1975

Standard Optical Company v. Salt Lake Corporation : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STANDARD OPTICAL COMPANY, et al.,
Plaintiffs-Appellants,
vs.
SALT LAKE CITY CORPORATION,
Defendant-Respondent.

STANDARD OPTICAL COMPANY,
Plaintiff-Appellant,
vs.
LAWRENCE A. JONES, as Salt Lake City Auditor, et al.,
Defendants-Respondents.

Case No. 13924

RESPONDENT, SALT LAKE CITY CORPORATION'S BRIEF

Appeal from the Judgment of the Third Judicial District Court for Salt Lake County, Utah
The Honorable Bryant H. Croft, Judge

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NATURE OF THE CASE

The plaintiff-appellants commenced two separate actions challenging the validity of a Salt Lake City special improvement district, created pursuant to the provisions of Section 10-16-1 et seq., *Utah Code Anno-*

tated 1953. They have challenged the jurisdictional and procedural aspects of that improvement district and seek to have the same declared void and enjoin further work on the project.

DISPOSITION IN THE LOWER COURT

After consolidating the two above enumerated cases, the lower court on August 19, 1974, partially granted defendant-respondent, Salt Lake City's Motion for Summary Judgment; subsequently, on an expedited hearing, held September 10, 1974, the lower court received testimony concerning the validity of the contract between the City and Gibbons and Reed. Thereafter, in a memorandum decision the lower court ruled that the special improvement district was validly created pursuant to law in every respect and that the contract between Salt Lake City and Gibbons and Reed was valid.

RELIEF SOUGHT ON APPEAL

Salt Lake City as defendant-respondents, seek to have this court affirm the decision of the lower court and dismiss the appeal, awarding costs to the defendants-respondents.

STATEMENT OF FACTS

The facts as shown by the affidavits, the Findings of Fact of the lower court and the matters of record are as follows:

1. For approximately eleven (11) years prior to 1973, the Salt Lake City Commission had been considering a special improvement district concerning the area subject of the within litigation. They had appointed an ad hoc citizens committee for the purpose of considering what configuration such an improvement district should take. (Deposition of Mayor Jake Garn at p. 4; Affidavit of Mayor Jake Garn, R-33; Affidavit of City Engineer, Joseph Fenton, R-83).

2. On or about December 4, 1973, the City Engineer submitted to the Board of Salt Lake City Commissioners, a cost estimate of the proposal, which proposal was approved by said Board. The City Attorney was directed to prepare a Notice of Intention for the creation of a special improvement district. (R-110).

3. On or about December 18, 1973, a Notice of Intention to create said district was prepared by the City Attorney. It was thereafter submitted to and approved by the Board of Salt Lake City Commissioners. As relevant to this appeal, said Notice of Intention, among other things, provided that:

a. The purpose for the assessment was:
"To remove all existing curbs, gutters, sidewalks and street paving and to construct new street paving, pedestrian and planting, curb and gutters, together with new street lighting and draining structures, and to do all other work necessary to complete the project in

accordance with Salt Lake City standards."

* * *

"All other necessary things shall be done to complete the whole project in a proper and workmanlike manner according to the plans, profiles, and specifications on file in the office of the Salt Lake City Engineer . . ."

b. The nature of the improvements was to install and construct new curbs, gutters, sidewalks and street paving, together with pedestrian paving, landscape structures, planters and planting materials. Also new street lighting and draining structures would be constructed, together with those more specific items and alterations on file as plans, profiles and specifications in the Salt Lake City Engineer's Office.

c. Described the boundaries of the district as that area of blocks, 57, 58, 69, 70, 75 and 76 of Plat A of Salt Lake City Survey, within the area of South Temple Street on the North and Third South Street on the South, and between State Street on the East and West Temple Street on the West.

d. The estimated cost of the project was $2,875,189.75, as determined by the Salt Lake City Engineer's estimate. The property owners would be charged and assessed a sum not to exceed said $505.00 per front foot. The City would pay the balance of the costs estimated to be $872,405.20.

e. Protests should be filed on or before January 16, 1974, and that on the 17th day of Jan-

uary, 1974, the Board would consider such protests and objections that had been made. (R-57-58); see, notice printed as 1- appendix.

4. The aforesaid Notice of Intention was published in the Deseret News, a newspaper of general circulation in Salt Lake City and within the County of Salt Lake, once a week for four (4) successive weeks. Said publications were on December 20, December 27, January 3, and January 10, which last publication date was at least five (5) days, but not more than twenty (20) days prior to the time fixed in the Notice as the last day for filing protests. (Affidavit of City Recorder, Herman Hogensen, R-51).

5. On December 26, 1973, the Notice of Intention was mailed, postage prepaid to the registered owner of each lot, parcel, plot or real property located within the proposed Special Improvement District. (Affidavit of City Recorder Herman Hogensen, R-51).

6. On January 17, 1974, at a regularly scheduled meeting of the Board of Salt Lake City Commissioners, said Commission received all of the written protests filed and referred them to the Salt Lake City Engineers Office and to City Attorney and to the Planning and Zoning Department for report and tabulation. Further, at said meeting, every person present was given an opportunity to protest and state his objections; however, it was recommended that a further meeting be held, after a complete tabulation of the protests. (Af-

fidavit of City Recorder Herman Hogensen, R-52; Deposition of Mayor Jake Garn, p. 22).

7. On January 18, 1974, a notice was sent to each registered property owner and protester within the proposed Special Improvement District No. 480, requesting their attendance at a meeting to be held January 25, 1974, at 2:00 o'clock p.m. in the Salt Lake City Commission Chambers. The purpose of the meeting was to discuss said proposed improvement district and to hear any and all further comments thereon. Further, notice of said meeting and its time, place and topic for discussion was published in the Deseret News on January 21, 1974. (Affidavit of Mayor Jake Garn, R-35, R-39).

8. On or about January 22, 1974, tabulation of the protest showed that protests representing substantially less than two-thirds of the property to be assesed had been received; to-wit: 49.15% of those protests of record property owners, or if, three questionable protests were counted, 51.23%. (R-35, 36).

9. On January 25, 1974, the previously announced meeting was held in the Salt Lake City Commission Chambers. This meeting was a continuation of the previous January 17, 1974 hearing and was held as per the Notice mailed January 18, 1974. Further, there was wide public publicity of the said January 25, 1974 meeting in the public news media. There were more persons present at this meeting than were present at the January 17, 1974 meeting. A full discussion was

had before the Board of Salt Lake City Commissioners, wherein all who desired to speak were given opportunity to speak against or for the proposal. All of the plaintiff-appellants received notice of this January 25, 1974 meeting and all were either present in person or represented at this meeting. (Deposition of Mayor Jake Garn at p. 27; Affidavit of Mayor Jake Garn, R-36); Stipulation of Facts, R-55).

10. After said meeting of January 25, 1974, numerous previous protesters withdrew their protests and if these withdrawals are considered, the percentage of those protesting was reduced to 44.4%. (R-152).

11. On or about February 13, 1974, the Board of Salt Lake City Commissioners approved a Notice to Contractors requesting the submission of bids, which Notice was published in a newspaper having general circulation in Salt Lake City, February 14, 1974, and solicited bids for an opening March 7, 1974. Further, on said date, the Board approved the project plans and specifications of the architect, Barton-Aschman. (Findings of Fact No. 1, R-42; Affidavit of City Recorder Herman Hogensen, R-52). Said publication date was more than fifteen (15) days prior to the date specified for the receipt of bids. Said bids were received and duly opened and referred to the City Engineer and the City Attorney for determination of the lowest responsible bidder. (R-52).

12. The date of the bid opening was duly post-

poned, and bids were opened March 21, 1974. Findings of Fact No. 2, R-42).

13. Two bids were received, both on a "line item" basis. Schocker Construction Company bid a total price of $4,771,581.95, and Gibbons and Reed Company, $4,-123,254.15. The Gibbons and Reed bid was $648,327.80 lower than that of Schocker Construction Company, but $1,248,064.40 higher than the ~~engineer's~~ engineer's estimate of $2,-875,189.75. (Findings of Fact No. 3, R-42).

14. Because of the City's express guarantee to the property owners concerning their cost being limited to $505 per front foot, and difference between the estimated (and budgeted) amount, and the lowest bid, the City, with the assistance of its consulting architects, investigated the possibility of eliminating some of the proposed improvements. (Findings of Fact No. 6, R-43).

15. It was determined that the project could be brought within the City's budget by making certain deletions, that the deletions would have no adverse effects on the aesthetics of the project, and that the project as modified would have the same general effect as originally intended. This determination was based upon substantial facts before the City Commission and upon the opinion of the consulting architects. (Findings of Fact No. 7, R-43).

16. In connection with the proposed revisions to

the contract, the City caused to be prepared a "Target Vitality" summary sheet, dated April 4, 1974, which contained possible revisions to the lowest base bid which, as therein summarized, would reduce the cost from $4,123,254.15 to $2,834,766.21. (Findings of Fact No. 8, R-43).

17. On April 9, 1974, a notice of a meeting to be held April 16, 1974, in Salt Lake City Commission Chembers was mailed, postage prepaid, to each of the property owners within the district. (Affidavit of Mayor Jake Garn, R-37).

18. Thereafter, on April 16, 1974, an informal public meeting was held, notice of the meeting having been given and all affected property owners having been invited to attend. A summary of the proposed changes were distributed, which summary was patterned after a "Target Vitality" summary and showed a reduction in cost of $2,764,536.21. All members of the City Commission attended the meeting, and all persons desiring to be heard were heard, but no formal action was taken. (Findings of Fact No. 12, R-44).

19. The adjusted bid of Gibbons and Reed Company as computed by the City was below the engineer's preliminary estimate of $2,875,189.75, and below a similarly adjusted bid of Schocker Construction Company, City Engineer Fenton recommended to the Board of City Commissioners that the contract be awarded to Gibbons and Reed Company on the basis of the adjusted bid.

20. The "adjusted bid with deletions" of Gibbons and Reed Company was arrived at in the following manner:

Base Bid		$4,123,254.15
Less deletions:		
Traffic obelisks	$357,200.00	
Tree Guards	84,136.00	
Thick set pavers at intersections	389,061.45	
7" concrete bed	64,700.00	
Replacement of suspended system including hatch covers with grouted paving system	191,441.24	
Storm Sewer	202,534.50	
		1,289,073.19
Adjusted Bid		2,834,180.96

(Findings of Fact No. 14, R-45).

21. Because of the deletions that would be required in the contract, and the necessity of substitution of some other work as a result of the deletions, the City gave consideration to the possibility of rejecting both of the bids and readvertising the contract. Readvertising for new bids would not have been practicable and probably would have led to increased costs for the project inasmuch as the bidders would be expected to use

the July costs rather than the February costs, during a period of rapidly accelerating inflation in the construction industry; the contractors had been given a sufficient time to determine their costs accurately and the experience of the City had been that re-bidding of such a contract, under similar circumstances had never led a reduction in bid prices. (Findings of Fact No. 15, R-46).

22. The plans and specifications of the contract required that the pre-cast concrete pavers for the sidewalks to be the product of a manufacturer who was a licensee of Schokbeton, or comparable thereto. The only Schokbeton licensee in Utah or Idaho was Otto Buehner Company of Salt Lake City. Both Schocker Construction Company and Gibbons and Reed Company had received paver subcontract bids only from Otto Buehner Company and had based their bid prices thereon. Otto Buehner Company was the only subcontractor who could practicably supply the concrete pavers, and its price for such pavers would have been the same to any prime contractor bidding on the project. (Findings of Fact No. 16, R-46).

23. On or about July 2, 1974, the City issued an "Order for Extra Work" signed by the City Engineer, which directed Gibbons and Reed Company to do certain work "pursuant to" section 1 of the contract of June 12, 1974. The extra work so ordered was as follows:

Description of Work	*Value*
Shallow drainage system	$14,725.00
Roof drain adjustments	$ 2,400.00
Fire alarm pedestals	$ 1,589.00
TOTAL	$18,714.00

(Findings of Fact No. 29, R-50).

24. It was important for the City to award the contract on the basis of the bids previously submitted because if new bids were sought, the first phase of the project, between South Temple Street and First South Street, could not be completed by the scheduled date, and delayed completion would have a substantial adverse effect upon the businesses of the property owners along that section of Main Street. (Findings of Fact No. 17, R-46, 47).

25. On June 12, 1974, after advice had been given by the Salt Lake City Attorney and by the City's bonding counsel, that a contract could be entered into without readvertising, a contract was executed between Salt Lake City and Gibbons and Reed Company at the agreed price of the adjusted bid as shown in Statement of Fact No. 20 above. (Findings of Fact No. 18 R-47).

26. The contract, as awarded on June 12, 1974, deleted in their entirety the traffic obelisks, tree guards, thickset pavers at the intersections, seven-inch concrete underlayment (6470 square yards), and the storm sewer system included in the original plans and specifications. (Findings of Fact No. 20, R-47).

27. At the time Gibbons and Reed Company and the City entered into the contract on June 12, 1974, the following changes with their costs, were contemplated by the contracting parties:

Grout System	$540,789.02
Asphalt Paving at Intersections	$ 41,180.00
Drainage System	$ 22,786.00

(Findings of Fact No. 22, R-48).

28. Because of these deletions, completion of the project required some minor additions to the contract. Deletion of the storm sewer from the system necessitated installation of a shallow drainage system; and elimination of the suspended sidewalk system, permitted the use of non-reinforced sidewalk pavers which were thinner and smaller in dimension. (Findings of Fact No. 21, R-47).

29. Although the "grout system" was not shown as such in the line items, the contract price included what was intended to be the cost of the system. (Findings of Fact No. 23, R-48).

30. Replacement of the sidewalk suspension system with a grout system resulted in a net reduction in cost of $191,441.24, which is the difference between the line items comprising the suspension system totaling $731,434.50, as originally bid, and the cost of the side-

walk system as shown in the line items of the adjusted bid. (Findings of Fact No. 24, R-48).

31. Elimination of the storm sewer system required the addition of a shallow drainage system, and deletion of the thick set pavers at the intersections required the intersections to be covered with asphalt paving. Neither of these two additions were included in the total contract price of June 12, 1974, but the contract did include a unit price for asphalt paving. (Findings of Fact No. 25, R-48).

32. Under date of September 5, 1974, the City and Gibbons and Reed Company entered into a Supplemental Agreement to bring the line items into conformance with the plans and specifications. The agreement provided that line items 205:03 through 205:10 and 205:18 through 205:23 were stricken from the June 12, 1974, contract and line items of the descriptions, quantities, and prices shown in the September 5, 1974 agreement were substituted therefor. (Findings of Fact No. 26, R-48).

33. The Supplemental Agreement of September 5, 1974, resulted in a net increase in the contract price of approximately $784.02. All of the grout necessary to complete the installation of all pre-cast concrete pavers for the sidewalk system was included in the prices. (Findings of Fact No. 27, R-49).

34. The pavers included in the substituted line items as described in the September 5, 1974, agreement

were substantially the same type of pavers as were included in the June 12, 1974, agreement except that some of the pavers were thinner, nonreinforced, and of smaller dimensions. Otherwise, the pavers were the same. They required the same materials and had to be made by the Schockbeton or a comparable process. (Findings of Fact No. 28, R-49).

35. The items in the extra work order of July 2, 1974, were not included in the original contract but were necessary in order to complete the project. At the time of execution of the original contract on June 12, 1974, the need for the shallow drainage system was known, but the need for roof drain adjustments and fire alarm pedestals was not. (Findings of Fact No. 30, R-50).

36. Under the plan for the Main Street Improvement Project, the cost of improvements at the intersections is to paid entirely by the City, and the cost of the asphalt paving in the intersection will not increase the assessment against the property owners within the improvement district. (Findings of Fact No. 31, R-50).

37. On or about July 30, 1974, an extra work order was issued for approximately 3,000 tons of sand, at a potential cost of $8,250.00. This sand was to be used in filling abandoned underground vaults through 1974 and 1975, as needed. This item had not been included in the original contract because of uncertainty as to what vaults would have to be filled, but the City Commission had gone on record as saying it would pay the cost of

sand to be used. Although the estimated cost of the work order is $8,250.00, Gibbons and Reed Company committed itself to supply sand at a $2.75 per ton price for the entire project. This was advantageous to the City in that it was able to obtain a fixed price, not subject to increase during the 1975 phase of construction. Only sand actually used need be purchased. (Findings of Fact No. 32, R-50, 51).

38. The major changes made in the contract prior to its award to Gibbons and Reed Company consisted of the entire elimination of some improvements previously contemplated. The remaining changes were not substantial, and were necessitated by the elimination of other items. (Findings of Fact No. 34, R-52).

39. The changes made by the City after advertising for bids on the project did not substantially change the character of the project or increase its cost; they were reasonable, were in fulfillment of the original undertaking, and were necessitated by an emergency situation. (Findings of Fact No. 35, R-52).

40. In making the changes in the contract, the City and Gibbons and Reed Company acted in good faith and reasonably under the circumstances. Readvertising for new bids on the project would have resulted in increased costs for the construction and an unreasonable delay in completion of phase 1 of the project. If the readvertising had resulted in costs to the property owners in excess of $505.00 per front foot, additional pro-

ceedings would have been required under the Municipal Improvement District Act. (Findings of Fact No. 36, R-52, 53).

41. The changes made by the City were of the type contemplated by the original solicitation for bids and by provisions of 10-16-8, Utah Code Annotated 1953. (Findings of Fact No. 37, R-53).

42. Errors or irregularities in the manner of awarding the contract, if any, e.g., deletion of some of the quantities and specified line items, did not go to the substance of the contract and did not go to the equity or justice of the proceeding. (Findings of Fact No. 38, R-53).

43. Approximately one block of the three block project has been completed and there has been no assessment of tax against the property as of this date. (R-90; R-580).

44. Gibbons and Reed has had a long history of contracting work within the State of Utah, and specifically, for Salt Lake City Corporation. They have a reputation and are known by the City to do high quality work at reasonable prices. They are a firm of substantial size, capable of handling this large project, with financial means to handle and expedite this matter. Further, said firm has expertise in the type of project contemplated and has, in the past, been an easy firm with which the City could deal and correct difficulties as

contract work progressed. (Affidavit of City Engineer Joseph Fenton, R-89, 91).

45. The custom and practice of the construction industry for contractors bidding on state and municipal contracts is to have contract clauses which contain provisions for changes and extra work orders. It is usual to have changes in specifications and plans after a contract has been let. The custom and practice in the industry on such necessary changes is for the governmental agency and the contractor to agree on a price for the additional or extra work, or proceed on a "cost plus" basis. These matters are not let for competitive bidding, because among other reasons, it would result in confusion, delay and expense by having separate independent contractors on the jobs, not under the supervision of the general contractor.

(Testimony of Noel Gold, R-524-527; R-529-530).

ARGUMENT

POINT I

SPECIAL IMPROVEMENT DISTRICTS ARE PRESUMED TO BE VALID AND THE PROCEEDINGS CREATING THEM ARE PRESUMED REGULAR; FURTHER, IT IS PRESUMED THAT MUNICIPAL AUTHORITIES COMPLY WITH THE LAW AND

THEY EXERCISE THEIR POWERS IN A LEGAL AND LAWFUL MANNER. THE BURDEN OF PROOF IS ON THE CHALLENGER.

The creation of a special improvement district pursuant to state law is an exercise of legislative power having its origin in the taxing power. As such, the court's power to review is limited. This point is clearly made by our sister state of New Mexico when it stated:

> " 'A city council in establishing a sewer district and determining its boundaries, is exercising a legislative power, having its origin in the taxing power.' " *Feldhake v. City of Sante Fe,* 300 P. 2d 934, 939 (New Mexico, 1956), citing *Wolff v. City of Denver,* 77 Pac. 364. (Other citations omitted)

The court further noted from McQuillin:

> " 'It has been uniformly held that the action of the municipal legislature, in the pursuance of statutory or charter powers, *in establishing a district to be benefited by local public improvements so as to justify a special assessment against property lying within the district, is a legislative act which is conclusive in the absence of any evidence that it was procured by fraud, or proof that it is manifestly arbitrary or unreasonable, or that the assessment is palpably unjust and oppressive.* Accordingly, the power of review of the courts is limited.' " *Feldhake v. City of Sante Fe,* id at p. 939, quoting 14 McQuillin. *Municipal Corporations,* S38.47 at p. 157. (Emphasis added)

This court further correctly noted:

> "These propositions of law existing, *the burden of proof as to fraud or arbitrary conduct equivalent to fraud necessarily rests upon him who makes an attack upon the action of the city in determining that a municipal improvement district shall be established." Feldhake v. City of Sante Fe*, id. at p. 939. (Emphasis added)

Thus, in view of the presumption of validity and the limited power of review by the court, the district under attack must be presumed to be valid. The burden of proof is upon the challengers to establish those elements. See also, *City Jacksonville v. Dorwart*, 164 N.E. 129 (Ill. 1928); *Wiget v. City of St. Louis*, 85 S.W. 2d 1038 (Mo. 1935); *Peicke v. Covington*, 249 S.W. 1008 (Ky. 1923); 63 *CJS* Mun. Corp. §1137.

In Point I of the plaintiff-appellant's brief, they attempt to give this court the impression that the City had a binding policy of the City Commission not to approve a special improvement district, if there were more than 50% opposed to it. The record contradicts that implication. Regarding this subject, the testimony of Mayor Garn in his deposition is as follows:

> "Q. So this is just a touchstone, if I may use that phraseology, in determining whether you would or would not approve, but not necessarily binding on yourself or any other commissioner, is that correct?
>
> A. No. It's absolutely not binding. It's a

feeling we have and we follow. But as to Mr. Roe's question, it is not an ordinance and certainly not binding on us collectively or individually.

Q. Well, I'm just saying would three votes have made any difference even though you're talking about 49 percent or 51 percent opposed?

A. If the final tabulation, as far as I am personally concerned, would have ended up with the majority protesting, my personal vote would have been against the project.

Q. But that wouldn't have been binding on the other commissioners.

A. No, absolutely not, any more than any other issue that comes up. I think it is important Roger, if you just permit me for a minute on that meeting on January the 25th. Even though I personally, and again my own personal opinion, had made a public statement that I would vote with the majority, and I still stand by that and that is my personal policy, when the vote was so close against indicating 50.85 percent in favor. And I said to the commission, I said, even though I have made a commitment, I will not vote to approve that project with such a slim margin until we've had an opportunity to go through with the hearing that I had promised the property owners. So let's take it under advisement." (Deposition of Mayor Jake Garn, at p. 48-49.)

Further, the statement of plaintiff-appellants that they have in some manner been prejudiced by detrimental reliance is entirely unsupported by the evidence.

The undisputed facts show that each of the property owners received actual notice of the meetings and had the opportunity to present protests. The plaintiff-appellants have admitted that they individually received acual notice of every meeting held and have admitted they were either personally present at the meetings or were represented.

At no time has any evidence been presented that any property owner entitled to file a protest did not file if he desired, or was dissuaded from filing because of the alleged City 50% protest policy. In fact, over the entire length of these proceedings, no one has even suggested the name of any property owner entitled to file a dissent was dissuaded from doing so. Rather, plaintiff-appellants make the naked assertion that somehow they detrimentally relied on statements of the Commmissioners without one scintilla of evidence to meet their burden of proof on this issue.

Utah law regarding the filing of a dissent as applicable to this special improvement district is clear and unequivocal. It states:

> "For purposes of this section, the necessary number of protests shall mean the aggregate of the following:
>
> (a) Protests representing *two-thirds* of the property to be assessed in cases where an assessment is proposed to be made according to frontage, or

(b) . . .

(c) . . .

> *If less than the necessary number of protests are filed by the owners of the property to be assessed, the governing body shall have jurisdiction to create the special improvement district and proceed with the making of the improvements."* 10-16-7(3). Utah Code Ann. 1953 (Replacement Volume 2A). (Emphasis added)

Thus, not only has the plaintiff-appellant failed to meet his burden of proof, but the statute clearly precludes their assertion.

However, even accepting arguendo that the City is somehow bound, contrary to the provisions of Utah law to a 50 percent test, the facts clearly show that this test has been met. The law specifically permits the withdrawal of protests during this hearing and evaluation period. It states that in computing the percentage of protesters, the municipality shall *not* count:

> ". . . (i) Protests relating to property or relating to a type of improvement which has been deleted from the district, and (ii) *Protests which have been withdrawn in writing prior to the conclusion of the hearing."* 10-16-7(3), *Utah Code Annotated* 1953, (Replacement Vol. 2A). Emphasis added.

The facts are undisputed that the meeting scheduled in the notice of protest was duly held January 17, 1974. This meeting was continued until January 25, 1974,

pursuant to written notice of all of the property owners concerned with this district. Thus, contrary to the assertion of the plaintiff-appellants in their brief the law specifically permits the withdrawing of protests and appellants citation of 1895 and 1929 cases can hardly amend language of a 1969 statute.

Further, in view of the clear statutory provision fixing the protesters at two-thirds, the City commission cannot be barred from considering the withdrawal of two protests and thus, reducing those protesting or opposed to the district to 44.4%, regardless of the time when withdrawn. The rule of thumb of some commissioners that they would personally not vote for a district, if more than fifty percent opposed it, as a legislative policy question, should not be codified into law by judicial fiat, as requested by appellants. Rather, these are political decisions for which the commissioners were elected to make and for which they are responsible to the electorate. If they choose in that political decision making process not to consider protests which have been withdrawn they are well within their statutory power and may approve or disapprove the project. That is exclusively a political and not a judicial decision.

Thus, under any count of the protesters, the board acted entirely within the scope of its statutory authority and exercised its political discretionary powers vested by state statute in approving the special improvement district. The decision of Judge Croft affirming their

right under the law to make decision should not be disturbed by this court.

POINT II

THE CREATION OF A SPECIAL IMPROVEMENT DISTRICT BY A UTAH CITY IS AUTHORIZED BY STATE LAW. COMPLIANCE WITH THE PROVISIONS OF STATE LAW IS TO BE JUDGED BY A STANDARD OF "SUBSTANTIAL" COMPLIANCE AND MERE IRREGULARITIES WILL NOT VOID THE DISTRICT.

A. *Substantial Compliance.*

This court has stated what standards are to be applied in determining the compliance with statutory requirements for creation of a special improvement district. It has said:

> ". . . (T)he courts generally hold that the giving of such notice (Notice of Intention to create a district) is jurisdictional, *and must be substantially complied with in order to authorize a levy of an assessment.* 4 McQuillin, *Municipal Corporations.* §1849-1852 . . . (Other citations omitted) The diversity among the decisions is not with respect to giving notice, but there is a marked difference among them with respect to the sufficiency of the notice where notice is given." *Jones v. Foulger,* 46 U. 419, 150 P. 933 (1915). (Emphasis added).

This observation was cited with approval in a 1974 decision of this court. In voiding a district for the *total* failure of Kanab City to provide for a Board of Equalization and Review, the court stated:

> "... Failure of the City to *substantially comply with the statutes* pertaining to the giving of notice are jurisdictional." *Lewis v. Kanab City,* -U.2d-, 523 P.2d 417, 418 (1974).

Thus, the City need not "strictly" meet all statutory requirements of the creation of an improvement district on pain of running the gauntlet of a jurisdiction defect and dismissal. Rather, a special improvement is valid if it "substantially" complies with the enabling legislation and a technical defect will not be grounds for judicially declaring it void.

B. *The Notice of Intention of this Special Improvement District.*

The Notice of Intention of this special improvement district complies with state law by generally describing the improvements to be made and stating the purpose for its creation.

In the case before the bar, there is no question that the Notice was given or that it was published as required by law; rather, the plaintiff-appellants have challenged only the sufficiency of the Notice of Intention. In this challenge they state that the published notice did not:

1. State the "purpose" for which the assessments were made;

2. Describe the improvements to be made;

3. Advise abutting property owners and the citizens of Salt Lake in general, that streets would be narrowed and the grade changed; and

4.Give notice that traffic pattern on Main Street would be changed. (Point II of plaintiff-appellants Brief).

A reading of the Notice and applicable Utah statutes answers these challenges clearly.

Section 10-16-4 of the Utah Code states that special improvement districts may be created, among other things therein listed, to: (1) Establish, open, extend and widen any street or sidewalk; (2) Install sewers, drains or parks; (3) Construct bridges or street lighting; (4) Cover or fence reservoirs, canals, ditches or other water facilities; (5) Acquire and maintain parking lots; and (6) Construct recreational facilities and parks. See, 10-16-4, *Utah Code Annotated* 1953, as amended in 1969. This section also specifically provides that special improvement districts and tax assessments may be levied to pay for any such improvement; it states:

"For the *purpose* of making or paying for all or a part of the cost of any *such* improvements . . ., the governing body of a municipality may . . . levy assessments on the property within such

a district. . . . "10-16-4(2), *Utah Code Ann.* 1953.

The statute regarding Notice of Intention only requires that the municipality state what improvements are to be made in a "general way." It provides that the notice:

> "In a *general way,* describe the improvements proposed to be made showing the places the improvements are proposed to be made and the general nature of the improvements." 10-16-5(1)(d), *Utah Code Ann.* 1953; cf. 10-16-5 (a), which says they will also state the "purpose" for tax assessments. (Emphasis added).

It is submitted that these three sections must be read together. Certainly the legislative merely intended that the property owners be apprised in a "*general way*" of the improvements proposed and be advised of the "purpose" for the assessment; that is, that the assessment is to do curb and gutter type of work and not to purchase land for a park, building a water reservoir or some other authorized project. This statutory construction seems certain since the legislature did not require a statement of "purposes." Obviously, there are many collateral and subjective types of purposes in any construction projects and not all of these need be published under law. Further, the legislature seems to have gone out of its way to make it abundantly clear, by stating the improvements need only be described in a "general way," that specifics need not be made a part of the notice. Certainly plaintiff-appellants citing of cases dating 50 years before this law was passed have no

precedent value on that issue.

Rather, Utah case decisions rendered after the Municipal Improvement District Act of 1969 was passed have sustained this interpretation of a general type notice. The most recent decision is the 1971 case of *Dawson v. Swapp*, 26 Ut.2d 250, 487 P.2d 1288 (1971). Like the case before the bar, the plaintiff there attempted to challenge the sufficiency of the Notice of Intention; he charged that it failed to state:

> a. All of the purposes of the project in the Notice of Intent, i.e., the purchase of land; and
> b. A general description of the work to be done.

In this *Swapp* case, the notice described the improvements as consisting:

> ". . . of the necessary grading and construction or reconstruction of the curbs, gutters, driveways, sidewalks and other appurtenant facilities and works." *Dawson v. Swapp,* id. at p. 1289.

This court observed that the lower court judge:

> ". . . found that the notice of intention and its publication fully complied with the statutory requirements and that sufficient notice was furnished to all interested persons of the intention to create the district and the improvements intended to be made." *Dawson v. Swapp,* id. at p. 1289.

That lower court holding was not disturbed by the court and it affirmed the dismissal by Judge Gould of the challengers action.

In the case before the Bar, Salt Lake City, Notice of Intention is virtually identical to the *Swapp* case. It described the purpose and the improvements to be made in a general way by stating that the proposed improvement district was:

> "To remove all existing curbs, gutters, sidewalks and street paving and construct new street paving, pedestrian paving, landscape structure, planters and planting, curb and gutters, together with new street lighting and drainage structures, and do all the work necessary to complete the project in accordance with Salt Lake City standards."
>
> . . .
>
> . . .
>
> "All other necessary things shall be done to complete the whole project in a proper and workmanlike manner according to the plans, profiles and specifications on file with the Salt Lake City Engineer . . ." Statement of Fact No. 3 and Appendix 1.

Further on file with the City Engineer were the plans and profiles and specifications which showed the details of the project in the notice. It showed the grade changes, the change in vehicular and pedestrian traffic patterns and the change in space allocations for pedestrian and vehicular traffic. (Affidavit of City Engineer Joseph Fenton, R-84). Our sister state Idaho specifically approved this incorporation by reference to augment a notice of intention to create a special im-

provement district. In the case of *Dement v. City of Caldwell,* the Idaho court upheld plans incorporated by reference and held:

> ". . . the reference to the plans and specifications is sufficient to give notice to all parties interested in the general character of the proposed works." *Dement v. City of Caldwell,* 125 P. 200, 202 (Ida. 1912); see also 13 McQuillin, *Municipal Corporation,* §37.85 and cases therein cited.

Thus, it is respectfully submitted that even if one accepts arguendo, plaintiff-appellants position that the Notice should have been more specific, the incorporation by reference of the detailed plans gave all notice of the details of this proposed improvement district. The statute regarding notice has been more than "substantially" complied with by the City and the district is valid.

The only known case to the writer which has language which could possibly be construed to support the appellants position that the Notice of Intention of Salt Lake City was not sufficient, is a 1917 case of *Gwilliam v. Ogden City,* 49 Ut. 555, 164 P. 1022 (1917). However that case is distinguishable because the plans were not incorporated by reference. Further, with regard to the notice requirement, that case was based on Section 273 of the Laws in force in 1917; and that section of Utah law has long ago been repealed. In fact, the 1969 State Legislature passed a Comprehensive Municipal Improvement District Act, which Act as a whole,

shows that the publications are for the purpose of giving property owners notice of the project, not in specifics, but in a "general" way. The change in the language specifically by inserting "general way" makes the *Gwilliam* holding on this point of no precedent value. Obviously, under the present law, the notices of intention are not intended to be published in book form.

The Notice of Intention in the case before the bar certainly meets this legislative intent and "substantially" complies with state law. Further, the challengers have not shown any prejudice and have not even alleged that anyone in the district was, in fact, unaware of: (a) The grade change of less than one foot; (b) The elimination of one traffic lane to make Main Street have two vehicle traffic lanes in each direction, instead of two in one and three in another; and (c) The alteration of some vehicular traffic patterns by preventing Main Street from being a thoroughfare to Davis County over Victory Road.

It is respectfully submitted that the Notice is valid within the meaning of the 1969 Municipal District Act and this court should so find.

POINT III

A STREET IS THAT AREA BETWEEN PROPERTY LINES AND INCLUDES SIDEWALKS AND SPACE FOR VEHICULAR TRAFFIC. AS SUCH, THERE IS NO NEED TO

PASS AN ORDINANCE WHEN THE CITY CHOOSES TO CHANGE THE ALLOCATION OF SPACE BETWEEN VEHICULAR AND PEDESTRIAN TRAFFIC ON SALT LAKE CITY STREETS.

Plaintiff-appellants have assigned as error the alleged failure of the City to pass an ordinance narrowing a street as required by Section 10-8-8.2, Utah Code Ann. 1953, as amended. This statute provides as follows:

> "When in the opinion of the governing body of the city there is good cause for vacating, or narrowing a street or alley, or any part thereof, and that such vacation or narrowing will not be detrimental to the general interest, it may, by ordinance, and without petition therefor, vacate or narrow such street or alley or any part thereof."

Significantly, Section 10-8-8.5, *Utah Code Ann.* 1953, provides that when the street has been narrowed by ordinance, that action shall constitute a relinquishment of the City's ownership therein. The statute provides:

> "The action of the governing body vacating or narrowing a street . . . which has been dedicated to public use by a proprietor, shall operate to the extent to which it is vacated or narrowed, . . . *as a revocation of the acceptance thereof and the city's relinquishment of the city's fee therein by the governing body. . . .*" (Emphasis added).

Thus, the statutes are clear if a street is narrowed

or vacated by ordinance as permitted by Utah statutes, to the degree that the street is narrowed or vacated, the ownership and rights of the City to that property is abandoned and vacated. Obviously, the intent of the legislature was not to require that whenever a municipality chose to allocate portions of this right-of-way to vehicular or pedestrian traffic, that it must pass an ordinance and thereby lose ownership thereof. This is the result that would accompany the logic propounded by the plaintiff-appellants in their brief.

Rather, Utah law is clear that the word "street" contemplates the full area between abutting property lines. This point was made clear early by the Utah Court in the case of *Davidson v. Utah Independent Telephone Co.*, 34 U. 249, 197 P. 124, 125 (1908). Here, in rejecting the claim that the word "street" meant only area used for vehicular traffic, the court stated:

> *"The word 'street', 'as commonly used and understood,' means a highway in a town or city used for the public for travel either by means of vehicles or on foot, and embraces all of the areas between the lots on either side."* (Emphasis added) (Citations omitted) See also, *Salt Lake City v. Schubach*, 108 U. 266, 159 P. 2d 149 (1945); *Stringham v. Salt Lake City*, 114 U. 517 201 P. 2d 758 (1949); *Gallegos v. Midvale City*, 27 U. 2d 27, 492 P. 2d 1335 (1972), *City of Holdenville v. Talley*, 240 P. 2d 761 (Okl. 1952), cited with approval in *Gallegos v. Midvale City*.

Thus, it is clear and obvious that City has not nar-

rowed the "street"; rather, it has merely changed the space allocations for vehicular and pedestrian traffic. It has not narrowed the street within the meaning of 10-8-8.2. Therefore, no passage of an ordinance is required.

Further, contrary to the assertion of the plaintiff-appellants, the lower court did not find the "street" narrowed. The memorandum decision of Judge Croft, referred to by the plaintiff-appellants in Point II of their brief, constituted a partial granting of defendant-respondents motion for a summary judgment. His statement in that decision referring to undisputed facts that one lane of the then five lane Main Street was eliminated and that space allocated to sidewalk area; two lanes of vehicular traffic in both direc~~tors~~ (1982) were and are to remain. To suggest that the lower court made a finding of fact on conflicting evidence in that summary judgment proceeding is ludicrous. (See, the Plans entered as Exhibits T3-D and T4-D and the testimony of Mayor Jake Garn at Deposition p. 28; cf. Memorandum Decision of Judge Croft in which he specifically held that Section 10-8-8.2 could not create a jurisdictional defect in the Municipal Improvement District Act, R-285; cf. R-290).

However, even accepting arguendo, the position of the plaintiff-appellants that a City ordinance should have been passed, it does not follow, as was specifically held by Judge Croft, that the provisions of Section 10-8-8.2, *Utah Code Ann.* is a jurisdictional element for

creation of a special improvement district. It will be noted that the aforesaid section of the Utah Code is not within the Municipal Improvement District Act and cannot possibly be construed to be a jurisdiction requirement thereof. In fact, the said Municipal Improvement District Act specifically provides that it:

> ". . . shall constitute *full authority* for the making of improvements, creations of special improvement district, levying of assessments, and the issuance of special improvement bonds by municipalities." 10-16-38, *Utah Code Ann.* 1953, as amended.

The failure to pass such an ordinance provided in Chapter 8 could not be considered jurisdictional to void the improvement district created under the provisions of Chapter 16, when it is expressly stated to be self executing.

In addition, it is important to note that Utah law grants to the cities the unbridled power and discretion to lay out, establish, alter, widen or *narrow* streets and sidewalks. The statute provides as follows:

> *"They may lay out, establish, open, alter, widen, narrow, extend, grade, pave . . . streets . . . sidewalks . . ."* 10-8-8, Utah Code Ann. 1953, as amended. (Emphasis added)

Thus, the City has broad power and right to allocate right-of-way areas between vehicular and pedestrian traffic. There is no requirement that there be any

notice whatsoever given for this exercise of city prerogatives in managing the streets.

Further, Utah law is clear that property owners have no vested right in traffic flow. The cases are consistent and uniform in their holding; a representative case states as follows:

> "It is settled in this jurisdiction that the land owner has no property right in the flow of traffic on a public highway." *Utah Road Commission v. Hansen,* 14 U. 2d 304, 393 P. 2d 917 (1963) and cases therein cited; see also, *Town or State v. Roselli,* 101 U. 464, 120 P. 2d 276; *Springville Banking Co. v. Barton,* 10 U. 2d 349 P. 2d 157; *Robinette v. Price,* 74 U. 512, 280 P. 2d 736.

Thus, it is respectfully submitted that this court should affirm the lower court's ruling that the special improvement district is not void or defective because it altered space allocations between vehicular and pedestrian traffic on Main Street. The abutting property owners have no vested right to traffic patterns of a street. The street has not been narrowed; rather, space allocations between vehicular and pedestrian traffic have merely been altered as permitted by law. Further, the passage or failure to pass a city ordinance relating to an alleged street narrowing is not a jurisdictional element for the creation of a special improvement district.

POINT IV

EVEN ACCEPTING ARGUENDO THAT THE NOTICE OF INTENTION TO CREATE A DISTRICT WAS DEFECTIVE IN SOME JURISDICTIONAL ASPECT, THAT DEFECT DOES NOT VOID THE DISTRICT; RATHER, EQUITY REQUIRES THAT THE DISTRICT AND THE TAX BE HELD VALID SO FAR AS THE CHALLENGERS HAVE BEEN BENEFITED AND TO THE EXTENT THE CITY HAS NOT EXCEEDED ITS AUTHORITY.

It is well settled law in the State of Utah that even an improvement district has been created with jurisdiction defects, the entire district is not voided. Rather, only those portions which exceed the City authority are invalidated.

The principle case concerning this subject, concerned the creation of a curb and gutter district which plaintiff-appellants challenged on the ground that the Notice of Intention failed to:

> a. State the purpose for which the taxes would be levied; and
> b. Describe the proposed improvements which were contemplated.

This court observed:

> "The law is well settled that, if what the city does merely amounts to an irregularity, either in

> publishing notice or in letting contracts, or in their execution, etc., the assessment of tax imposed to defray the cost of the improvement cannot be collaterally assailed in equity or otherwise. If, however, what the city does or omits to do affects its power or jurisdiction to make the proposed improvement, that is, if the publication of the notice is jurisdictional, and the city in publishing said notice does not comply with the requirements of the law, and, for that reason, does not acquire jurisdiction to order or to make the proposed improvement and to levy the special tax to defray the cost thereof upon the abutting property, the the tax may be collaterally assailed at any time." *Gwilliam v. Ogden City*, 49 U. 555, 164 P. 1022, 1024 (1917).

Thereafter the court reasoned that the Notice of Intention of Ogden City failed to meet the requirements imposed by Section 273 of the Law of Utah 1917 and stated:

> "In all the foregoing cases this court held that the things required of the city by Sec. 273 (notice of intention) are jurisdictional, and unless they are complied with with reasonable strictness the city authorities are without power or jurisdiction to impose a special assessment or tax to defray the cost of the proposed improvement." *Gwilliam v. Ogden City*, id. at p. 1024.

However, after so holding that the notice was jurisdictional and was defective, the court refused to void the entire district. Rather, it deleted from the tax assessment only that portion concerning street grading, which

was not properly made subject of the Notice of Intention under then existing law. The court specifically held:

> "To the extent that the tax is valid and as far as it benefited plaintiffs' property equity requires that their property be held to pay the same. To the extent that the city has exceeded its authority and hence seeks to impose an invalid assessment and tax upon plaintiffs' property, they should be given relief." *Gwilliam v. Ogden City,* id. at p. 1025.

Therefore, the court specifically refused to enjoin collection of the improvement assessment and held that the court in equity would restrain the city only from enforcing the invalid portion of the tax; that is, that portion which was not properly made a part of the Notice as required by law.

Another case closely in point is *Branting v. Salt Lake City,* 153 P. 995 (1915). In this case, the Utah Supreme Court was asked to rule on an objection to a special improvement district which attempted to levy an assessment in excess of the Engineer's estimated costs published in the Notice of Intention. The complainants argued that had all the property owners been aware of the cost, they may have been unwilling to approve the district and filed timely protests. The court acknowledged the possibility but rejected the argument, stating that a taxpayer had a duty to file timely protests. When they did not file protests, they waived their

rights to oppose the district; that is, the court apparently rejected the argument that the entire district must be voided for an alleged jurisdictional defect in the Notice of Intent. The court stated specifically:

> "Now, they (plaintiffs) say, the taxpayers may have been willing to pay the cost of the improvement according to the estimate, *while they may not have been willing to pay for one which exceeded the estimated cost.* That may be so, but that is not the controlling question here. Taxpayers like all other persons, must take notice of and abide by the law. ***Branting v. Salt Lake City,*** id. at p. 999. (Emphasis added)

The Municipal Improvement Act of 1969 also contemplates this result by limiting judicial review. That law provides:

> "No assessment or proceeding in a special improvement district shall be declared void or set aside *in whole or in part in consequence of any error or irregularity which does not go to the equity or justice of the assessment or proceeding.* However, *any party . . . who has not waived* his objections thereto (by failure to file protest or object) . . . shall have the right to commence a civil action against the municipality to enjoin the levy or collection of the assessment or to set aside and declare unlawful the proceedings."

> "(2) . . . ***Such action shall be the exclusive remedy of any aggrieved party. No court shall entertain any complaint which the party was authorized to make, but did not make in a pro-***

test filed pursuant to Section 10-16-7 *or at hearings held pursuant to Section* 10-16-17, *or any complaint that does not go to the equity or justice of the assessment or proceeding."* 10-16-28 (1) (2), *Utah* Code Ann. 1953, as amended. (Emphasis added)

It is respectfully submitted that this observation is the reason why this Court in 1971 ruled that it was premature to commence an action prior to the time that an actual tax assessment had been made. Only that portion of the tax illegally assessed may be challenged and only those persons who properly filed protests or objections may so object. See, *Dawson v. Swapp,* supra. Thus, the law in Utah is clear that jurisdictional defects may only be asserted by those who have properly filed protests. Further, only those particular defects must be deleted from the project's tax assessment.

In the case before the Bar, even if one accepts the entire position of plaintiff-appellants that the Notice of Intention was defective for failure to notify the landowners of the grade change and the others mentioned, the only remedy would be to delete the proportionate cost thereof from the protestor's tax assessments. Those sums deleted would be paid by the City. On this point, the Municipal Improvement District Act states:

"If any property shall be illegally assessed . . . the municipality so assessing such property shall be liable to the holder of the special improvement bond issuing against the funds created by such assessments, which amount shall be

paid from the general fund of the municipality." 10-16-29 (2), *Utah Code Ann.* 1953, as amended.

This statutory provision follows former case law statements. In *Ryberg v. Lundstrom,* 70 U. 517, 261 P. 453 (1927), the court refused to grant a writ of mandamus to compel the city to levy an assessment after a special improvement district was held void for failure to establish a Board of Equalization. The court held that extraordinary relief was not available because the City was required to pay the contractor from the general fund and that it was legal for the city to make an additional assessment in substitute for the illegal one. Virtually identical to that result was the case of *Booth v. Midvale City,* 184 P. 799 (1919) In this case, the court refused to grant a writ of prohibition to restrain the city from paying the cost of repaving a road. In that case, the complainant urged that the city lacked power to improve a road without establishing a special improvement district to assess the cost to abutting landowners. The court rejected this argument and held that the city had authority to contract the work under other powers and it was, therefore, authorized to pay for the roadway improvements from the general fund for the work performed.

Thus, it is respectfully submitted that the law in Utah is clear in that only those portions of an improvement district which are not properly part of the district are exempt from a tax levy under that district. Further,

only those persons filing proper protest may object to assessments levied against their property. Those improvements which are held not to be properly part of the district will be paid for by the city from its general fund. Further, even if the plaintiff-appellants position were accepted, the court is not in a position to make a determination of what portions of the project shall be assumed by the city, until after a tax levy and assessment has been made. Therefore, the Improvement District should be upheld.

POINT V

THE PLAINTIFF-APPELLANTS ORDER TO SHOW CAUSE CALLED AN "ALTERNATIVE WRIT OF PROHIBITION" IN CASE NO. 221266, FAILED TO COMPLY WITH THE PROVISIONS OF RULE 65 OF THE UTAH RULES OF CIVIL PROCEDURE AND WAS PROPERLY SET ASIDE AND DENIED BY THE LOWER COURT.

Point IV of plaintiff-appellants brief is essentially a red herring; however, a short response will be made to avoid confusion of the ~~germain~~ germane issues of this case.

The facts that show that the plaintiff-appellants filed an action under Third District Court Case No. 220475, on or about June 20, 1974. Thereafter, on July

31, 1974 the plaintiff-appellants filed a pleading under case number 221266, alleging virtually identical facts. In the latter action, they prayed for a temporary restraining order which they called an "Alternate Writ of Prohibition" and had the same executed ex parte by Judge Marcellus J. Snow on July 31, 1974. Said order, issued without prior notice to the City, enjoined the City from further work on the Main Street project and set-up a hearing date when said order would become final. It specifically stated:

> "You are further commanded to show cause before this court at 2:00 p.m. on the 15th day of August, 1974, or as soon thereafter as counsel may be heard, in the courtroom of the Honorable Gordon R. Hall, one of the judges of the above entitled court at the Courts Building, Salt Lake City, Utah, why you should not permanently and absolutely be restrained and prohibited from proceeding in the respects and particulars above stated and more particularly complained of in the verified petition on file herein and why petitioner should not have such other and further relief as may be appropriate in the premises." (Temporary Restraining Order called "Alternative Writ of Prohibition, R-14-15; Court Minute Entry, R-24).

There was no attempt by the plaintiff-appellant to comply in any regard with the provisions of Rule 65 of Utah Rules of Civil Procedure in obtaining said temporary order. They failed to even allege, let alone state facts sufficient to show how they would be irreparably

harmed or damaged. The judge failed to note thereon the date and time when issued and failed to state that the order would expire within ten days, unless the order was reissued. Further, and most importantly, the plaintiff-appellants failed to post any security to indemnify the City or Gibbons and Reed from any of the damages and losses which would inherently flow from halting this construction project in midstream.

Therefore, the City Attorney attempted to contact Judge Snow concerning the order; however, he was on vacation. The law and motion judge set the matter aside ex parte pursuant to the provisions of Rule 65, which provides that the court can set aside an ex parte temporary restraining order on ". . . such notice as the court may prescribe." Because of its inherent defects, no notice was deemed necessary to vacate the temporary restraining order by the court; but the hearing date on the order to show cause why such a restraining order should not be issued was still in effect. Subsequent cross motions for summary judgment were filed. All matters were set for hearing on the order to show cause date of August 15, 1974 at 2:00 p.m. (R-28-31).

These matters were transferred from Judge Hall to Judge Croft of the Third District Court. Judge Croft indicated that he did not have sufficient time to prepare for the matter August 15 and, pursuant to an agreement between all counsel, the matter was continued for hearing August 19, 1974. On August 19, 1974,

the court considered the memorandums, affidavits and matters of record before the court. Third District Court Case No. 220475 and Case No. 221266 were consolidated for hearing and the court heard oral arguments by all counsel.

At the hearing the court also noted that the Alternate Writ of Prohibition was a temporary restraining order and that the plaintiff-appellants had failed to comply with the provisions of Rule 65 of the Utah Rules of Civil Procedure. The court stated:

> (THE COURT): "My point is simply this. Before we leave it, I want to make it clear what I think on this matter and, that is, you filed a petition for a writ of prohibition. In connection with that you asked for a temporary restraining order."
>
> (MR. GUSTIN): "No, we did not, your honor."
>
> (THE COURT): "Yes, you do. That's what he does. He temporarily restrains and orders the defendants to appear and show cause why the writ shouldn't be made permanent, you see. What you are doing is, you file a petition and you want to restrain the defendants from doing something and what you are arguing, is, even though you are asking for a temporary restraining order, the rule with respect to temporary restraining orders doesn't apply and I don't agree with you." (Argument Transcript, R. 382)

Subsequently, after more discussion on the point,

Judge Croft stated that he could rule on Mr. Gustin's motion for summary judgment and resolve the question of whether a Writ of Prohibition should issue after the hearing. Mr. Gustin agreed; the record states as follows:

> (THE COURT): "If I grant your motion for summary judgment today, I can probably rule on the question of jurisdiction in any event.
>
> (MR. GUSTIN): "Right, so we will pass the matter and go to the motion for summary judgment with reference to the injunction suit, civil no. 220475." (Argument Transcript, 383)

Subsequently, the court after fully reviewing the record and hearing argument, denied the plaintiff-appellants motion for summary judgment and granted the City a partial summary judgment, reserving for trial only the issue of the contract validity. (Memorandum Decision of Judge Croft, R-41-53)

It is submitted that plaintiff-appellants have cited no case to justify their disregard for the provisions of Rule 65 of the Utah Rules of Civil Procedure. They voluntarily submitted the matter for hearing and the lower court ruled as a matter of law that the improvement district was valid. To now pose a procedural issue regarding the vacation of a temporary restraining order and the refusal of the lower court, after a full hearing, to reissue it, does not serve to illuminate this court on any germane issue.

POINT VI

THE STATE MUNICIPAL IMPROVEMENT DISTRICT ACT SPECIFICALLY AUTHORIZES DELETIONS TO BE MADE FROM PROJECTS, AFTER BIDDING HAS BEEN COMPLETED; FURTHER, THE CONTRACT TERMS OUTLINING THE TERMS OF BIDDING AUTHORIZES SUCH DELETIONS TO BE MADE BY THE CITY.

The City adopts the brief of Co-Defendant-Respondent Gibbons and Reed on this point.

POINT VII

THE CONTRACT SUBJECT OF THE WITHIN LITIGATION WAS LET TO THE LOWEST RESPONSIBLE BIDDER. EXTRA WORK ORDERS AND COSTS INCURRED DUE TO THE CHANGES IN PLANS AND SPECIFICATIONS, WHICH WERE MADE IN GOOD FAITH AND WITHOUT COLLUSION OR FRAUD AND NOT MOTIVATED OR INFLUENCED BY PERSONAL FAVORITISM OR ILL WILL, ARE INCLUDED WITHIN THE ORIGINAL CONTRACT BID AND NEED NOT BE SUBMITTED FOR ADDITIONAL AND SEPARATE BIDDING PROCEDURES.

The City adopts the brief of Co-Defendant-Respondent Gibbons and Reed on this point.

SUMMARY

The creation of a special improvement district is a legislative function of Salt Lake City Corporation and, as such, the acts of the legislature are presumed to be valid, lawful and within the scope of legislative authority. Further, judicial review of those legislative actions in creating a special improvement district is limited to those areas charging that acts of the City were arbitrary, capricious, grossly unjust or inequitable, or that the City lacked lawful authority or jurisdiction to proceed. The party attacking the District has the burden of proof concerning these elements. In addition, in evaluating the conduct of the city legislative body against applicable state law, the City must only be in "substantial" compliance to those statutory requirements. Plaintiff-appellants have wholly failed to meet that burden in this challenge to the Improvement District.

A review of the facts in this case clearly demonstrates that all of the conditions and requirements for establishing a special improvement district were "substantially" complied with. The Notice of Intent stated the "purpose" of the District and stated in a "general way" the improvements to be made. The challengers

assertion that detailed and specific notices as required under a repealed law in effect in 1917 is not well taken.

However, even if the court were of the persuasion that a detailed and specific Notice of Intention should be published, the City has complied. In the Notice of Intention, the City incorporated by reference the detailed plans and specifications of this project which were filed with the City Engineer. These plans gave all persons concerned constructive notice of the minute details of grade changes, alterations of traffic flow patterns and changes in space allocations for pedestrian and vehicular traffic.

Further, the street right-of-way was not narrowed as charged; rather, the City exercised its statutory powers to decide how much of it should be used for vehicular and pedestrian traffic. Again, even accepting arguendo, the challengers position that failure to pass an ordinance concerning an alleged narrowing of the street is not a matter which goes to justice, equity or jurisdiction as to void this improvement district.

In addition, even accepting arguendo the position of plaintiff that the district was created with defects in the Notice of Intent, those defects do not rise to the level to require this court to enjoin or halt construction. Rather, only those specific items which are subject to improper notice may be subject to attack, after the tax assessment has been levied by the city. The city can pay those items which may have not been properly sub-

ject to assessment in the district. In this case, the property owners total construction cost is $505 per front foot; the balance of the costs will be paid from city capital improvements budget. Even if the court finds some defects, it is premature to object to the district on those items until there has been an attempt to levy a tax for them.

This Main Street Improvement Project is approximately one-third completed. The work, planning and expense which has been undertaken since 1963 should not, at this point in time, be destroyed. The Main Street Improvement District should be upheld and allowed to proceed to culminate, by completion of the final two blocks.

Respectfully submitted,

ROGER F. CUTLER

Attorney for Defendant-Respondent

Salt Lake City Corporation
101 City & County Building
Salt Lake City, Utah 84111

NOTICE

NOTICE IS HEREBY GIVEN by the Board of Commissioners of Salt Lake City, Utah, of the intention of such Board of Commissioners to make the following described improvements:

To remove all existing curbs, gutters, sidewalks and street paving and construct new street paving, pedestrian paving, landscape structures, planters and planting, curbs and gutters, together with new street lighting and drainage structures, and to do all other work necessary to complete the project in accordance with Salt Lake City Standards.

All the street frontage in this extension, upon which improvements are to be made, will be assessed up to an amount not to exceed, $505.00 per front foot, with the City to absorb all additional amounts as determined from the Urban Designer's estimates.

This extension will be constructed within the following described area and boundaries and upon the following named street:

AREA: Blocks 57, 58, 69, 70, 75 and 76 of Plat "A", Salt Lake City Survey.

BOUNDARIES:

North — South Temple Street
South — 3rd South Street
East — State Street
West — West Temple Street

STREET:

Main Street — South Temple Street to 3rd South Street

IMPROVEMENTS AND ESTIMATED COSTS

PROPOSED IMPROVEMENTS	Est. Cost Per Front Foot	Front Feet of Abutting Property	Total Estimated Cost
Removals	$31,864392	3,965.91	T26,371.31
Roadway and Underground	60.085032	3,965.91	238,291.83
Underlayment for Pedestrian Paving	26.981999	3,965.91	107,008.18
Pedestrian Paving	166.123258	3,965.91	658,829.89
Lighting/Electrical	39.078391	3,965.91	154,981.38
Landscape Structures	81.294815	3,965.91	322,407.92
Architectural Features	41.617684	3,965.91	165,051.99
Planting	57.954429	3,965.91	229,842.05

Total Estimated Abutter's Cost Exclusive of Extra Costs for Structural Slabs $2,002,784.55
Abutter's Total Rate $505.00 x 3,965.91 feet $2,002,784.55
Total Estimated City's Cost 872,405.20

TOTAL ESTIMATED COST OF THE PROJECT $2,875,189.75

All other necessary things shall be done to complete the whole project in a proper and workmanlike manner according to plans, profiles and specifications on file in the office of the Salt Lake City Engineer and to defray the Abutter's Portion of the cost and expense of said improvements by a Special Tax or assessment to be paid in ten (10) equal annual installments, plus seven percent (7%) interest on the unpaid balance levied according to the front or linear foot frontage upon and against all lots, pieces or parcels of land to be benefited and affected by said improvements. The whole amount of the tax may be paid without interest within fifteen (15) days after notice by the Salt Lake City Treasurer of the amount due.

The abutter's estimated cost per front foot does not include the extra costs resulting from structural slabs at underground vaults; the cost of which will vary according to the area to be covered. These costs are estimated to be approximately $15.00 per square foot of the structural area. The structural slab extra costs will be assessed against the properties benefited in addition to the assessment at the aforementioned rate of cost per front foot of abutting property.

All protests and objections to the carrying out of such intention must be presented in writing, stating therein, lot, block or description of property, together with the number of front feet to the City Recorder on or before the 16th day of January, 1974. The Board of Commissioners at its first regular meeting thereafter, to-wit, the 17th day of January, 1974, will consider the proposed levy and hear and consider such protests and objections to said improvements as have been made.

BY ORDER OF THE BOARD OF COMMISSIONERS OF SALT LAKE CITY, UTAH.

Dated this 18th day of December, 1973.

HERMAN J. HOGENSEN
City Recorder

Curb and Gutter Extension No. 480
First publication — December 20, 1973
Second publication — December 27, 1973
Third publication — January 3, 1974
Last publication — January 10, 1974

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