate that its continuation or termination was contingent upon the availability of that parking. Third, Winn-Dixie paid separate consideration ("additional rent") for the monthly maintenance and repair for the parking area. The Lease required Winn-Dixie to pay .10 per square foot "as additional rent" to assist the landlord in maintaining and repairing the common areas, including "general repair and maintenance of all paved surfaces [and] repainting of parking area striping." Therefore, when read as a whole, the expressed terms of the Lease indicate that Winn-Dixie bargained for an interest in the parking area of the shopping center.

Id. at 730.

In the present case, while the Maple Grove Lease does not explicitly refer to the parking area and other portions of Lot 16, the declarations of the subdivision and the by-laws of the owners association demonstrate that by leasing Lot 19, Maple Grove was also entitled to an easement for parking and access to Lot 16, portions of which are now part of Ustick Road, Maple Grove and their sidewalks.

Going beyond the legal descriptions, one can easily see how the taking of real property needed for the road widening project would affect a business located in the office building on Lot 19. The new road and sidewalks are only a few feet from the office building. Access and parking were also significantly affected. All of these factors plainly played into ACHD's decision to purchase Dr. Curtis' property outright rather than attempting to carve out sections of it and being liable for damages for the remainder. This is also clear from the fact that ACHD, in the settlement agreement, compensated Dr. Curtis for his share of business damages sustained by Maple Grove. If Maple Grove was not a qualifying business under section 7-711 and/or there

was no taking of property that affected a property interest of Maple Grove, then there would have been no reason for ACHD to compensate Dr. Curtis for his share of Maple Grove's business damages.

F. Maple Grove is Entitled to Recover Business Damages Reasonably Caused by the Taking, Including Relocation Costs

While a discussion of the nature and amount of damages that may be recoverable by Maple Grove in this action is premature, ACHD argued in response to the motion for partial summary judgment, and the trial court agreed, that Maple Grove has no right to recover business damages because Dr. Klure relocated his practice and the expense of the relocation is not compensable. This position is contrary to the plain language of the statute and this Court's decision in *Seubert.* In that case, the government made exactly the same argument that ACHD made in this case – that relocation costs are not recoverable as business damages under section 7-711(2). The *Seubert* court held:

> Idaho Code § 7-711 does not attempt to define a limit of what damages are allowable under the statute, but rather refers to damages generally, providing for damages to any business "which the taking of a portion of any property . . . may reasonably cause." I.C. § 7-711(2). The language in I.C. § 7-711(2)(b), on which the City relies, does not preclude an award of relocation costs. It mainly serves to prevent a business from sitting on the condemned property and claiming business damages that could have been mitigated by relocating.

Id. at 586, 130 P.3d 1124. Thus, relocation costs are potentially recoverable in this action if Dr. Klure can prove that those costs were reasonable caused by the Project. Whether the relocation costs were caused by the Project and, if so, in what amount, are issues that were not presented to

the trial court during the summary judgment proceedings, and questions of fact preclude any determination of those issues at this time.[3]

G. Maple Grove is Entitled to Recover Its Attorney Fees on Appeal if it Prevails in the Action

Idaho law is clear that a condemnee is entitled to recover its attorney fees in an eminent domain or inverse condemnation action if the condemnor does not reasonably make a timely offer of settlement of at least ninety percent of the ultimate jury verdict. *Ada County Highway District v. Acarrequi,* 105 Idaho 873, 877, 673 P.2d 1067, 1071 (1983). This also applies to qualifying businesses that are entitled to damages under Idaho Code § 7-711(2). *Seubert* at 587, 130 P.3d at 1125. Therefore, upon remand, if Maple Grove prevails in this action and recovers business damages against ACHD, then it will be entitled to its fees and costs, including those incurred this appeal, pursuant to Idaho Code § 7-718 and I.R.C.P. Rule 54(d)(1)(B).

VI. CONCLUSION

Idaho's eminent domain statute contains the clearly expressed intent of the Idaho Legislature to compensate qualifying businesses that are damaged by the taking of real property for public use. The undisputed facts in the record show that ACHD needed to acquire property at the intersection of Ustick and Maple Grove for the Project, including property owned by Dr. Curtis and subject to the lease between Dr. Curtis and Maple Grove. By acquiring the property for use in the Project, ACHD triggered the application of Idaho Code § 7-711(2) and must

---

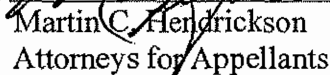
[3] It is ironic that one of the grounds for the trial court's decision to dismiss Maple Grove's claims in this case is that Dr. Klure had relocated his practice prior to the actual date that the property was purchased given the fact that this Court observed in *Seubert* that a qualifying business has a duty to mitigate its damages by relocating when necessary.

compensate any qualifying business for the damages reasonably caused by the taking. Maple Grove is a qualifying business by virtue of being located upon adjoining property owned by the Dr. Curtis. In addition, ACHD infringed upon Maple Grove's leasehold interest when it acquired property for the Project. Maple Grove should be permitted to proceed with proof of the damages reasonably caused by the Project.

For these reasons, Maple Grove respectfully requests that this Court reverse the judgment of the trial court and remand this action with the instruction that partial summary judgment be entered in Maple Grove's favor on the issue of Maple Grove's right to recover any business damages that it can prove were reasonably caused by the Project.

DATED This 18th day of December, 2009.

GIVENS PURSLEY, LLP



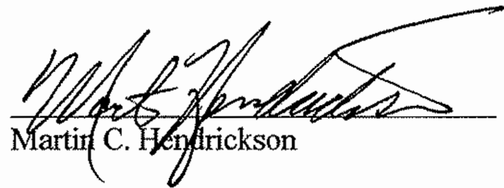
By ______________________
Martin C. Hendrickson
Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of December, 2009, a true and correct copy of the foregoing was served upon the following individual(s) by the means indicated:

J. Frederick Mack
Steven C. Bowman
Mary V. York
HOLLAND & HART LLP
Suite 1400, U.S. Bank Plaza
101 South Capitol Boulevard
P.O. Box 2527
Boise, ID 83701
Facsimile (208) 343-8869

☐ U.S. mail, postage prepaid
☐ express mail
☑ hand delivery
☐ facsimile



Martin C. Hendrickson