

2000

# Walt Parker, Linden Disposal Service v. Provo City Corporation : Brief of Appellant

Utah Supreme Court

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Ryberg; McCoy and Halgren; Leon A. Halgren; Attorneys for Appellant.

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IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

Defendant and Respondent.

Case No. 14087

APPELLANT'S BRIEF

Appeal from a Judgment for the Defendant Under the  
Declaratory Judgment Act, Honorable George E. Baliff, Judge.

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Chief, Supreme Court, Utah

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IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

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WALT PARKER dba Linden  
Disposal Service,

Plaintiff and Appellant

-vs-

PROVO CITY CORPORATION,

Defendant and Respondent.

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IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

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WALT PARKER dba Linden     )  
Disposal Service             )

Plaintiff and Appellant     )

-vs-                             )

PROVO CITY CORPORATION,     )  
Defendant and Respondent     )

Case No. 14087

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APPELLANT'S BRIEF

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NATURE OF THE CASE

The plaintiff, hereinafter called Parker, brought this action against Provo City Corporation, hereinafter called Provo City pursuant to the provisions of the Declaratory Judgment Act, Section 78-33-2, Utah Code Annotated, 1953, challenging the ordinance of Provo City which purports to prohibit Parker from engaging in the business of collecting and hauling waste material from the private premises of customers who desire this service within the corporate limits of Provo City.

DISPOSITION IN LOWER COURT

Judge George Ballif, in a partial ruling (record p.43), found that the Provo City ordinance did not prohibit Parker from

collecting and hauling "waste matter" as that term was then defined. Thereafter, Provo City amended its ordinance for the specific purpose of prohibiting Parker from "competing with the City's Sanitation Department" (see copy of letter, Record p.27, dated January 14, 1975, addressed to Leon A. Halgren, Parker's attorney from Glen J. Ellis, Provo City Attorney). Thereafter, on Provo City's Motion to Reconsider the Court made and entered its decision and judgment, wherein the Court ruled that Provo City was empowered, through its ordinance, to prohibit absolutely the waste material collection and hauling activity of Parker within the corporate limits of Provo City.

#### RELIEF SOUGHT ON APPEAL

Appellant appeals from the decision of the Lower Court, requesting this court to review the law as it applies to the power of Provo City to enact laws which, if valid, would prohibit absolutely the waste material collection and hauling activities of Parker rather than regulate them within the corporate limits of the city.

#### STATEMENT OF THE FACTS

The Appellant Parker is a properly licensed, equipped and qualified collector of waste material such as cardboard, rags, scrap wood and shavings, bottles, cans and other non-vegetable or animal refuse, doing business in Linden, Utah, under the style and name of Linden Disposal Service.

Parker had for more than a year prior to the filing of this action served a customer whose business was then situated in Orem, Utah. The customer later moved his business operation to Provo, Utah, and desired the continued collection services of

Parker at his place of business in Provo. Provo City had enacted an ordinance which it claimed absolutely prohibited Parker from serving this customer within the corporate limits of Provo City. Furthermore, it is admitted in the pleadings that Provo City did not have the equipment to properly service Parker's customer.

At the first hearing, the Lower Court determined that by reason of the definition of "garbage" in the Provo City ordinance, there was no local law which then prohibited the Appellant's waste material collection and hauling activity. Thereafter, the Respondent amended its ordinance to specifically and absolutely prohibit Parker from collecting, removing or disposing of waste matter within the limits of Provo City on a commercial basis for hire.

The Lower Court then found that Provo City had the power to prohibit the commercial hauling for hire of waste materials by Parker within the corporate limits of Provo City and entered Judgment accordingly.

#### ARGUMENT

#### POINT I

THE CITY'S EXCLUSIVE PRE-EMPTION OF COMPETITIVE COMMERCIAL WASTE DISPOSAL SERVICES FAR EXCEEDS ITS LEGISLATIVE AUTHORITY AND IS AN UNWARRANTED EXTENSION OF ITS POLICE POWER

The City claims the exclusive right to collect and haul within Provo City limits all waste material, as that term is defined in its amended ordinance, and thereby absolutely prohibits Parker, by means of criminal sanctions, from competing with Provo City in the business of commercial hauling of waste matter. The ordinance, as amended, is found on Page 47 of the Record on Appeal.



Provo City bases its authority to enact the above ordinance on Section 10-8-61, Utah Code Annotated, 1953:

Regulations to Prevent Contagious Diseases-Quarantine-Garbage disposal-They may make regulations to secure the general health of the city, prevent the introduction of contagious, infectious or malignant diseases into the city, and make quarantine laws and enforce the same within the corporate limits and within twelve miles thereof. They may create a board of health and prescribe the powers and duties of the same. They shall not, however, by any ordinance, contract, rule or regulation, prevent or seek to prevent any person from transporting through the streets or public thoroughfares garbage, kitchen refuse or the by-products of the business of such person, or from selling or otherwise disposing of the same, except under such uniform and reasonable regulations as the board of commissioners or city council may by ordinance prescribe for the removal, hauling and disposal of the same, and they shall not grant to any person the exclusive right to collect or transport through the streets or public thoroughfares any garbage, kitchen refuse or by-products, but they may prescribe, by ordinance, that any garbage, kitchen refuse or by-product which may be deemed deleterious to the public health may be taken by the city and burned or otherwise destroyed by it.

Nowhere in this statute does it specifically grant to cities the power to absolutely prohibit the subject activity of Appellant. The express power to properly regulate is clearly therein granted. The only power of prohibition granted to cities in Section 10-8-61 relates to any garbage, (not waste material) kitchen refuse or by-product which may be "deemed deleterious to the public health", and in reference to such defined items, the city may absolutely control and dispose of them. It is respectfully submitted that waste matter as defined by the ordinance in question is not in the same category as kitchen refuse and by-products, and when properly and regularly collected and hauled away, is not "deleterious" to the public health. Therefore, any attempt by Provo City, through an ordinance, to pre-empt commercial competition is a sham and misuse of its police power and far exceeds the express powers granted by the Legislature.

Stated in other terms, Provo City, under the guise of police power to protect the public health, is attempting to create a monopoly and deprive businesses from going to the open market for the waste material collection, hauling and disposal service to obtain the best service at the best price possible.

The law has heretofore been fully and completely briefed, and is contained in written memoranda, filed with the Court, and is a part of the Record on Appeal.

Beginning on p. 12 and through to p.20 is a written memorandum, obviously prepared by a law clerk at the request of the Court. This memorandum was not submitted by or through Appellant's counsel nor was counsel aware of it until the Record on Appeal was reviewed. However, the author of this memorandum clearly and analytically reviews the law and comes to the conclusion (which the learned Trial Judge failed to heed) that the ordinance is unwarranted and exceeds its police power, in that the City is acting ultra vires in exercising exclusive control over waste matter. As this author points out, it is acting ultra vires because the statute Section 10-8-61 (supra) restricts cities and they can only exercise exclusive control with regard to "garbage, kitchen refuse or by-product which may be deemed deleterious to public health", and this type of refuse, obviously, does not fit within the definition of "waste matter" as that term is defined in the subject ordinance.

No purpose apparently would be served to repeat the case law, and arguments of Appellant already found in the Record on Appeal. Therefore, the Court's attention is respectfully called to the Appellant's Memorandum of Authorities on pp. 50-56 and

pp. 21-25 of the Record which, by this reference, are incorporated as a part of this Brief.

# CONCLUSION

Provo City's Amended Ordinance No. 388 should be declared ultra vires, and therefore invalid, only insofar as and as regards its attempt to prohibit (rather than regulate) the commercial collection, hauling and disposal of waste material by Parker within the corporate limits of Provo City, and Provo City should be permanently enjoined from enacting and enforcing any ordinance which would have that purpose and effect.

Respectfully submitted,

RYBERG, McCOY & HALGREN

Leon A. Halgren

Attorneys for Plaintiff-Appellant

## APPENDIX A

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