

1975

Standard Optical Company v. Salt Lake Corporation : Unknown

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

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STANDARD OPTICAL COMPANY, ^{BRIGGS} YOUNG UNIVERSITY
et al., J. Reuben Clark Law School
Plaintiffs-Appellants,

vs.

SALT LAKE CITY CORPORATION,
Defendants-Respondents.

Case No.
13924

STANDARD OPTICAL COMPANY,
Plaintiff-Appellant,

vs.

LAWRENCE A. JONES, as Salt Lake
City Auditor, et al.,
Defendants-Respondents.

APPENDIX IN SUPPORT OF APPELLANTS' 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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FILED
JAN 24 1975

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TABULATION OF VOTES PROTESTING
IMPROVEMENT DISTRICT NO. 38-480

February 11, 1974

Honorable E. J. Garn
Mayor of Salt Lake City
Room 114 - Building

Subject: Curb & Gutter Extension No. 480
Main Street Beautification from South Temple
to Third South Street

Dear Sir:

For your information and use, I submit herewith the present status of protests to the above referenced project.

1. January 17, 1974 the due date for protests, produced a tabulation of front footage opposed to the project in the amount of 51.32%.
2. January 25, 1974 a late protest by Carl Lollin (J. F. Lollin, et al.), representing opposition to the project, if considered, would increase the protest in front feet to 52.14%.
3. February 4, 1974 the City Recorder received communications from Ziniks, Prudential Federal Savings and Salisbury Investment Company (with conditions), indicating that they would rescind their protests. If considered, the protesting frontage would decrease to 44.40%.

Today we are in receipt of the plans and specifications from Barton-Aschman Associates, Incorporated. We

will proceed to advertise the Notice To Contractors schedule for this project, unless otherwise advised by the Commission.

Respectfully yours,

Joseph S. Fenton
City Engineer

JSF:ph

cc: Commissioner Greener
Commissioner Harmsen
Commissioner Harrison
Commissioner Phillips, Jr.
File

EXCERPTS FROM FINDINGS OF FACT AND
CONCLUSIONS OF LAW INCLUDING EXCERPTS
FROM EXHIBIT A TO FINDINGS OF FACT

14. 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 sus- pended system in- cluding hatch covers with grouted paving system	191,441.24
Storm Sewer	202,534.50
	1,289,073.19
Adjusted Bid	\$2,834,180.96

21. 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.

22. 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

23. 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. In entering into the contract the parties reduced the quantities and thereby reduced the costs of the following line items: 205:3, 04, 05, 06, 07, (08), 09, 10, 18, 19, 20, 21, 22, and 23. The total price reduction for these items was \$540,006.00.

24. Replacement of the sidewalk suspension system with the 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 sidewalk system as shown in the line items of the adjusted bid.

25. Elimination of the storm sewer system required the addition of a shallow drainage system, and deletion of the thick set pavers at the intersection will require 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.

26. 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. The detailed amounts of these line item changes are shown on the attached Exhibit "A".

27. 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 price.

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

29. 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:

<i>Description of Work</i>	<i>Value</i>
Shallow drainage system	\$14,725.00
Roof drain adjustments	\$ 2,400.00
Fire alarm pedestals	\$ 1,589.00
TOTAL	<u>\$18,714.00</u>

30. 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.

34. The major changes made in the contract prior to its award to Gibbons and Reed Company consisted of the entire elimination of improvements previously contemplated. The remaining changes were not substantial, and were necessitated by the elimination of other items.

35. 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.

38. 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.

CONCLUSIONS OF LAW

1. The contract entered into by Salt Lake City Corporation and Gibbons and Reed Company on June 12, 1974, the Supplemental Agreement of September 5, 1974, and the orders for extra work dated July 2 and July 30, 1974, were in accordance with the law, and were valid.

2. The complaint in Civil No. 220475 should be dismissed, no cause of action, and the petition in Civil No. 221266 should be denied.

DATED this 5th day of December, 1974.

EXCERPTS FROM EXHIBIT A TO FINDINGS AND CONCLUSIONS OF LAW
SCHEDULE ON DELETIONS AND CONTRACT CHARGES
CASE NO. 220475

Item	Description	Cost on Original Bid		As Shown on June 12, 1974 Contract	As Shown on Sept. 5, 1974 Contract
		Gibbons & Reed	Shocker		
91	205:03	148,058.00	142,332.00	111,315.00	111,248.00
92	205:04	17,640.00	16,954.00	13,320.00	13,328.00
93	205:05	24,853.50	23,933.00	17,860.50	17,884.00
94	205:06	945.00	910.00	850.50	680.00
95	205:07	391,600.00	379,140.00	318,120.00	318,086.00
97	205:09	8,496.00	8,208.00	6,490.00	6,433.20
98	205:16	25,058.00	24,120.00	17,391.00	18,180.32
100	205:18	22,590.00	4,635.00	5,020.00	4,657.50
107	205:19	29,174.00	5,974.00	6,036.00	6,003.00
108	205:20	7,752.00	3,502.00	2,736.00	3,519.00
109	205:21	3,192.00	1,442.00	1,596.00	1,449.00
110	205:22	37,395.00	35,100.00	28,375.00	28,350.00
111	205:23	14,681.00	13,833.00	10,896.00	10,971.00
		<u>731,434.50</u>	<u>650,083.00</u>	540,006.00	540,789.00
				<u>53,340.00</u>	<u>53,340.00</u>
		1,829,066.50	1,937,418.00	593,346.00	594,129.00
			<u>1,829,066.50</u>		<u>593,346.00</u>
			108,351.50	Difference	783.00

SUPPLEMENTAL AGREEMENT

SUPPLEMENTAL AGREEMENT entered into this 5th day of September, 1974, between Salt Lake City, a municipal corporation of the State of Utah, by the Mayor and City Engineer of said City, hereinafter called the City, and Gibbons and Reed Company, a Utah Corporation, with its principal place of business in Salt Lake City, Utah, hereinafter called the Contractor.

WHEREAS, on or about June 12, 1974, the parties entered into a contract for the construction of Main Street Environmental Improvements (Project No. 38-480), hereinafter called the Contract, and

WHEREAS, it has been necessary to make certain changes in the contract specifications relating to the sidewalks to be constructed for the project, and

WHEREAS, the changes constitute "extra work" as defined in Paragraph 2 of the Contract, and

WHEREAS, Paragraph 2 of the Contract provides that such extra work and compensation therefor may be provided for in a supplemental agreement, and

WHEREAS, the parties have agreed upon the terms and conditions under which said extra work will be performed,

NOW, THEREFORE, it is mutually agreed as follows:

1. Line items 91 through 98 and 106 through 111 of the Contract are deleted and the following line items are substituted therefor:

<u>Item No.</u>	<u>Description</u>	<u>Qty.</u>	<u>Unit Price</u>	<u>Total</u>
91	Precast half modules light and dark cut in 8 pieces	6,544 ea.	\$ 17.00	\$111,248.00
92	Precast half modules, modified (light & dark) cut in 8 pieces	784 ea.	17.00	13,328.00
93	Precast quarter modules (light & dark) cut in 4 pieces	1,052 ea.	17.00	17,884.00
94	Precast quarter modules modified (light & dark) cut in 4 pieces	40 ea.	17.00	680.00
95	Precast half medallion modules 4" cut in 2 pieces	3,560 ea.	89.35	318,086.00
96	Precast half medallion modules 6" (crosswalk) cut in 2 pieces	420 ea.	127.00	53,340.00
97	Precast quarter medallion modules 4"	72 ea.	89.35	6,433.20
98	Precast banded half modules type A & B cut in small module pieces 1 $\frac{1}{8}$ thick	3,071 sf.	5.92	18,180.32
106	Hatch covers Type A hinged	45 ea.	103.50	4,657.50
107	Hatch covers Type B & C hinged	58 ea.	103.50	6,003.00
108	Hatch covers Type A lift out	34 ea.	103.50	3,519.00
109	Hatch covers Type B & C lift out	14 ea.	103.50	1,449.00
110	Precast service module and cover cut in 8 pieces	1,080 ea.	26.25	28,350.00
111	Precast service medallion module and cover cut in 2 pieces, 2" thick	106 ea.	103.50	10,971.00

2. By virtue of the foregoing changes the total contract price is increased by the sum of approximately \$784.02.

3. Except as modified herein, all other terms and conditions of the contract remain in full force and effect. Provided, however, that it is specifically understood and agreed between the parties that the grout necessary to complete the installation of all pavers to be installed in the sidewalk system is included in the contract price and may not be the subject of additional cost change orders or extra work orders under the contract.

IN WITNESS WHEREOF, the parties have executed this supplemental agreement on the day and year first above written.

SALT LAKE CITY CORPORATION

Attest

By E. J. Garn

Herman J. Hogensen

City Recorder

Joseph S. Fenton

City Engineer

GIBBONS AND REED COMPANY

By Noel E. Gold

Vice President

APPROVED:

Stephen L. Harmsen

Commissioner of Streets and
Public Improvements

STATE OF UTAH }
County of Salt Lake } ss.

On the 5th day of September, 1974, personally appeared before me E. J. Garn and Herman J. Hogensen, who being by me duly sworn, did say that they are the Mayor and City Recorder, respectively, of Salt Lake City,

and that the name of Salt Lake City was attached to the foregoing instrument by them by authority of a motion of the Board of Commissioners of Salt Lake City, passed on the 5th. day of September, 1974; and said persons acknowledged to me that said corporation executed the same.

Mildred V. Higham
Notary Public, residing in
Salt Lake City, Utah

STATE OF UTAH }
County of Salt Lake } ss.

On the 6th day of September, 1974, personally appeared before me Noel E. Gold, who being by me duly sworn, did say that he is the Vice-President of Gibbons and Reed Company, and that the foregoing instrument was signed in behalf of said corporation by authority of a resolution of its Board of Directors; and said Noel E. Gold acknowledged to me that said corporation executed the same.

Christine Field
Notary Public, residing in
Salt Lake City, Utah

My Commission expires:
May 3, 1977

EXCERPTS FROM AFFIDAVIT
OF WARREN R. FENN, PROJECT
ENGINEER FOR GIBBONS AND REED COMPANY,
INCLUDING EXCERPTS FROM
EXHIBIT "A" ATTACHED THERETO

6. Exhibit "A" attached hereto is a copy of the abstract of bids on the project. The items deleted from the original bid are lined out on the abstract. Where quantities were changed, the original quantity is set out in parenthesis in red next to the quantity as awarded.

7. No other revisions were made in the contract as awarded and it is the position of Gibbons and Reed Company that any other revisions to the contract would have to be made in accordance with the contract, Section 1 paragraph 2, "Extra Work," and Section 1, paragraph 16, "Changes in Plans, Specifications and Quantity."

ABSTRACT OF BIDS

Engineering Dept.
Salt Lake City Corporation

Bids Opened
Thursday, March 7, 1974

CONSTRUCTION OF MAIN STREET IMPROVEMENTS — PROJECT 38-480

Work and Material	Quantities		Gibbons & Reed Company		Shocker Constr. Co.	
	Each		Unit Price	Amount	Unit Price	Amount
91. Precast half modules ,light & dark)	615	(18)	\$181.00	\$111,315.00	\$174.00	\$142,332.00
92. Precast ½ mod., modified (lt. & dark) ..	74	(8)	180.00	13,320.00	173.00	16,954.00
93. Precast quarter modules (lt. & dark)	189	(63)	94.50	17,860.50	91.00	23,933.00
94. Precast ¼ mod. modified (lt. & dark) ..	9	(0)	94.50	850.50	91.00	910.00
95. Precast half medallion modules, 4"	1,446	(780)	220.00	318,120.00	213.00	379,140.00
96. Precast half medallion modules 6"	210		254.00	53,340.00	246.00	51,660.00
97. Precast quarter medallion modules 4"	55	(2)	118.00	6,490.00	114.00	8,208.00
98. Precast banded ½ mods., Type A & B ..	93	(34)	187.00	17,391.00	180.00	24,120.00
106. Hatch cover, Type A (hinged)	10	(45)	502.00	5,020.00	103.00	4,635.00
107. Hatch cover, Type B & C (hinged)	12	(58)	503.00	6,036.00	103.00	5,974.00
108. Hatch cover, Type A (lift out)	12	(34)	228.00	2,736.00	103.00	3,502.00
109. Hatch cover, Type B & C (lift out)	7	(14)	228.00	1,596.00	103.00	1,442.00
110. Precast service module & cover	125	(135)	227.00	28,375.00	260.00	35,100.00
111. Pre. serv. medall. module and cover	48	(53)	227.00	10,896.00	261.00	13,833.00

EXCERPTS FROM DEPOSITION OF E. J. GARN

“* * * And city policy has been that if the majority do not protest, we do not follow the state law of using two-thirds because we do not believe one-third should be able to impose on two-thirds, and all the districts are created the same. So, no, we wouldn't have initiated the district on our own.

Q. How long has this policy that you referred to on the 50 per cent been in effect, as far as you know?

A. As long as I have been here, and I'm told it's for however far it goes back the city commission have felt that way.

Q. And if any further district(s) are formulated, would you adopt that same policy?

A. I would see no reason to change it.

* * *

Q. Now, then, calling your attention, Mayor, to Exhibit P-1, again, the notice of intent, I believe in the notice of intent it gave notice of a hearing to be held on the 17th of January, 1974. Were you present on the 17th of January?

A. Yes.

Q. What took place on that date, if you can recall?

A. Well, in our normal commission meeting we have a period from 10:00 to 10:30 when we take care of all of our routine work. 10:30 is when we schedule all hearings, where we listen to anyone who comes to the commission

to make any statements, bring up any problems that they have. And under a special improvement district, as I'm sure you're aware, the law sets up very specifically how you will receive protests. They're to be in the city recorder's office, I believe, at 5:00 p.m., written protests, listing the property owner and description of his property at 5:00 p.m. on the day previous. On the 16th of January is when the protests were to be filed in the city recorder's office. Then they were brought to the city commission meeting where the commission referred them to the city engineer's office for their tabulation so that he can total up the protests on a front footage basis, compare that on a percentage basis to the total front footage in the district, then report back to the commission at a future city commission meeting as to the percentage of protests so that a determination can then be made by the commission as to whether or not the district should then be created.

At that time, I noted this, explained that to the people that were there, and said that we could not make a decision on the district until we had a tabulation. Some of the people there suggested that they would like to talk about it. And I made the comment that I had just explained the procedure, the legal process, and that we could stay there all day or into next week and either the pros or the cons could be verbally discussed but that it could not alter the vote. That was strictly a legal tabulation that had to be made, and all the talk in the world could not alter the votes. And so although they could talk if they wanted to, that I would prefer that they not

until we knew what the tabulation was and then we could discuss it at a future meeting, extension of that particular meeting that we had that day. And so I said that — someone said, well, I'd like to speak in favor. I said, well, that's fine. Mr. Schubach and others would like to speak against, and again, and I suppose I repeated it five or six times in different ways, that if they wanted to speak I would not deny them that right, but it didn't seem too sensible to me to spend a lot of time discussing pros and cons, going on for hours, when it would be determined by the written protests as required by the law, and that as soon as we had that tabulated we would schedule a meeting and they could be heard.

* * *

Q. Was there anyone who made an effort to speak at that hearing on the 17th that was not able to put forth —

A. I've already testified that several people said they wanted to talk, and I discouraged them from doing so, as I have already testified, but told them that they could if they wanted to but that I didn't see a practical sense in it when the determining factor was the written protests. They could talk for 10 hours on each side — I remember using that kind of phraseology — if they wanted to stay, if they wanted to talk they could, but at no time were they denied to make any absolute prohibition. I discouraged them until a future meeting.

* * *

Q. Did anyone, as a matter of fact, argue for or against it at that hearing?

A. Oh, yes. There were some brief comments for and against. It didn't get into any discussion because, again, repeating myself as I did in that particular meeting, I wanted to discourage them until we could see what the vote was. You see, let me explain just further, in all the years, seven years that I have been here, I never recall anyone at this particular hearing ever verbally speaking or really wanting to show up because of knowledge that the written protest is what determines it. And I recognized that this was a horse of a different color, that there was controversy on it, and it would much be better if the vote was opposed, and boom, it was over. If it was way in favor, okay, so why spend all that time talking today. Let's get the results and then is the time. So there was never any intention on my part to deny anybody the right to speak. I did not deny them the right to speak in that meeting, only discouraged them, to postpone it until another date.

* * *

A. * * * 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 our report was that the legal protests were 49.15 per cent against indicating 50.85 per cent 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 op-

portunity to go through with the hearing that I promised the property owners. So let's take it under advisement. So I walked into that hearing with the understanding that a majority of those who legally could protest were record owners was less than majority on the basis that I felt it was just so evenly divided that we ought to sit down and see if we could talk, come to a meeting of the minds with the property owners, have them fully understand the project. And immediately upon arriving at that meeting, and I told them what had happened, and I said we've got the engineers here, we've got Barton-Aschman. We want to respond, have the experts respond to any questions which you have about the project so that the commission will have all of this in-put we talked about the other day and it is so evenly split. And at that point Mr. Schubach got up and said that there were these other three. And I said I am aware of that; but, I said, even if they legally could be counted, what difference does it make, Mr. Schubach. That switches it about one percentage point the other way. And I came here today in good faith thinking a majority were in favor, but it was so close and on my commitment we just simply could have gone ahead and said, okay, we approve it with that small a margin, but I didn't feel good about that. And I'd also made a commitment to you on the 17th and the other people to give you your opportunity to be heard, and so first let's have the project explained, respond to questions, and then anybody that wants to speak on either side can do so. Kill the project right now. There's 51.something against with

those three. And I said no, that doesn't change it as far as I'm concerned. After this meeting is over, everybody has been heard, and if that's the way the final percentage is I'll keep my commitment to vote with the majority.

Well, after a considerable amount of harangue to establish that point that this was a consolatory meeting to have everybody heard and to be able to come to some meeting of the minds with the property owners because this had never been a city project, it has never been attempted by this city commission or previous ones to do anything but what the majority of the property owners wanted to do, in spite of a lot of things that have been said about who is trying to cram anything down anybody's throat. And somebody else said, yes, that's what we came for. We want to hear it. So then the project was explained. They went through the entire thing and discussed it. A lot of people at that meeting were surprised to find out that there were two lanes in each direction plus parallel parking plus middle-of-the-street bus parking and right turn lanes at every intersection. And a couple of them came up to me and said, well, gee, I sure didn't know that. I thought we were having a mall. Well, then, during — I don't remember the exact time — there were some protests that were withdrawn on the basis of understanding the project from that meeting. So I told the engineer to figure up all the protests, not only the three that were questionable technically legally, whether they could be included or not, but one that was late that was absolutely not to be used whatso-

ever that came in late but was a protest, to plug that one in, to take the ones that were withdrawn and use every conceivable one either way just to see so that we could get an indication. And this was the one that came out somewhere 59.something to 41.something against, and that was the basis on which the city commission made their decision with a nearly six to four margin in favor including everybody's protest, even one late one that in no way could be considered legal. And so I kept my commitments to allow everyone to be heard at great length.

We subsequently had another hearing after that, and a commitment to vote with the majority of the property owners.

* * *

Q. Was the widening of the sidewalk a necessary ingredient of this thing because of what you wanted to put on the sidewalk?

A. Well, I think it certainly facilitates the sidewalk furniture and bus stops and greenery, things of that nature, and makes it more accessible for pedestrians.

Q. How important is the widening of the sidewalk in reference to the overall project?

A. Well, I think it's important to achieving the overall goal of making it more attractive for shoppers.

* * *

Q. With reference to the project, did you feel that it was necessary to advise the property owners and the people of the city generally that the street or at least

the vehicular traveled portion of the street would be narrowed by approximately 24 feet as a result of the project?

A. Well, yes. And it was very widely publicized for a long period of time, and particularly in light of the EPA hearings in July which had a great amount of coverage and discussion.

Q. So it stood out in your mind as a very important item?

A. Well, I think any project of the size of this is important, not any one particular aspect of it. But it is important that the property owners who are going to pay the bill be particularly advised as to what is going to happen.

* * *

Q. Do you have any knowledge with reference to whether or not the city engineer had all of the plans and specifications with reference to the project at the time the contract was signed on June 12th?

A. We delayed the signing of the contract waiting for the plans to arrive.

* * *

EXCERPTS FROM DEPOSITION OF
JOSEPH S. FENTON

* * *

Q. Was an essential feature of that plan to widen the sidewalk also?

A. Yes, sir.

* * *

A. The sidewalks were to be widened, yes.

Q. And approximately how much in footage are they to be widened?

A. Oh, 10 to 12 feet, I'd say, is an average.

Q. Is that on each side of the street?

A. Yes.

Q. And that's between South Temple on the north and Third South on the south, is that correct?

A. Yes.

* * *

Q. Is there anything in the plans that call for the change of the grade of the street in that area?

A. The grade of the street was to be lowered about approximately one foot. This was due to the sidewalk's being extended out toward the street and would necessitate the street being lowered in order to facilitate this change.

Q. And that change of grade would be for the full extent of the three blocks in question, would it?

A. Yes, sir.

Q. Are there any other main features with main features to the improvements that stand out as being significant?

A. I'm not aware. I don't think of anything other than what we've spoken about.

* * *

Q. The effect of the improvements that are being done there on Main Street will, in fact, narrow the street, will it not?

MR. ROE: What do you mean by street?

Q. (By Mr. Gustin) The portion of the road that was used for vehicular travel.

A. Yes, for vehicles. It will usurp the area basically that was used for parking previously.

* * *

Q. Now, with respect to those items that are listed there, have there been any changes since the notice of intent was published that have been incorporated in the contract that the city has entered into with Gibbons and Reed?

A. Yes. There were items that were deleted.

Q. What are those items?

A. They're available in our records. I couldn't tell you from memory.

* * *

Q. You mentioned that you have a list or a document that describes what the changes are?

A. Yes.

Q. Do you have that with you?

A. It would be in the vault.

Q. May I ask you, could you take the time to get that.

A. Would you like me to do that now?

Q. Yes, please.

(Whereupon Exhibit P-2 was marked for identification.)

Q. (By Mr. Gustin) I show you, Mr. Fenton, what has been marked as Plaintiffs' Exhibit P-2 and ask you if you can identify that document.

A. Yes.

Q. Will you state for the record what it is.

A. This was a list of the items that had been considered for deletion from the original bid items.

Q. Are there also items there of additions to the proposed project?

A. There appear to be noted that they are add items.

* * *

Q. Now, have you made any effort, Mr. Fenton, to compare those figures that are in that Exhibit P-2 with the figures under those designated items there in the contract?

A. No.

* * *

Q. Is there another document, another contract, that rationalizes these figures, Mr. Fenton, as far as you know?

A. No, sir.

Q. If there were a dispute between the figures given in Exhibit P-2 which has been previously identified and the contract, which, in your opinion, would prevail?

* * *

Q. (By Mr. Gustin) I'll qualify it. As far as your office is concerned, which would you treat as the controlling document?

A. As far as we're concerned, this is the legal document because it is the one that's been approved by the city commission. We have to work on their - -

MR. ROE: May the record show he held up the contract when he said that.

THE WITNESS: Yes.

* * *

Q. (By Mr. Gustin) I show you what's been marked here, Mr. Fenton, as Plaintiffs' Exhibit P-3 and ask you if you can identify that document.

A. Yes, sir.

Q. What is it?

A. I was directed to give a notice to all the property owners of the new revised costs and to give them notice of an informal hearing that would be held by the city commissioners.

Q. Is that your signature that appears there at the bottom of the notice?

A. Yes.

Q. What is attached to the notice? Did that accompany the notice, those figures and summary of additions and deletions?

A. Yes, sir.

Q. As far as you know, is that the way the project is proceeding at the present time in accordance with that notice?

A. As far as I know.

MR. GUSTIN: I'll make Exhibit P-3 a part of the deposition.

* * *

Q. I show you what's been marked for purposes of identification as Exhibit P-4 and ask you, Mr. Fenton, if you will state what that is.

A. It's part of our contract documents. It is titled the Notice to Contractors which gives the date of bid opening and the project location and identification.

Q. To your knowledge, was that the only notice to contractors that was published or sent?

A. Yes.

Q. There were none others, as far as you know?

A. None that I'm aware of.

MR. GUSTIN: I'll make Exhibit P-4 a part of the deposition.

Q. (By Mr. Gustin) I ask you, Mr. Fenton, if that exhibit refers to plans and specifications on file in the city engineer's office.

A. Yes, sir.

Q. What plans and specifications did you have on file at the time that was published?

A. The notice to contractors?

Q. Yes.

A. To the best of my knowledge, the plans and specifications were on file in this office.

Q. And are they the same plans and specifications that are now being used in connection with the project?

A. No, sir.

Q. They are not?

A. No, sir.

Q. What changes have been made in the plans and specifications that were not there when that notice, Exhibit P-4, was made?

A. Changes were made on the plans and the specifications to correlate with the revised bid schedule we discussed.

Q. When did you receive those plans and specifications?

* * *

A. I don't recall. Our files should indicate that. There should be a letter of transmittal.

Q. It would be fair to say, then, that these revised plans and specifications were not in your office at the time of notice to contractors was given?

A. That would be fair.

* * *

Q. Why wasn't there a new notice to contractors after the plan had been conceived to change the project in the particulars that we've talked about?

A. I just don't think it was ever considered. The low bid came in and it was just decided upon to negotiate with the low bidder.

* * *

EXHIBIT P-2

TARGET VITALITY
SALT LAKE CITY, UTAH

APRIL 4, 1974

CONSTRUCTION OF MAIN STREET
ENVIRONMENTAL IMPROVEMENTSGibbons & Reed Base Bid \$4,123,254.15

Possible Revisions:

DELETE Traffic Control

Obelisks \$357,200.00 \$3,766,054.15
(Item 206:20)DELETE Tree Guards \$ 84,136.00 \$3,681,918.15
(Item 206:20)

DELETE Thick Set Pavers

In Intersections \$389,069.00
(Items 205:15 - 205:17)

DELETE 7" Concrete

Underlayment \$ 64,700.00
(Item 201:13) \$453,769.00

ADD Asphalt Paving In

Intersections \$ 41,180.00
(Items 201:04 & 201:05)

DEDUCTIONS \$412,589.00 \$3,269,329.15

DELETE Suspended
System Incl. HatchCovers \$731,434.50
(Items 205:03 - 205:07,
205:09 - 205:10, 205:18 -
205:23)

ADD Grout System	<u>\$540,789.02</u>	
(Change Items 205:03 thru 205:07, 205:09 and 205:10, 205:18 thru 205:23 to 1-5/8" thick grouted in place smaller sections)		
DEDUCTIONS	\$190,645.48 \$3,078,683.67
DELETE Street Lighting ..	\$134,398.96 \$2,944,284.71
(Items 210:21 - (210:01) - 210:14)		
DELETE Storm Sewer	\$202,534.50	
(Items 204:01 - 204:12)		
ADD Drainage System	\$ 22,786.00	
(To City Engineer's Specifications)		
DEDUCTIONS	\$179,784.50 \$2,764,536.21
DELETE Bus Shelters	\$128,000.00 \$2,636,536.21
(Items 207:01 & 207:02)		
ADD Cross Walks At Intersections,, 20'-0" wide Precast Pavers 7" wide 26,560 sq. ft. @ \$7.00	\$185,920.00	
(Items 205:15, 205:16 and 205:17)		
ADD 7" Concrete Underlay- ment 2,951 sq yds. @ \$10.00	\$ 29,510.00	
DELETE Asphalt Paving	<u>\$ 17,200.00</u>	
ADDITIONS	\$198,230.00 \$2,834,766.21
TOTAL ESTIMATED COST		<u><u>\$2,834,766.21</u></u>

EXHIBIT P-3

TO ALL PROPERTY OWNERS:

On March 21, 1974, bids were received from construction contractors for the construction of the Main Street Environmental Improvements. The apparent low bidder was Gibbons and Reed with a base price of \$4,123,254.15.

The project designers have analyzed the bids and reviewed their analysis with the Downtown Planning Committee, including the City department heads who served as ex-officio members of the committee. The Designers find the bids to be responsive and appropriate for these uncertain times.

Through selective deletion of certain desirable but nonessential bid items, and substitution of less expensive items for more costly ones in selected parts of the improvement, it was possible to award a contract to Gibbons and Reed within the \$2,800,000 budget established by the committee.

The urban designer has advised the committee that with the possible adjustments, the project will fulfill their same high expectations for the project improvements. The committee has voted in favor of awarding a construction contract on that basis. All members of the committee then present, save Mr. Richard Schubach, voted in favor.

A summary of the proposed changes are included for your consideration.

You are cordially invited to attend an informal public hearing to be held on the foregoing, April 16, 1974, at 10:30 A.M. in the City Commission chambers, at which time your opinions and comments will be appreciated.

Joseph S. Fenton
City Engineer

Notes on Recommended Adjustments

1. Traffic Control obelisks are decorative covers which were to be used to cover all but the lighted lens parts of traffic control signals. They do not appear in the enclosed brochure; their deletion does not have functional impact and will not significantly impair the over-all aesthetic improvement.
2. Tree guards may be seen in the bus shelter sketch and in the display case sketch in the brochure. They are desirable, decorative elements, but their loss is of very limited over-all significance.
3. In terms of the Assessment District, the special intersection paving is to be removed. In that the cost of work in the intersection is the City's responsibility, the City may elect, at no extra cost to the Assessment District, to provide some type of access paving system in some or all of these areas.

The patterns which were to be created by the special

intersection paving system, appear as concentric squares of light and dark bands in the intersection shown on the over-all plan in the brochure.

The mid-block pedestrian crosswalks, those highlighted with honeycomb medallions, are to be provided as shown.

4. The large, pre-cast sidewalk slabs which were to rest on corner support blocks and thus be suspended over an air space in this area will not be used. Instead, smaller, pre-cast sidewalk paving units will be set in grout directly over a poured-in-place concrete slab. This system was to be used for the sidewalk near the building fronts, but now will be used for almost all of the sidewalk area.

The same durability and resistance to spalling (flaking apart of the concrete) expected of the large slabs will also be characteristic of the smaller ones.

It will be possible to remove the small slabs and later replace them to permit utility and other sub-surface work beneath them; this operation will not be as foolproof as it would have been with the layer units, but it will represent a marked improvement over the patchwork created when efforts are made to match new and old poured-in-place sidewalk systems.

The sidewalk patterns shown in the brochure will be provided with the revised paving system, but there will be more joints, and more manholes, meter

vaults and valve stem covers will appear in the sidewalk.

The system, as revised, will provide an exceedingly attractive, very functional and durable sidewalk system.

5. Street lighting as previously proposed will still be provided. The cost of this work is not to be considered in the budget of this Special Assessment District. The funds for this work will come from a Special Lighting Assessment District.
6. If other funds can be found, a storm sewer system will be provided. If not, drainage comparable to this which exists today will be provided. This will have no affect on the appearance of the project.

Amended Adjustments to Gibbons & Reed's low bid on Main Street Environmental Improvements (Curb and Gutter Extension 480).

Gibbons & Reed Base Bid \$4,123,254.15

Proposed Adjustments:

1. Delete: Traffic Control
Obelisks \$357,200.00 \$3,766,054.15
2. Delete: Tree Guards \$ 84,136.00 \$3,681,918.15
3. Use normal asphalt street paving rather than pre-cast concrete blocks in intersection paving areas:
Delete: Thich Set Pavers
In Intersections \$389,069.00

Delete: 7" Concrete Under-
 layment \$ 64,700.00
 \$453,769.00

Add: Asphalt Paving in
 Intersections \$ 41,180.00
 Deductions \$412,589.00 \$3,269,329.15

4. Substitute one sidewalk paving system for another in the new sidewalk area being created from part of the present vehicle parking space.

Delete: Suspended System,
 incl.Hatch Covers \$731,434.50
 Add: Grout System \$540,789.02
 Deductions \$190,645.48 \$3,078,683.67

5. New Street Lighting not to be considered in cost of this improvement.

Delete: Street Lighting \$134,398.96 \$2,944,284.71

6. Replace proposed storm sewer with ditch and shallow pipe/trough systems used customarily in downtown Salt Lake City.

Delete: Storm Sewer \$202,534.50
 Add: Shallow Drainage
 System \$ 22,786.00
 Deductions \$179,748.50

RECOMMENDED ADJUSTED TOTAL \$2,764,536.21

EXCERPTS FROM DEPOSITION OF
LAWRENCE A. JONES

* * *

Q. What funds from the city were used to pay that to Gibbons and Reed?

A. Well, of course, when the special improvement district was established, the abutters' portion was set up and with that, of course, the city's portion too was set up so it came to classification. Obviously the classification was that it is a proper capital improvements expenditure so we looked to the capital improvements fund to pay the city's share. However, at that point in time, capital improvements fund did not have the city's share so we went to an inter-fund note.

Q. Will you describe what an inter-fund note is.

A. Well, in the first place, we had a special improvement district established.

Q. What special improvement district are you referring to?

A. This one, this Downtown Beautification District.

Q. That would be Project No. 38-480?

A. That is right.

Q. All right, Continue, please.

A. So according to the Uniform Municipal Fiscal Procedures Act, it is lawful to negotiate inter-fund loans from one fund to another. In this particular case,

there was only one place that we could find sufficient backing or assets to be able to negotiate an inter-fund loan and that was from the general fund and so we did negotiate an inter-fund loan from the general fund to the special improvement district.

Q. How was that evidenced, Mr. Jones?

A. By an inter-fund note, interest-bearing note on demand.

Q. Do you have that note here in your possession?

A. It's in the file.

MR. GUSTIN: May we have a copy of that, Mr. Cutler?

MR. CUTLER: Yes.

Q. (By Mr. Gustin) As I understand you, that inter-fund note between the general fund of the city and the special improvement district?

A. Right. Now, we looked to the special improvement fund to pay the city's share. The capital improvements fund will pay the city's share to the special improvement district, whereupon the special improvements district will retire the note to the general fund.

* * *

Q. (By Mr. Gustin) Mr. Jones, I hand you what's been marked as Exhibit P-2 and ask you if you would please state for the record what that exhibit is.

A. Your question again, please.

Q. Would you please state for the record what that exhibit is.

A. It is a cover letter requesting the city commission to approve an inter-fund loan from the general fund of Salt Lake City Corporation to the special improvement district fund of Salt Lake City Corporation for the amount of \$876,000.00 bearing interest at the rate of four per cent payable upon demand dated May 1, 1974.

MR. GUSTIN: We will make Exhibit P-2 part of this deposition.

Q. (By Mr. Gustin) Mr. Jones, is there any money in the special improvement district that's now formed?

A. At this time?

Q. Yes.

A. Yes. \$876,000.00 less this payment that was just made the other day for \$17,375.13. That's the first and only payment that's been made. If you'd like that, I could pull that out here on the machine for you, the difference.

* * *

PETITION FOR WRIT
OF PROHIBITATION

1. Petitioner is a taxpayer and resident of Salt Lake City, Utah, and owns property abutting Main Street between South Temple Street on the North and 300 South Street on the South in said city, which is within the boundaries of an alleged Improvement District, described in the Notice of Intent to form said district, a copy of which, marked Exhibit A, is attached hereto and made a part hereof by reference.

2. On the 12th day of June, 1974, Gibbons and Reed Company entered into a construction contract with Salt Lake City Corporation for the construction of the so-called improvements referred to in said Notice of Intent, Exhibit A, and others, not mentioned therein, but which are included in said contract as part of said Improvement District, known as Project No. 38-480. Work was commenced on said project on or about June 17, 1974.

3. The contract aforesaid provides for the payment from time to time to Gibbons and Reed Company for work performed and materials furnished under said contract by the issuance of interim warrants with interest thereon at the rate of six percent per annum.

4. On May 1, 1974, respondents caused a loan to be made from the general funds of Salt Lake City Corporation to the alleged Improvement District in the amount of \$876,000.00, out of which respondents propose to make payments from time to time to Gibbons

and Reed Company for work done under the contract. The loan thus made was evidenced by a promissory note in said amount and provides for the payment of interest thereon at the rate of four per cent per annum. A copy of said note marked Exhibit B, is attached hereto and made a part hereof by reference.

5. On or about the 19th day of July, 1974, respondents authorized and paid the sum of \$17,375.13 to Gibbons and Reed Company from the funds so loaned; said payment represented the first partial estimate due Gibbons and Reed Company for alleged work done under said contract, as set forth in the authorizations for said payment, copies of which, marked Exhibits C and D, are attached hereto and made a part hereof by reference.

6. Petitioner is informed and upon such information and belief alleges that the Brigham Young Monument located in the intersection of Main Street and South Temple Street in Salt Lake City, Utah, is owned by the Brigham Young Memorial Association, and its successors, including the fee of a tract of 25 by 25 feet in the center of said intersection upon which said monument is situate, and that the cost of maintaining and improving said monument is to be borne by said association without cost to the city, all as set forth in an ordinance granting the site for said purpose passed in the year 1897, a copy of which ordinance, marked Exhibit E, is attached hereto and made a part hereof by reference.

7. That petitioner is informed and upon such information and belief alleges that included within the improvements proposed to be made in Project 38-480 is the enlargement and refurbishing of the Brigham Young Monument and that the abutting property owners will be assessed a portion of the costs of the same. That it would be unlawful and contrary to the aforesaid ordinance for the city or abutting owners to be so charged, and respondents should be prohibited from incurring and paying any costs in connection therewith.

8. Petitioner is informed and upon such information and belief alleges that the plans and specifications of Project No. 38-480 call for the existing sidewalks on each side of Main Street to be widened by approximately 10 to 12 feet on each side of the street resulting in the narrowing of the vehicular traveled portion of said street by approximately 10 to 12 feet on each side of the street, and that the grade of Main Street between North (South) Temple Street on the North and 300 South Street on the South is to be lowered approximately one foot, none of which purposes, including the enlargement and refurbishing of the Brigham Young Monument, were set forth in the Notice of Intent, Exhibit A above referred to. Section 10-16-7(2), Utah Code Annotated (1953), prohibits the making of any improvements in an Improvement District not stated in the Notice of Intent unless a new Notice of Intent is given and a new hearing held; that no other Notice of Intent has been made or published. Respondents should be prohibited from paying to Gibbons and Reed Com-

pany out of the funds of said Improvement District any amounts claimed by said Gibbons and Reed Company for the payment of any improvements not stated in the Notice of Intent, including, but not limited to, amounts attributable to widening the sidewalk on both sides of Main Street as aforesaid, including all material and labor in connection therewith, amounts for changing the grade of the aforesaid street, and amounts for enlargement and refurbishing of the Brigham Young Monument.

9. Petitioner is informed and upon such information and belief alleges that respondents have consented to Gibbons and Reed Company working two eight-hour shifts on said project so that said project can be expedited as fast as possible, the same to be completed by October 1, 1974, and petitioner has no other plain, speedy, and adequate remedy for the prevention of said unlawful payments contemplated to be made to Gibbons and Reed Company under the contract for improvements not stated in the Notice of Intent as aforesaid, and petitioner is entitled to a writ or (of) prohibition to arrest and prohibit the payment of the funds in said Improvement District for such purposes which actions are in excess of and contrary to the jurisdiction and authority of respondents in their respective capacities.

WHEREFORE, petitioner demands that an alternative writ of prohibition be issued prohibiting and arresting said respondents and all persons acting by, through, or under their directions from unlawfully pay-

ing Gibbons and Reed Company for improvements not stated in the Notice of Intent, including, but not limited to, amounts attributable to widening the sidewalk on both sides of Main Street as aforesaid, including all material and labor in connection thereof, amounts for changing the grade of the aforesaid street, and amounts for enlargement and refurbishing of the Brigham Young Monument until further order of this Court, and that said respondents be directed to appear before this Court on a day certain to show cause, if any they have, why a permanent writ of prohibition should not be issued; and for such other and further relief as petitioner may be entitled to in the premises.

GUSTIN & GUSTIN

By FRANK J. GUSTIN

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

RICHARD H. SCHUBACH, being first duly sworn upon oath, deposes and says that:

He is an officer and agent of Standard Optical Company, to wit its Vice President, and as such officer and agent, he makes this verification for and on behalf of said corporation; that he has read the foregoing petition and knows the contents thereof and that the same is true to the best of his knowledge, information, and belief.

RICHARD H. SCHUBACH

SUBSCRIBED AND SWORN before me this 31st day of July, 1974.

FRANK J. GUSTIN
NOTARY PUBLIC

Residing at Salt Lake City, Utah

My Commission Expires:
January 7, 1975.

ANSWER TO PETITION FOR WRIT OF PROHIBITION

COME NOW the respondents and answer the petitioner's Petition as follows:

FIRST DEFENSE

The petitioner's Petition fails to state a claim upon which relief may be granted.

SECOND DEFENSE

1. Respondents admit that Exhibit "A" of petitioner's Petition is a correct copy of the Notice of Intent to Form Curb and Gutter Extension No. 480 and that Petitioner is a taxpayer and resident of Salt Lake City, Utah, and owns property within the district described in said Notice of Intent.

2. Respondents admit that on or about the 12th day of June, 1974, Gibbons and Reed Company entered into a construction contract with Salt Lake City Corporation for the construction of certain improvements as set forth in said contract, and that work was commenced on said project, on or about June 17, 1974.

3. That said respondents admit that the aforesaid contract calls for payment as provided in said contract which contract speaks for itself.

4. That said respondents admit that a loan was made from the general fund of Salt Lake City Corporation to the special assessment fund for the purpose of funding approximately \$876,000.00 of the cost of said

special improvements, and that Exhibit "B" of Petitioner's Petition represents the Promissory Note that was executed pursuant to that transaction.

5. That said respondents admit the allegation of paragraph 5 of Petitioner's Petition.

6. That said respondents admit that Exhibit "E" of Petitioner's Petition is a correct copy of an ordinance as of 1897 which exhibit speaks for itself and respondents specifically deny that the City gave the title to the tract of land described in paragraph 6 of Petitioner's Petition.

7. That said respondents deny the allegations of paragraph 7 of Petitioner's Petition.

8. Said respondents admit that the plans and specifications for Project No. 38-480 call for some alteration of vehicular and pedestrain allocations and some grade changes necessary resulting from curb, gutter and sidewalk changes. Respondents affirmatively allege that Utah law speaks for itself regarding the matters alleged in paragraph 8 of Petitioner's Petition.

9. Said respondents admit that Gibbons and Reed Company are working two eight hour shifts on said project so that said project can be expedited as fast as possible, but said respondents deny that petitioner has other speedy or adequate remedy at law.

10. That said respondents deny each and every other allegation of Petitioner's Petition not specifically admitted or otherwise qualified herein.

THIRD DEFENSE

As a separate and affirmative defense, Respondents affirmatively state the above captioned matter has been brought prematurely and that the subject matter of the within litigation is not ripe for determination by this court.

FOURTH DEFENSE

That said respondents were acting in good faith in a discretionary function on the advice of counsel and are therefore immune from liability under state law.

FIFTH DEFENSE

The petitioner lacks standing to bring the above entitled action.

DATED this 19th day of August, 1974.

ROGER F. CUTLER
Attorney for Salt Lake City
Corporation

WALTER R. MILLER
Attorney for Salt Lake City
Corporation

I hereby certify that I received a copy of the foregoing Answer this 19th day of August, 1974.

FRANK GUSTIN
BRYCE ROE

**ALTERNATIVE WRIT
OF PROHIBITION
TO THE RESPONDENTS ABOVE NAMED:**

It appearing from the Verified Petition of Standard Optical Company that you are acting and intend to continue to act in excess of your statutory authority in unlawfully paying Gibbons and Reed Company under its construction contract with Salt Lake City Corporation, Project No. 38-480, for work done and materials furnished and to be furnished in connection with, among other things, the widening of the existing sidewalks on each side of Main Street by approximately 12 feet, resulting in the narrowing of the vehicular portion of said street by approximately 12 feet on each side of the street between South Temple Street on the North and 300 South Street on the South, and the lowering of the grade of said Street between said boundaries by approximately one foot, and enlarging and refurbishing of the Brigham Young Monument located at the intersection of Main Street and South Temple Street, none of which purposes appear to have been set forth in the Notice of Intent published in connection with the formation of said alleged Improvement District, Project No. 38-480, and it further appearing that petitioner has no plain, adequate, or speedy remedy in the ordinary course of law in the premises.

THEREFORE, you and all persons acting by, through, or under your directions, are commanded immediately upon service of this writ upon you not to pay

any sums to Gibbons and Reed Company for any of the improvements not stated in the Notice of Intent to form said district as above delineated until further order of this Court.

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 Court's Building, Salt Lake City, Utah, why you should not be permanently and absolutely restrained and prohibited from proceeding in the respects and particulars above stated and more particularly complained of in the Verification Petition on file herein and why petitioner should not have such other and further relief as may be appropriate in the premises.

It is further ordered that this order together with a copy of the petition be served upon respondents and Gibbons and Reed Company forthwith.

DATED this 31st day of July, 1974.

BY THE COURT:
MARCELLUS K. SNOW
DISTRICT JUDGE

ATTEST
W. STERLING EVANS
Clerk

By Robert A. Olsen
Deputy Clerk

**ORDER VACATING
EXTRAORDINARY WRIT**

It appearing that the Temporary Restraining Order heretofore entered in the court, entitled "Alternative Writ of Prohibition," was issued ex parte defectively, among things, without the posting of bond as required by law; and upon the ex parte motion of the defendants,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said Order entitled "Alternative Writ of Prohibition" heretofore entered by the court, is vacated, set aside and held for naught.

DATED this 1st day of August, 1974.

BY THE COURT:

**STEWART M. HANSON,
JUDGE**

**ATTEST
W. STERLING EVANS
Clerk**

**By Randy Wells
Deputy Clerk**