

2000

# Walt Parker, Lindon Disposal Service v. Provo City Corporation : Brief of Respondent

Utah Supreme Court

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BRIGHAM YOUNG UNIVERSITY  
J. Reuben Clark Law School

IN THE SUPREME COURT OF THE STATE OF UTAH

WALT PARKER, dba  
LINDON DISPOSAL SERVICE,

Plaintiff and Appellant,

vs.

PROVO CITY CORPORATION,  
a municipal corporation,

Defendant and Respondent.

Case no.

14087

RESPONDENT'S BRIEF

AN APPEAL FROM A JUDGMENT FOR THE  
DEFENDANT UNDER THE DECLARATORY  
JUDGMENT ACT, BEFORE THE HONORABLE  
GEORGE E. BALLIF, JUDGE.

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IN THE SUPREME COURT OF THE STATE OF UTAH

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WALT PARKER, dba  
LINDON DISPOSAL SERVICE,

Plaintiff and Appellant,

vs.

PROVO CITY CORPORATION,  
a municipal corporation,

Defendant and Respondent.

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Case no.

14087

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RESPONDENT'S BRIEF

Nature of the Case

The Plaintiff brought an action against Provo City Corporation challenging the City's Ordinance which prohibited commercial hauling of garbage within Provo City.

The Defendant filed a motion for summary judgment under the Declaratory Judgment Act.

Disposition in the Lower Court

Judge George E. Ballif, ruled that Provo City's Ordinance prohibiting the commercial hauling of waste matter within the corporate limits of Provo City by commercial haulers was a valid exercise of the police power.

Relief Sought on Appeal

The Appellant appeals on the law only, and seeks the court to over rule the decision of the trial court.

Statement of Facts

The Defendant is a Municipal Corporation of the State of Utah and duly enacted an ordinance which was codified as Chapter 18.04 of the Revised Ordinances of Provo City, 1964, which Chapter was amended on the 12th day of December, 1974, by the passage of Ordinance no.388.

The Ordinance makes it unlawful for any person, firm or corporation other than the Waste Removal Department of the City, to collect, remove, or dispose of garbage or waste matter, in the City on a commercial basis, or for hire. The Ordinance preserves the right for any person to haul their own garbage or waste material to the garbage dump and specifically allows the person who produces or the owner of the premises where garbage is produced to haul garbage which is suitable for hog feed.

While the Ordinance was in effect a temporary paper shortage drove the price of waste paper products to an unusually high level and the defendant, who operates a commercial disposal system in the nearby community of Lindon, commenced hauling garbage and parti-

cularly waste paper products from at least two sources within Provo City, to-wit: Reams Grocery Store and Heilner Manufacturing, a small manufacturing business. Plaintiff was notified to desist from violation of the Ordinance and brought this action to directly challenge the constitutionality of the Ordinance and the authority of the City to enact such a regulation.

ARGUMENT

Point I

AN ORDINANCE PROVISION LIMITING  
TO THE MUNICIPALITY, THE RIGHT  
TO COLLECT AND DISPOSE OF GARBAGE  
AND WASTE IS A PROPER EXERCISE  
OF THE MUNICIPALITY'S POLICE AND  
OTHER POWERS.

The Plaintiff-appellant's brief seeks to draw a distinction between the power to regulate and the power to absolutely prohibit the activity of garbage and waste collection. The Appellant's brief also seeks to have the court believe that the only power of prohibition is found in Section 10-8-61, UCA, 1953 as amended.

This is of course not the only specific authorization in state law under which the City may regulate waste disposal. See 10-8-24, with respect to Regulations of Refuse in Public Places; 10-8-30 with respect to Traffic Regulation; 10-8-39 with respect to the Licensing of Business, including Drayman; 10-8-43

with respect to regulation of Markets, and Sale of Food Stuffs; 10-8-44 regulating and providing for Inspection and Control of Food Stuffs; 10-8-56 with respect to Combustible and Explosive Substances and Materials; 10-8-60 with respect to Abatement of Nuisances; 10-8-61 with respect to regulations of Garbage and Prevention of Disease; 10-8-66 with respect to Regulations of Offensive Businesses.

In addition, the Supreme Court of Utah has held that it is patently within the police power of a City to regulate garbage and waste disposal apart and aside from any specific statutory authority. See Salt Lake City vs. Bernhagen, 189 P. 583, 56 Utah 159 at Page 586 wherein the Court quotes from Dillon on Municipal Corporations, Section 678 (5th ed.):

"the removal and disposal of garbage, offal and other refuse matter is recognized as a proper subject for the exercise of the power of a municipality to pass ordinances to promote the public health, comfort and safety....

Founded upon the foregoing considerations it is therefore within the power of the City, not only to impose reasonable restrictions and regulations upon the manner of removing garbage, but also, if it sees fit, to assume the exclusive control of the subject, and to provide that garbage and refuse matter shall only be



removed by the officers of the City, or by a contractor hired by the City or by some single individual to whom exclusive license is granted for the purpose. An exclusive right so created is not open to the objections that is it a monopoly."

The court in the Bernhagen case further quotes, Gardner vs. Michigan 199 U.S. 330, 26 Supreme Court 108, 50 L. ed. 212, wherein the Supreme Court of the United States approved the instruction of the trial court as a correct statement of the law which instruction read as follows:

"Defendant in this case was transporting what confessedly was garbage. It is well settled that no one may claim damages because of enforced obedience to a police regulation designed to secure and protect public health. It is manifest that were individuals permitted to escape the regulation fixed by a common council and dispose of garbage as they severally saw fit, all systems in the collection in the removal of refuse matter would be destroyed. Even if this garbage have some value or some such use as that to which the respondent or employer put it, the feeding of hogs, the Court will not, at the expense of the public health, recognize that this refuse matter in its common legal aspect is property. No property right has therefore, been violated."

Subsequent to the Bernhagen case, the Legislature of the State of Utah, amended Section

10-8-61 to allow a person to transport his own garbage and kitchen refuse. This amendment was done in the laws of 1921.

Thereafter, the only other Utah State Supreme Court case that touches on the question of Municipal Regulations of Garbage occurred in the case of Retan et al vs. Salt Lake City, 63 Utah 459, 226 P. 1095 (May 29, 1924.)

The issue in the Retan case was whether the City had power under its police power to ignore an exclusive franchise which had been given to the Plaintiff in the case for collection of useable garbage and the court found that the police power was sufficient to overcome the contract right. The court held on page 1097:

"No matter what the terms of the contract, it is subject to the right of the City to exercise its police power for the public benefit. And to the lawful exercise of such power the provisions of the contract must yield, even though their purposes are defeated."

The Court then makes reference to the amendment made by the change in the laws of Utah in 1921 and says:

"It is clear that the purpose of this amendment was to deprive the City Governments of the power to absolutely prevent private persons from disposing of their

own garbage, and to secure such right to owners of garbage, under such uniform and reasonable regulation as the City might prescribe therefore,...

The legislature by the amendment referred to, prescribed a limitation on the power of the City, in the respect mentioned, and required it to depart from a policy which it formerly might or might have not done in its discretion."

No other cases have been tried before the Supreme Court of the State of Utah, on the precise issue presented in this Appeal. Many, many cases in other jurisdictions however, have held that the police power, with or without expressed statutory authorization has been held to be sufficient to allow the city to prohibit any other persons from engaging in the business of collection of garbage and trash. See McQuillin on Municipal Corporation, Section 24.249:

"A city may forbid the commercial removal of house dirt, trash and the like without a license; it may perform the function; or it may let a contract, which may be exclusive for the service."

See also McQuillin, Municipal Corporation, Section 24.250:

"Municipal corporations, frequently perform the service of collecting and removing all garbage, trash and similar substances, and prohibit any other person from engaging in that business. A

municipality may do this under its police or general power to provide for the health of its inhabitants and to prevent and abate nuisances. It may do so even though it has charter power to let a contract for the purpose, it may provide that all scavenger work within it be done by a person appointed by it and prohibit anyone else from engaging in any such work. At least it may prohibit anyone but City officials or a contractor with the City from removing such matters, where they are a nuisance, offensive or likely to be dangerous to the public health. The gathering of garbage is not a trade, business or occupation, but it is a public duty, to be performed by a City in a manner that will best promote the health of the inhabitants."

The footnote on the bottom of Page 94 of the cited quotation from McQuillin lists Supreme Court decisions from many, many states. An excellent annotation covering the subject is attached to the case of Strub vs. Village of Deerfield, an Illinois Supreme Court case in 1960, 167 NE 2(d) 83, ALR 2(d) 795.

The facts in that case are very similar to those in the instant case, the Plaintiff claimed that the limitations on his scavenger activities violated the due process clause, created a monopoly in contravention of the common law and the state constitution. The Supreme Court of Illinois granted judgment for the

Defendant City, and found that the limitations bore a reasonable and real relation to the objects of public health sought to be obtained and justified the subordination of individual rights.

In the ALR citation the annotator summarizes the findings of his annotations as follows, at Page 801:

"the great weight of authority is to the effect that a municipality, in the discharge of its police power and duty to protect the health, safety, comfort, and general welfare of its residents, may regulate the removal of garbage and rubbish within its limits by either taking such service upon itself as a governmental function, which it exercises through its employees, and exclude private operators from this field, or by contracting with private removal and disposal enterprises for the scavaging services of the latter, granting then for such services, an exclusive license or privilege..."

Headnote 5 of the same annotation at Page 819 quotes a large number of cases from various jurisdictions on the question of exclusive collection by the City personnel, in these words:

"In many cases municipalities have adopted ordinances or regulations giving the governmental body itself the exclusive right or privilege of operating garbage or rubbish removal services, excluding private operators from this field. Such provisions have been attacked, usually

by private scavengers, on a variety of grounds, involving claims that the enactment violated due process by unlawfully taking property in the scavenger business or in the garbage itself, or that an lawful monopoly in restraint of trade was created, or that the regulation amounted to an improper revenue device.

In the great majority of cases discovered, such attacks have been unsuccessful, the provision limiting to the municipality the right to collect and dispose of garbage or trash being regarded as a proper exercise of the municipalities police or other powers."

A review of the most recent cases to pass on the case subject discloses two recent decisions which are consistent with the above. See the City of Spokane vs. Karlson, 436 P. 2(d) 454, and the City of Tigard vs. Werner 515 P. 2(d), 934(Oregon, 1973).

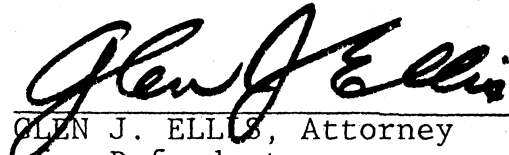
The latter case held that absent some contract right in the scavenger, the municipality was not depriving the defendant of property without due process in passing and enforcing an exclusive ordinance relegating that duty to the City.

#### CONCLUSION

The weight of decisions from all of the jurisdictions quoted to the effect that a City has every right under the general police power whether set forth in

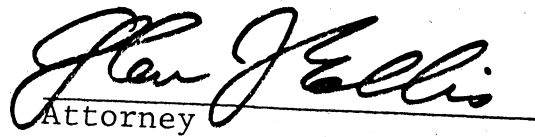
specific statute or not, to relegate the exclusive right to collect garbage to its own employees as a governmental function and that in so doing there is no violation of the due process clause or any other constitutional provision.

Respectfully submitted this 21st day  
of July, 1975.

  
GLEN J. ELLIS, Attorney  
for Defendant-  
Respondent Provo City  
Corporation

Mailing Certificate

Mailed 10 copies of Respondent's Brief to the Utah Supreme Court, Utah State Capitol Building Salt Lake City, Utah; and 2 copies to Leon Halgren, Attorney for the Appellant at 325 South Third East, Salt Lake City, Utah, postage prepaid this 21st day of July, 1975, at Provo, Utah.

  
Attorney



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