

2007

Hogs R Us, a Utah corporation, Scott C. McLachlan,
an Individual, Utah Valley Turf Farms, L.C., a Utah
limited liability company, Ault Farms, LLC, a Utah
limited liability company, Zane Dansie, an
individual, and Keith Jonsson, an individual v.
Town of Fairfield : Brief of Appellant

Utah Court of Appeals

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Richard G. Allen; Larry S. Jenkins; Wood Crapo; Attorneys for Defendant/Appellee.

Joseph C. Rust; Kesler & Rust; Mark H. Richards; Bennett, Tueller, Johnson & Deere; Attorneys for Plaintiffs/Appellants.

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IN THE UTAH SUPREME COURT

HOGS R US, a Utah corporation, SCOTT C. MCLACHLAN, an individual, UTAH VALLEY TURF FARMS, L.C., a Utah limited liability company, AULT FARMS, LLC, a Utah limited liability company, ZANE DANSIE, an individual, and KEITH JONSSON, an individual

Plaintiffs/Appellants

v.

TOWN OF FAIRFIELD,

Defendant/Appellee.

Case No. 20070872

Subject to reassignment to the Court of Appeals

BRIEF OF APPELLANTS

ON APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT
OF UTAH COUNTY, STATE OF UTAH
HONORABLE JAMES R. TAYLOR

Richard G. Allen
2975 West Executive Parkway #509
Lehi, Utah 84043

Larry S. Jenkins
WOOD CRAPO
500 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111

Attorneys for Defendant/Appellee

Joseph C. Rust
KESLER & RUST
68 South Main Street, Second Floor
Salt Lake City, Utah 84101
*Attorneys for Plaintiffs/Appellants
Hogs R Us, Scott C. McLachlan,
Zane Dansie, and Keith Jonsson*

Mark H. Richards
BENNETT TUELLER JOHNSON & DEERE
3165 East Millrock Drive, Suite 500
Salt Lake City, Utah 84121
*Attorneys for Plaintiffs/Appellants Utah Valley
Turf Farms, L.C. and Ault Farms, LLC*

COURTS

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500 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111

Attorneys for Defendant/Appellee

Joseph C. Rust
KESLER & RUST
68 South Main Street, Second Floor
Salt Lake City, Utah 84101
*Attorneys for Plaintiffs/Appellants
Hogs R Us, Scott C. McLachlan,
Zane Dansie, and Keith Jonsson*

Mark H. Richards
BENNETT TUELLER JOHNSON & DEERE
3165 East Millrock Drive, Suite 500
Salt Lake City, Utah 84121
*Attorneys for Plaintiffs/Appellants Utah Valley
Turf Farms, L.C. and Ault Farms, LLC*

A COMPLETE LIST OF ALL PARTIES TO THE PROCEEDING:

Hogs R Us
Scott C. Melachlan
Utah Valley Turf Farms, L.C.
Ault Farms, LLC
Zane Dansie
Keith Jonsson

- Plaintiffs/Appellants

Town of Fairfield

- Defendant/Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iv
STATEMENT OF JURISDICTION.....	1
STATEMENT OF THE ISSUES.....	1
DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND RULES.....	2
STATEMENT OF THE CASE.....	3
Nature of the Case	3
Course of Proceedings and Disposition at Trial Court	5
STATEMENT OF FACTS	6
SUMMARY OF THE ARGUMENT	9
ARGUMENT	10
I. UNDER UTAH LAW, THE TOWN OWES A DUTY TO MAINTAIN THE ROAD IN A REASONABLY SAFE CONDITION FOR TRAVEL	10
A. The Utah Legislature Has Imposed Upon Each Utah Municipality an Affirmative Duty to Keep the Roads under the Municipality's Control in a Safe and Usable Condition.....	10
B. Utah Courts Have Consistently Held that Municipalities in the State of Utah are under a Legal Duty to Keep Their Streets in a Reasonably Safe Condition for Travel.....	12
C. Consistent with the Imposition of a Duty to Maintain Roads in Safe and Usable Condition, the Utah Legislature has waived Governmental Immunity for Injuries Caused by a Defective Road.....	13

D.	Under Utah Law, the Trial Court Possessed the Authority to Compel the Town to Fulfill Its Duty to Maintain the Road by Requiring the Town to Conduct All Repairs on the Road Necessary to Make the Road Safe and Usable.....	14
II.	THE TOWN IMPROPERLY REJECTED MONIES FROM PLAINTIFFS/ APPELLANTS TO DO ROAD REPAIR WORK	23
	CONCLUSION	24

ADDENDUM

Ruling dated March 30, 2007

Findings of Fact and Conclusions of Law

Order dated September 24, 2007

TABLE OF AUTHORITIES

CASES

<i>Bowen v. Riverton</i> , 656 P.2d 434, 437 (Utah 1982)	13
<i>Commonwealth v. Ball</i> , 121 Atl. 191 (1923)	18
<i>Day v. State ex rel. Utah Dept. of Public Safety</i> , 1999 UT 46, ¶8, 980 P.2d 1171.....	1,2
<i>Home Owners' Loan Corp. v. Logan City</i> , 92 P.2d 346 (Utah 1939).....	16
<i>Jamison v. City of Zion</i> , 834 N.E.2d 499 (Ill. Ct. App. 2005)	20
<i>Jones v. Barlow</i> , 2007 UT 20, 154 P.3d 808	17
<i>Lank v. Hughes</i> , 167 A.2d 268 (Pa. 1961)	18
<i>Lee v. West Valley City</i> , 860 P.2d 336 (Utah 1993).....	12
<i>Murray v. Ogden City</i> , 548 P.2d 896 (Utah 1976).....	13
<i>Morris v. Salt Lake City</i> , 101 P. 373, 377 (Utah 1909)	13
<i>Platt v. Town of Torrey</i> , 949 P.2d 325, 328 (Utah 1997)	17
<i>Pund v. Village of Walton Hills</i> , 2002 Ohio 981, P2-3 (Ohio Ct. App. 2002)	19
<i>Renn v. Board of Pardons</i> , 904 P.2d 677, 682 (Utah 1995)	15
<i>Rice v. Utah Security Division</i> , 95 P.3d 1169 (Utah Ct. App. 2004).....	15
<i>Rollow v. Ogden City</i> , 243 P. 791 (Utah 1926).....	20
<i>Ross v. Fox</i> , 2003 Ohio 3513, P7 (Ohio Ct. App. 2003)	19
<i>Skeen v. Ogden Rapid Transit Co.</i> , 112 P.120 (Utah 1910)	17
<i>St. Louis & S.F.R. Co. v. Sutton</i> , 119 P. 423, 428 (Okla. 1911)	19

<i>State v. Stirba</i> , 972 P.2d 918, 921 (Utah Ct. App. 1998).....	15
<i>Trapp v. Salt Lake City Corp.</i> , 835 P.2d 161 (Utah 1992)	13, 14
<i>Villiers v. Utah County</i> , 882 P.2d 1161 (Utah Ct. App. 1994)	14
<i>Willoughby v. Whetstone Township Bd.</i> , 581 N.W.2d 165 (S.D. 1998)	18

STATUTES

Utah Code Ann., § 63-30d-301(3)	2
Utah Code Ann., § 63-30d-301 et seq.....	13
Utah Code Ann., § 63-30d-301(3)(a)(i)	14
Utah Code Ann., § 72-3-104	3,10
Utah Code Ann., § 72-3-104(4)	10
Utah Code Ann., § 72-3-104(5)	10
Utah Code Ann., § 72-3-104(7)(a).....	10
Utah Code Ann., § 72-5-101 et seq.....	20
Utah Code Ann., § 72-5-302	21
Utah Code Ann., § 72-5-303	21
Utah Code Ann., § 72-5-305	21
Utah Code Ann., § 72-5-305(1)	22
Utah Code Ann., § 72-5-305(2)	22
Utah Code Ann., § 72-5-305(3)(a).....	22
Utah Code Ann., § 72-5-305(5)	22

Utah Code Ann., § 72-6-108	10, 11
Utah Code Ann., § 72-6-109	10
Utah Code Ann., § 72-6-109(1)(e)	11, 12
Utah Code Ann., § 72-6-109(2)	11
RS (Revised Statute) 2477 (“R.S. 2477 rights-of-way”)	21

RULES

U.R.C.P. 65B(d)(2)(B)	14
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STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2-2(3)(j). This appeal is subject to reassignment to the Utah Court of Appeals pursuant to Utah Code Ann. § 78-2-2(4).

STATEMENT OF THE ISSUES

Issue # 1: Did the District Court err in ruling as a matter of law that, although a municipal road is unsafe in its current condition due to its lack of being maintained, private citizens cannot require the municipality to undertake repairs to the road to make it safe?

Standard of Appellate Review: Correctness. Determination of the obligations of a municipality relative to repair of its roads on summary judgment is a question of law reviewed for correctness and according no particular deference to the legal conclusion reached by the district court. *Day v. State ex rel. Utah Dept. of Public Safety*, 1999 UT 46, ¶8, 980 P.2d 1171.

Preservation of Issue Below: This issue was directly addressed by the trial court in its March 30, 2007 Memorandum decision.

Issue #2: Did the District Court err in ruling as a matter of law that although a municipal road is unsafe in its current condition due to its lack of being maintained, private citizens cannot require the municipality to accept the private citizen's funds for the purpose of repairing the road to make it safer than it was?

Standard of Appellate Review: Correctness. Determination of the obligations of a municipality relative to repair of its roads on summary judgment is a question of law reviewed for correctness and according no particular deference to the legal conclusion reached by the district court. *Day v. State ex rel. Utah Dept. of Public Safety*, 1999 UT 46, ¶8, 980 P.2d 1171

Preservation of Issue Below: This issue was directly addressed by the trial court in its March 30, 2007 Memorandum decision.

**DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES,
ORDINANCES, AND RULES**

1. Utah Code Ann., § 63-30d-301(3):

(a) Except as provided in Subsection (3)(b), immunity from suit of each governmental entity is waived as to any injury caused by:

(i) a defective, unsafe, or dangerous condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct, or other structure located on them; or

(ii) any defective or dangerous condition of a public building, structure, dam, reservoir, or other public improvement.

(b) Immunity from suit of each governmental entity is not waived if the injury arises out of, in connection with, or results from:

(i) a latent dangerous or latent defective condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct, or other structure located on them; or

(ii) a latent dangerous or latent defective condition of any public building, structure, dam, reservoir, or other public improvement.

2. Utah Code Ann., § 72-3-104:

(1) City streets comprise:

(a) highways, roads, and streets within the corporate limits of the municipalities that are not designated as class A state roads or as class B roads; and

(b) those highways, roads, and streets located within a national forest and constructed or maintained by the municipality under agreement with the appropriate federal agency.

(2) City streets are class C roads.

(3) Except for city streets within counties of the first and second class as defined in Section **17-50-501**, the state and city have joint undivided interest in the title to all rights-of-way for all city streets.

(4) The municipal governing body exercises sole jurisdiction and control of the city streets within the municipality.

(5) The department shall cooperate with the municipal legislative body in the construction and maintenance of the class C roads within each municipality.

(6) The municipal legislative body shall expend or cause to be expended upon the class C roads the funds allocated to each municipality from the Transportation Fund under rules made by the department.

* * * *

STATEMENT OF THE CASE

I. NATURE OF THE CASE

The Town of Fairfield (the “Town”) issued a weight limitation ordinance in August 2005, which prevented many of the large trucks operated by the Appellants from using a Town road known as 1600 North (hereinafter referred to as the “Road”).

Plaintiffs/Appellants brought suit seeking an injunction against the enforcement of the weight limitation ordinance. At a preliminary injunction hearing, the trial court granted Plaintiffs/Appellants' request for preliminary relief and enjoined the Town from enforcing its weight limitation ordinance on the Road pending a trial on the merits of Plaintiffs/Appellants' claims. Anxious to have the Road repaired so that their trucks might safely use the Road, Plaintiffs/Appellants subsequently submitted a proposal to the Town whereby Plaintiffs/Appellants offered to pay all costs associated with conducting such repairs on the Road as necessary to place the Road in the same condition in which Utah County had maintained the Road. The Town flatly rejected Plaintiffs/Appellants' proposal stating that unless Plaintiffs/Appellants were willing to pay for the reconstruction of the Road in accordance with the Town's requirements for reconstruction (which requirements Plaintiffs/Appellants estimate would cost in excess of \$300,000), the Town was unwilling to allow Plaintiffs/Appellants to pay for, or otherwise cause to be performed, any repairs on the Road. Furthermore, the Town failed to make the repairs suggested by Plaintiffs/Appellants needed to maintain the Road in a safe and usable condition for travel.

Thereafter Plaintiffs/Appellants were allowed to amend their Complaint to include the following cause of action whereby Plaintiffs/Appellants sought an order from the trial court requiring the Town to perform its statutory and common law duty to maintain the Road in a safe condition for travel:

Based on [the Town's] refusal to conduct any repairs on the Road in breach of its duty to maintain the Road in a reasonably safe condition for travel, [Plaintiffs/Appellants] are entitled to an order from the Court requiring [the Town] to repair the Road. Alternatively, [Plaintiffs/Appellants] are entitled to an order from the Court permitting [Plaintiffs/Appellants] to hire and pay for an independent contractor to make any necessary repairs to the Road.

II. COURSE OF PROCEEDINGS AND DISPOSITION AT TRIAL COURT

After a preliminary injunction hearing held on October 26, 2005 and November 8, 2005, the Court issued an injunction, pending trial, preventing the Town from enforcing its weight ordinance. Later in its March 30, 2007 Memorandum Decision, which ruled on the Town's Motion for Partial Summary Judgment, the Court determined that it did not have the authority to require the Town to either repair the Fairfield Road or to accept money from the Plaintiffs for the purpose of repairing the same. However, the trial court reserved for trial the issue of the validity and enforceability of the Town weight ordinance. During the course of the trial, which commenced on April 16, 2007, the trial court held by reason of testimony from Town witnesses, that the Fairfield Road in its present condition is unsafe for the traveling public due to the potholes and other deterioration of the Road. However, the trial court did not reverse its earlier Decision with regard to requiring the Town to make needed repairs. After the end of the full trial, the injunction with regard to the weight ordinance was made permanent, and a final Order was entered on September 24, 2007 to that effect. Plaintiffs/Appellants appeal from the Decision granting the partial summary judgment.

STATEMENT OF FACTS

1. The Town of Fairfield (“Town”) is an incorporated municipality of the State of Utah located in the South-central section of Cedar Valley in western Utah County. The Town was incorporated in late 2004. The Town is located in one of the most rural, agrarian areas of Utah County. R. at 523.

2. The primary residential area of the Town is located very near State Road 73. R. at 523.

3. Plaintiffs/Appellants all are businesses or individuals engaged in farming operations immediately East of the Town. R. at 523.

4. The case arises out of Plaintiffs/Appellants’ use of a road located within the Town known as 1600 North Street (“Road”). R. at 522.

5. The western terminus of the Road is at its intersection with State Road 73, which is a highway traversing Cedar Valley from the Lehi area of Utah county, past Cedar Fort, Fairfield and on toward Faust. R. at 522.

6. At its western terminus, and for the first mile or so of its length, the Road is known as 1540 North. R. at 522.

7. For many years before the incorporation of the Town, Utah County maintained the Road, including that portion of the Road that is located away from the primary residential area of the Town. R. at 522.

8. Following the Town's incorporation the County no longer provided maintenance for the Road. Nor has the Town provided any maintenance on the Road. R. at 521.

9. In 2006, TNT Construction, owned by a Town resident, filled the potholes on that portion of the Road located in the primary residential area of the Town. It did not, however, make any repairs to the rest of the Road. R. at 520.

10. The portion of the Road repaired by TNT Construction, a section of Road over which the trucks must ravel to access Highway 73, has held up remarkably well with the modest maintenance that TNT performed. R. at 520.

11. Since the preliminary injunction hearing in October and November 2005, the Town has not spent any money nor invested any time or labor in maintaining the Road after it leaves the primary residential area of the Town. Because the Road has not been maintained, it has deteriorated considerably since the preliminary injunction hearing. R. at 518.

12. As the Road has continued to deteriorate following the preliminary injunction hearing, plaintiffs obtained a bid from TNT Construction for repairs to the S-turn on the Road and other repairs. Plaintiffs also agreed to pay all of the cost for these repairs. However, the Town refused this offer by plaintiffs. At the same time, the Town has not spent any funds to make any repairs to the Road. R. at 518.

13. On May 24, 2005 Earthtec Testing & Engineering, P.O., the engineering

firm advising the Town (“Earthtec”) sent a letter to the Town in which it recommended that the Road be completely rebuilt, with a pavement section of 4 inches of asphalt, over 6 inches of road base, over 8 inches of sub base. Exhibit 4 to Preliminary Injunction hearing.

14. In July 2005, Earthtec sent a subsequent letter in which it recommended an alternative proposed pavement improvement for the Road. This alternative was prepared by Earthtec after the Plaintiffs/Appellants advised the Town that they were willing to participate to some extent in the cost of the improvement of the Road. R. at 514.

15. In July 2005, Earthtec sent a letter to the Town in which it recommended an alternative proposed pavement improvement for the Road. This alternative was prepared by Earthtec after the Plaintiffs/Plaintiffs/Appellants advised the Town that they were willing to participate to some extent in the cost of the improvement of the Road. R. at 514.

16. The Town did not make any of the improvements recommended in the July 2005 letter. R. at 514.

17. The Town’s own witnesses, including the Town Mayor, have said that the Road is in terrible condition and is not safe. Preliminary Injunction Hearing Tr. at 82, 116.

18. The Town was ultimately enjoined from enforcing its weight limit ordinance. R. at 526.

SUMMARY OF THE ARGUMENT

Under both Utah statutory law and common law a Utah municipality clearly owes a duty to maintain the roads under its control and jurisdiction in a safe and reasonable condition. Because this duty to maintain is a clear, mandatory and non-delegable duty under Utah law, a court may order a municipality to fulfill such duty in the event the municipality has either failed or refused to do so. The imposition of such an order is nonetheless subject to certain limitations relating to the municipality's discretionary rights. In other words, while a court may order the performance of the duty to maintain, a court may not order (and a municipality retains the discretion over) the particular way in which the municipality performs the repairs required to bring an unsafe road to a safe and usable condition. Because the Town has refused to fulfill its duty to safely maintain and otherwise to make necessary repairs to the Road, despite the fact that the Town has repeatedly admitted that the Road's condition is terrible and unsafe and despite the fact that the Town has rejected any payments by Plaintiffs/Appellants for some or all of the necessary repairs, this Court should reverse the decision of the trial court and order that the Town perform its duty to maintain the Road in a safe and usable condition.

ARGUMENT

I. THE TRIAL COURT ERRED IN HOLDING THAT IT LACKED THE AUTHORITY TO ORDER THE TOWN TO PERFORM ITS DUTY TO MAINTAIN THE ROAD IN A SAFE AND USABLE CONDITION.

A. The Utah Legislature Has Imposed Upon Each Utah Municipality an Affirmative Duty to Keep the Roads under the Municipality's Control and Jurisdiction in a Safe and Usable Condition.

Statutes relating to, among other things, the designation of the State of Utah's roads, streets and highways, the division of jurisdiction and control over those roads, streets and highways and the duties arising out of such jurisdiction and control are all contained in Utah's Transportation Code (the "Code"), located at Section 72 of the Utah Code Annotated. Section 72-3-104 of the Code states that the "municipal governing body exercises sole jurisdiction and control of the city streets within the municipality" and thus is responsible for the "construction and maintenance" of such city streets (which are designated as "Class C" roads under the Code). *See* U.C.A., §§ 72-3-104(4), (5), and (7)(a). Section 72-6-108 of the Code sets forth certain conditions with which a municipality must comply in connection with the performance of its construction and maintenance duties. In part, that section requires a municipality to cause plans, specifications, and estimates to be made prior to the construction of any qualifying "improvement project."

Section 72-6-109 of the Code, in turn, contains definitions of various terms that both appear in and are referenced by Section 72-6-108. Subsection (1)(d) of Section 72-

6-109 defines the term “improvement project” as “construction and maintenance as defined in this section except for that maintenance excluded under Subsection (2).”

Subsection (1)(e) of Section 72-6-109 then defines the term “maintenance” as follows:

(e) “Maintenance” means the *keeping of a road facility in a safe and usable condition to which it was constructed or improved*, and includes:

- (i) the reworking of an existing surface by the application of up to and including two inches of bituminous pavement;
- (ii) the installation or replacement of guardrails, seal coats, and culverts;
- (iii) the grading or widening of an existing unpaved road or flattening of shoulders or side slopes to meet current width and safety standards; and
- (iv) horizontal or vertical alignment changes necessary to bring an existing road in compliance with current safety standards.

U.C.A., § 72-6-109(1)(e) (emphasis added). Subsection (2) of Section 72-6-109 excludes from the definition of “improvement project” qualifications contained in Section 72-6-108 of the Act, the following types of maintenance work: “(a) the repair of less than the entire surface by crack sealing or patching; and (b) road repairs incidental to the installation, replacement, or repair of water mains, sewers, drainage pipes, culverts, or curbs and gutters.” U.C.A., § 72-6-109(2).

Accordingly, as outlined above, the Utah Legislature has imposed on each municipality within the State of Utah, a statutory duty of constructing and maintaining the streets within the boundaries of the municipality (*i.e.* all streets under the control and

jurisdiction of the municipality). In further delineating the obligations associated with this statutory duty, the Utah Legislature also defines the type of “maintenance” required to be performed by a municipality in order to fulfill the duty of maintaining its city streets, to wit, “*the keeping of a road facility in a safe and usable condition to which it was constructed or improved.*” See U.C.A., § 72-109(1)(e) (emphasis added).

The duty to maintain is not discretionary inasmuch as nowhere in the Code is a municipality given any option not to maintain its roads. Therefore, in order for the Town to fulfill its affirmative and nondiscretionary duty under the Code to maintain its city streets, the Utah Legislature requires that the Town keep its streets “in a safe and usable condition.”

B. Utah Courts Have Consistently Held that Municipalities in the State of Utah are under a Legal Duty to Keep Their Streets in a Reasonably Safe Condition for Travel.

The statutory duty outlined above and imposed by the Utah Legislature upon each municipality to maintain all roads under the municipality’s control and jurisdiction in a safe and usable condition, is consistent with (and virtually identical to) a common law duty that Utah courts have uniformly imposed on all Utah municipalities during the past century. In *Lee v. West Valley City*, 860 P.2d 336 (Utah 1993), for example, this Court stated the following regarding such a legal duty: “it has long been the law in Utah (going back to its territorial era) that a municipality has a duty to exercise ordinary care to keep streets which it has opened for travel and which it has invited the public to use in a

reasonably safe condition for travel.” *Id.* at 338; *see also Bowen v. Riverton*, 656 P.2d 434, 437 (Utah 1982) (a Utah municipality has “a nondelegable duty to exercise due care in maintaining streets within its corporate boundaries in a reasonably safe condition for travel.”), citing *Murray v. Ogden City*, 548 P.2d 896 (Utah 1976); *see also Morris v. Salt Lake City*, 101 P. 373, 377 (Utah 1909) (holding that it is “the primary duty of the city to exercise reasonable care to maintain the streets in a reasonably safe condition and to guard against injury to persons and property by removing or making reasonably safe any dangerous objects in the streets.”) In *Trapp v. Salt Lake City Corp.*, 835 P.2d 161 (Utah 1992), this Court noted that the duty of municipalities to maintain their streets in a safe and usable condition is “generally grounded upon the common law principle that one who has control over a physical facility has an obligation to keep it in a safe condition.” *Id.* at 162.

C. Consistent with the Imposition of a Duty to Maintain Roads in Safe and Usable Condition, the Utah Legislature has waived Governmental Immunity for Injuries Caused by a Defective Road.

Consistent with the statutory and legal duties imposed upon a Utah municipality to maintain its roads in a safe and usable condition, Utah’s Governmental Immunity Act (U.C.A., § 63-30d-301 et seq.) specifically states, in relevant part, as follows:

(3) (a) Except as provided in Subsection (3)(b), *immunity from suit of each governmental entity is waived* as to any injury caused by:

(i) *a defective, unsafe, or dangerous condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct, or other structure located on them; . . .*

Utah Code Ann., § 63-30d-301(3)(a)(i) (emphasis added). Indeed, in *Villiers v. Utah County*, 882 P.2d 1161 (Utah Ct. App. 1994), the Utah Court of Appeals specifically held that a municipality’s “duty to keep its streets maintained in a reasonably safe condition for public use” is “consistent with” the Utah’s Governmental Immunity Act. *Id.* at 1165 (referencing the previous version of the above-quoted section), citing *Trapp*, 835 P.2d at 161-62.

Based on the foregoing review of Utah statutory law and case law, it is clear that the Town has an affirmative and nondelegable statutory duty and legal duty to maintain the streets within its boundaries, including the Road, in a reasonably safe and usable condition. The only remaining question is whether a court possesses the authority under Utah law to compel a municipality to perform its duty to maintain its roads in a safe and usable condition in the event that the municipality has failed or refused to do so. As demonstrated below, Utah law clearly provides that courts do, in fact, possess such authority.

D. Under Utah Law, the Trial Court Possessed the Authority to Compel the Town to Fulfill Its Duty to Maintain the Road by Requiring the Town to Conduct All Repairs on the Road Necessary to Make the Road Safe and Usable.

Rule 65B of the Utah Rules of Civil Procedure allows a court, in its discretion, to grant the extraordinary relief of a writ in the nature of mandamus, compelling a municipality, among others, to fulfill or perform “an act required by law as a duty of

office” which the municipality has failed to or refuses to fulfill or perform. *See* U.R.C.P. 65B(d)(2)(B); *see also State v. Stirba*, 972 P.2d 918, 921 (Utah Ct. App. 1998). While Rule 65B abolished traditional writs, including writs of mandamus, Utah courts “continue to be guided by established mandamus principles.” *Rice v. Utah Security Division*, 95 P.3d 1169 (Utah Ct. App. 2004), citing *Renn v. Board of Pardons*, 904 P.2d 677, 682 (Utah 1995) and *Stirba*, 972 P.2d at 921.

In *Renn*, this Court stated the following with regards to a writ of mandamus: “The common law writ of mandamus was designed to compel a person to perform a legal duty incumbent on him by virtue of his office or as required by law.” *Renn*, 904 P.2d at 682. The mere fact that the performance of a particular duty involves the exercise of judgment or discretion does not make relief of a writ in the nature of mandamus inapplicable to that duty; rather, as this Court stated in *Renn*, a court may “compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way.” *Renn*, 904 P.2d at 682 (citations omitted). Relief under Rule 65B is likewise limited. Accordingly, under Utah law, a party may request a court to “direct the exercise of discretionary action,” but may not ask the court to “direct the exercise of judgment or discretion in a particular way.” *Stirba*, 972 P.2d at 921 (quotations and citations omitted).

The request for relief made by Appellants to the trial court in their Amended Complaint was appropriate under Utah law and should have been granted. Appellants

sought to have the trial court compel the Town to fulfill the Town's duty to maintain the Road in a safe and usable condition. Appellants at no time sought to have the trial court compel the Town to make any particular repairs to the Road or repair the Road in a "particular way," such as to demand that it repair the Road in accordance with any particular standard. Because Appellants' request for relief was appropriate, the trial court possessed the authority to require the Town to fulfill its duty to maintain the Road by ordering the Town to complete all repairs to the Road necessary to make the Road safe and usable for vehicular travel. Indeed, Appellants offered to pay the cost of repair work, which the Town rejected. Ordering the Town to conduct whatever repairs are required to make the Road safe and usable is not equivalent to directing the Town to make repairs to the Road in a particular way. Under such an order, the Town would be free to exercise its discretion in determining both what repairs to the Road should be made and the manner in which such repairs should be conducted, so long as the repairs selected by the Town and the manner in which such repairs are conducted are, when completed, sufficient to place the Road in a safe and usable condition in fulfillment of the Town's duty to maintain.

The use of mandamus principles in the present situation is consistent with its use by Utah courts in similar circumstances. For example, in *Home Owners' Loan Corp. v. Logan City*, 92 P.2d 346 (Utah 1939), this Court held that mandamus was the proper remedy to compel a municipality to supply a service that the municipality is under a legal

duty to supply in situations where such service is wrongfully withheld by the municipality. Specifically, the Court held that a writ of mandamus is the proper remedy to compel a public service corporation to supply an applicant with electricity, gas, or water, applying reasonable rules and procedures in connection therewith. *Id.* at 349; confirmed as to the right to use mandamus in *Platt v. Town of Torrey*, 949 P.2d 325, 328 (Utah 1997). Whereas, the service which was found to be wrongfully withheld in the *Home Owner's* case was water, the service wrongfully withheld in the present action is the Town's maintenance of the Road. Just as this Court held in *Home Owner's* that through mandamus, the trial court could order Logan City to perform the service of supplying the water that it was under a duty to supply, the trial court in the present action possessed the authority to compel the Town to perform the service of maintaining the Road in a safe and usable condition pursuant to the Town's duty to do so. Also, in the case of *Skeen v. Ogden Rapid Transit Co.*, 112 P.120 (Utah 1910) (cited with approval on other grounds in *Jones v. Barlow*, 2007 UT 20, 154 P.3d 808, this Court made clear that a court has the authority to enforce through mandamus duties imposed by common law alone. *Id.* at 124.

While no Utah court has thus far faced or addressed the particular issue of whether a court may, through mandamus, compel a municipality to perform its statutory duty or even common law duty to maintain its roads in a safe and usable condition, courts from numerous other jurisdictions have addressed the issue and held that a court may compel

such action under mandamus. For example, in *Willoughby v. Whetstone Township Bd.*, 581 N.W.2d 165 (S.D. 1998), the plaintiffs, a group of cabin owners, brought an action against the defendant, the town in which the plaintiffs' cabins were located, seeking a writ of mandamus which would require the town to make repairs to the road used by the plaintiffs to access their cabins. Prior to filing the action, the plaintiffs had submitted several requests to the town asking that it repair the road which would deteriorate and become nearly impassable after heavy rains. In the years preceding the plaintiffs' initiation of their action, the town spent over \$7,000 in connection with several annual attempts to repair the road. When the town efforts to repair the road failed and its plans for additional repairs were delayed, the plaintiffs filed suit. The trial court awarded the plaintiffs' request and issued a writ of mandamus against the town ordering it to make certain repairs to the road. On appeal, the South Dakota Supreme Court concluded that "the duty to maintain township roads is ministerial and the proper subject for mandamus when a township fails or refuses to act according to statute." *Id.* at 168. The court further held that the trial court had acted properly in issuing the mandamus "after it found the road was out of repair and the supervisors were not meeting their statutory duties" and that ordering, among other things, "repairs to make the road usable under expected conditions" was within the scope of mandamus. *Id.* at 169-70.

Similarly, in *Lank v. Hughes*, 167 A.2d 268 (Pa. 1961), the Pennsylvania Supreme Court held that a Pennsylvania statute which provides that a town shall "(a) Have the

general care and superintendence of the improvement of the roads... in the township... (b) Cause such roads to be kept in repair and reasonably free from all obstructions, and give the necessary directions therefore” placed a mandatory statutory duty on all towns to keep their roadways “in repair and reasonably free from all obstructions” and that such “duty to repair and maintain public roads may be enforced by mandamus.” *Id.* at 286-87, citing *Commonwealth v. Ball*, 121 Atl. 191 (1923); *see also Ross v. Fox*, 2003 Ohio 3513, P7 (Ohio Ct. App. 2003) (holding that provisions of an Ohio statute which provides that boards of township trustees shall have control of the township roads in their townships and shall keep them in good repair were “mandatory and can be enforced through a writ of mandamus.”); *Pund v. Village of Walton Hills*, 2002 Ohio 981, P2-3 (Ohio Ct. App. 2002) (same); *St. Louis & S.F.R. Co. v. Sutton*, 119 P. 423, 428 (Okla. 1911) (“It has been repeatedly held that the general duty of municipal corporations ‘to keep their highways in repair’ is ministerial, and that a writ of *mandamus* lies to compel its performance, because it is a ministerial, in contradistinction from a discretionary duty.”).

Consistent with the above-cited cases, the Utah statutes which set forth a municipality’s duty to maintain its streets contain no discretionary language. In other words, nothing contained in the Code provides that a municipality “*may*” exercise jurisdiction and control over the streets within its boundaries or “*may*” be responsible for the construction or maintenance of those streets. The obligation that the Utah Legislature imposed on towns within the State of Utah to maintain their streets in a safe and usable

condition is a mandatory obligation and thus may be enforced by mandamus. In *Rollow v. Ogden City*, 243 P. 791 (Utah 1926), this Court explained that “[n]othing is more clearly or better settled” that a town “exercises a discretionary power” in “locating and opening streets and in regulating travel thereon.” *Id.* at 794. Nevertheless, the Court then further stated that it is “equally well settled” that once a street is located and opened by a town within its limits, “a positive legal duty is imposed to maintain them in a reasonably safe condition for travel.” Accordingly, while certain Utah statutes provide discretionary authority to a municipality in connection with certain decisions of the municipality with regards to the streets within its limits, such statutes do not alter the mandatory nature of the “well settled” duty imposed upon municipalities to maintain their streets in a safe and usable condition.

Even if the statutory duty to maintain was discretionary, the well-established common law duty to maintain expressed by Utah courts is clearly not and may, alone, be compelled through mandamus. For example, in the recent case of *Jamison v. City of Zion*, 834 N.E.2d 499 (Ill. Ct. App. 2005), the court held that though mandamus was not available to enforce a discretionary statutory duty to maintain (because of the Illinois statute’s explicit use of the term “may”) a mandamus-type action was proper to compel a city to fulfill its common-law duty to remove obstruction from a city roadway. *Id.* at 503.

It is also important to note, in situations where the Utah Legislature wishes to foreclose the use of mandamus-type relief to compel the performance of a particular duty,

it has carefully drafted statutory provisions in a way that prevents such use. For example, in drafting Utah's Rights-of-way Act, codified at section 72-5-101 *et seq.* of the Utah Code Annotated (the "Act"), the Utah Legislature used language that clearly provides that performance of the duties discussed throughout the Act cannot be compelled through mandamus.

The Act deals with, in part, federal rights-of-way under the provisions of an 1866 mining law known as RS (Revised Statute) 2477 ("R.S. 2477 rights-of-way"). Repealed by Congress in 1976, this mining statute was originally intended to serve the goal of granting the right to construct and use highways across public lands that were not otherwise reserved or set aside for other public uses. Section 72-5-302 of the Act states that the State of Utah and its political subdivisions have title to and jurisdiction over all R.S. 2477 rights-of-way within the state. However, section 72-5-303 of Act provides, in relevant part, that the state and its political subdivisions are not generally required to maintain highways within R.S. 2477 rights-of-way for vehicular travel unless a particular R.S. 2477 right-of-way encompasses a designated highway included on a state highway system. *See* U.C.A., § 72-5-303(1). Importantly, section 72-5-303 then provides that "[a] decision to improve or not improve an R.S. 2477 right-of-way is a *purely discretionary function*." *See* U.C.A., § 72-5-303(1) (emphasis added)

In addition, section 72-5-305 of the Act states, among other things, that (i) an R.S. 2477 right-of-way not otherwise designated as a Class A, B, or C road "is traveled at the

risk of the user” (U.C.A., § 72-5-305(1)); (ii) the state and its political subdivisions “do not waive immunity for injuries or damages” occurring in or associated with any R.S. 2477 right-of-way (U.C.A., § 72-5-305(2)); (iii) the state and its political subdivisions “assume no liability for injury or damage resulting from a failure to maintain” any R.S. 2477 right-of-way for vehicular travel (U.C.A., § 72-5-305(3)(a)); and (iv) as there are limited funds available to upgrade all R.S. 2477 rights-of-way to applicable safety standards, a decision to allocate funds for maintaining a particular R.S. 2477 right-of-way is “the result of evaluation and assigning of priorities” and the state or a political subdivision of the state “must use its judgment and expertise” to evaluate which safety feature improvements should be made first (U.C.A., § 72-5-305(5)).

Thus, whereas the Utah Legislature has imposed on municipalities within this State an affirmative duty to maintain the roads within their boundaries over which they have jurisdiction, the Utah Legislature has determined that the maintenance of R.S. 2477 rights-of-way by the State is “purely a discretionary function.” As such, a court cannot compel the State through mandamus to maintain any R.S. 2477 right-of-way. In addition, the Act also clearly provides that the State does not waive immunity from or assume any liability for injuries or damage resulting from any failure by the state to maintain any R.S. 2477 right-of-way. The Utah Legislature’s goals and intent are clearly expressed in the language of the Act.

In short, had the Utah Legislature desired that a municipality’s decision to

maintain or not maintain its roads in a safe and usable condition be a discretionary function, it could have used language such as that of section 72-5-303(1) of the Act to describe a municipality's duty to maintain. The Utah Legislature, however, drafted the duty to maintain as to make clear that a municipality's performance of such duty is mandatory and not discretionary. Because the duty is mandated under Utah law, a court possesses the authority to compel a municipality's performance of the duty. Accordingly, the trial court in this case possessed the authority to order the Town to fulfill its duty to maintain the Road in a safe and usable condition. The trial court's finding in its Decision that it lacked the authority to compel such action from the Town was, therefore, in error and should be reversed.

II. THE TOWN IMPROPERLY REJECTED MONIES FROM PLAINTIFFS/APPELLANTS TO DO ROAD REPAIR WORK.

Improbable as it may seem, the Town refused to accept monies from the Plaintiffs/Appellants which, at a minimum, would have covered all costs needed to repair the Road's numerous potholes to correct a curve in the Road called the "S Curve" by the parties. In refusing Plaintiffs/Appellants' offers, the Town, in effect, said it would not repair the Road but rather it would only do work on the Road if there were enough money (presumably paid by the Plaintiffs/Appellants) to completely reconstruct the Road with new base and an asphalt surface. In other words, the Town rejected any money offer from the Plaintiffs/Appellants, which called for the Road to be repaired and/or maintained despite the fact that such repairs and maintenance would have returned the

Road to a safe and usable condition. As a direct consequence of the Town's repeated rejection of the Plaintiffs/Appellants' offers, the Road has continued to deteriorate far beyond the few, minor potholes that existed at the time the Town passed its weight limitation ordinance and commenced its obstinate policy of zero maintenance on the Road. As the trial court specifically found, even modest repairs and maintenance efforts of the type for which Plaintiffs/Appellants offered to pay would have been sufficient to maintain the Road in a safe and usable condition, or at a minimum, better than it otherwise is.

In connection with the Town's duty to keep the Road safe and usable, it was improper for the Town to reject the money offer from the Plaintiffs/Appellants to do repair and maintenance work on the Road. Thus, it was error on the part of the trial court to strike Plaintiffs/Appellants' claim in that regard. That decision should also be reversed by this Court.

CONCLUSION

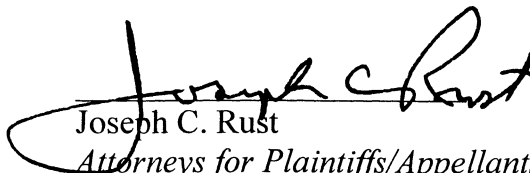
The evidence at trial demonstrated beyond dispute that the Road is in disrepair, unfit for travel, and unsafe due to the specific refusal of the Town to make the necessary repairs to the Road in breach of the Town's duty. The Town has not only refused to use its own money to make repairs or the funds it has received from the State of Utah for such purpose, it has refused to accept any money from the Appellants for that purpose. The trial court ordered in its Ruling following the trial of this matter that Appellants

possess the right to use the Road. The Town readily admits that the Road in its present condition is dangerous. By refusing to repair the Road or allow anybody else to make repairs to the Road, the Town is in clear breach of its duty under Utah statutes and common law to maintain the Road in a safe and usable condition. The effect of such breach is not only the dangers and difficulties to which Appellants are routinely exposed, the Town's breach also has the effect of precluding Appellants from exercising their right to use the Road, as its condition is nearing a point of disrepair that all travel on it may be impossible.

Because the Town clearly owes a duty to maintain the Road under Utah law and because the evidence clearly demonstrates that given the Road's present condition, the Town is not fulfilling its duty, the trial court in this matter possessed the authority to order the relief sought, namely that the Town makes repairs to the Road in order to make the Road safe and usable. The decision of the trial court in connection with the Town's Motion for Summary Judgment that the court lacked the authority to order the performance of any repairs on the Road by the Town should, therefore, be reversed. As a further consequence, this Court should order the Town to immediately make all repairs to the Road required to make the Road safe and usable.

DATED this 15 day of January 2008.

KESLER & RUST

A handwritten signature in black ink, appearing to read "Joseph C. Rust". The signature is fluid and cursive, with a large loop at the end.

Joseph C. Rust

*Attorneys for Plaintiffs/Appellants Hogs R Us,
Scott C. McLachlan, Zane Dansie & Keith Jonsson*

BENNETT TUELLER JOHNSON & DEERE

Mark Richard

*Attorneys for Plaintiffs/Appellants Utah Valley Turf
Farms, L.C. and Ault Farms, LLC*

CERTIFICATE OF SERVICE

I hereby certify that I caused to be delivered by the method indicated below two true and correct copies of the foregoing APPELLANT BRIEF, in Case No. 20070872, postage prepaid, this 15 day of January, 2008, to:

☐ FEDERAL EXPRESS
☒ U.S. MAIL
☐ HAND DELIVERY
☐ TELEFAX TRANSMISSION

Richard G. Allen
2975 West Executive Parkway #509
Lehi, Utah 84043

Larry S. Jenkins
WOOD CRAPO
500 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111


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ADDENDUM

**IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH**

HOGS R US, et al, Plaintiffs, vs. TOWN OF FAIRFIELD, Defendant.	CASE NUMBER: 050402661 DATED: MARCH 29, 2007 RULING ANTHONY W. SCHOFIELD, JUDGE
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This matter comes before the court on defendant's motion for partial summary judgment. Having reviewed the file and heard oral arguments, and being fully advised, in part I grant and in part I deny defendant's motion.

Factual Basis

This case primarily involves 1600 North Street (the "Road") within the Town of Fairfield (the "Town"). In 2005, the Town employed Earthtec Testing and Engineering for the inspection of the Road, and to make recommendations for dealing with the impact of heavy truck traffic on the Road. Earthtec recommended that weight limitations be imposed until the Road could be repaved and reconstructed in the manner recommended in the prepared reports.

On August 25, 2005, based on Earthtec's reports, the Town Council adopted Ordinance No. 8, which set forth weight restrictions on the Road. Plaintiffs and their commercial vendors

have consistently used the Road, and the Road continues to deteriorate. After several unsuccessful attempts between the Town and Plaintiffs to determine an agreeable level of improvement and payment of costs for improvement of the Road, plaintiffs filed a complaint on August 31, 2005 together with a motion for preliminary injunction against the enforcement of the Town's ordinance. This court granted the preliminary injunction on November 8, 2005.

Ruling

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Utah R. Civ. P.* 56(c). All reasonable inferences drawn from the facts are viewed in the light most favorable to the nonmoving party, here the plaintiffs. *McNair v. Farris*, 944 P.2d 392, 393 (Utah Ct. App. 1997). Applying that standard here, I grant summary judgment in favor of the Town concluding that I do not have authority to compel the Town to make repairs or to allow the plaintiffs to make repairs to the Road. However, I deny summary judgment on the issue of the validity of the Town's weight limitation ordinance.

1. Requiring the Town to Make Repairs or Allow the Plaintiffs to Make Repairs to the Road.

The plaintiffs' amended complaint requests that this court order the Town to repair the Road or, in the alternative, order the Town to allow the plaintiffs to make repairs to the Road. Such an order clearly would exceed the limits of this court's judicial power. *Utah Code Ann.* § 10-8-8 grants authority to municipal legislative councils to make decisions on whether to open, alter, grade, pave, or otherwise improve streets. By this statute the Town has been given the

statutory responsibility to make decisions regarding road improvements and repairs. It is not within my authority to supervise or interfere with such decisions.

Plaintiffs argue, citing *Braithwaite v. West Valley City Corp.*, that a municipality has a “duty to exercise ordinary care to keep streets which it has opened for travel and which it has invited the public to use in a reasonable safe condition for travel.” 860 P.2d 336, 338 (Utah 1993). This statement of the law is accurate, but does not compel the relief which the plaintiff seek. True, a municipality may be held liable for injuries or damages resulting from dangerous or unsafe roads that it does not properly care for. While a municipality may have liability for damages, that case does not stand for the proposition that a court can order a municipality to spend town funds to make any specific road improvements. That decision is a legislative decision. As the Town observes, “a duty of care for liability purposes does not give the courts the prerogative to direct what repairs a municipality must undertake to make a road safe.” Defendant’s Reply to Plaintiffs’ Memorandum in Opposition to Defendant’s Motion for Partial Summary Judgment at 10.

Because the Town has been given statutory authority to make such decisions, I grant partial summary judgment in favor of the Town, concluding that I cannot require it to make repairs to the Road nor require it to allow plaintiffs to make such repairs.

2. Validity of the Town’s Weight Limitation Ordinance.

The Town seeks summary judgment determining that the Town’s weight limitation ordinance is valid. In my view there are disputes of fact between the parties as to the meaning and weight to be given a letter from Earthtec. Those factual disputes preclude a grant of summary judgment as to the validity of the weight limitation ordinance.

Utah Code Ann. § 72-7-408 provides that a municipality may impose weight restrictions on a road “if an engineering inspection concludes that, due to deterioration caused by climatic conditions, a highway will be seriously damaged or destroyed unless certain vehicles are prohibited or vehicle weights are restricted.” This is an exception to *Utah Code Ann.* § 72-7-401 which limits the ability of local governments to alter weight limitations set by the State.

The specific question as to this issue is whether a letter from Earthtec dated August 25, 2005 provides a sufficient evidentiary basis for the Town to adopt the ordinance as an exception provided by Section 72-7-408. Of all the reports received by the Town from Earthtec, this letter contains the only reference to climatic conditions as a factor in the deterioration of the Road. A careful reading of the letter, however, does not establish that the deterioration has been actually caused by climatic conditions. Rather, it well can be argued that the letter identifies the weight of heavy vehicle loads is the cause of the deterioration since there is inadequate structural strength in the Road. In my view this is a factual issue which must be determined at trial. Thus, summary judgment is not appropriate and I deny partial summary judgment on this issue.

Pursuant to Rule 7(f)(2), Utah Rules of Civil Procedure, the Town’s counsel is directed to prepare an appropriate order.

Dated this 30 day of March, 2007.

BY THE COURT:



ANTHONY W. SCHOFIELD, JUDGE

MAILING CERTIFICATE


I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 30 day of March, 2007:

Joseph C. Rust
Attorney for Plaintiffs
Kesler & Rust
McIntyre Building, 2nd Floor
68 South Main Street
Salt Lake City, Utah 84101

Mark H. Richards
Attorney for Plaintiffs
Bennet, Tueller, Johnson & Deere
3865 South Wasatch Boulevard, Suite 300
Salt Lake City, Utah 84109

Richard G. Allen
Attorney for Defendant
2975 West Executive Parkway #509
Lehi, Utah 84043

LORI WOFFINDEN
CLERK OF THE COURT

By 
Deputy Clerk

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JOSEPH C. RUST (2835)
KESLER & RUST
McIntyre Building, 2nd Floor
68 South Main Street
Salt Lake City, Utah 84101
Telephone: (801) 532-8000

*Attorneys for Plaintiffs Hogs R Us, Scott C. McLachlan,
Zane Dansie & Keith Jonsson*

MARK H. RICHARDS (9018)
BENNETT TUELLER JOHNSON & DEERE
3865 South Wasatch Boulevard, Suite 300
Salt Lake City, Utah 84109
Telephone: (801) 272-5600

*Attorneys for Utah Valley Turf Farms, L.C.
and Ault Farms, LLC*

IN THE FOURTH DISTRICT COURT FOR UTAH COUNTY

STATE OF UTAH

HOGS R US, a Utah corporation, SCOTT C.
MCLACHLAN, an individual, UTAH
VALLEY TURF FARMS, L.C., a Utah
limited liability company, AULT FARMS,
LLC, a Utah limited liability company, ZANE
DANSIE, an individual, and KEITH
JONSSON, an individual

Plaintiffs

v.

TOWN OF FAIRFIELD,

Defendant.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Civil No. 050402661
Judge Lynn W. Davis

000011

This matter having coming on for trial before the Honorable Judge Anthony W. Schofield commencing on April 16, 2007, with Plaintiffs Hogs R Us, Scott C. McLachlan, Zane Dansie & Keith Jonsson being represented by their counsel Joseph C. Rust of Kesler & Rust; and Utah Valley Turf Farms, L.C. and Ault Farms, LLC being represented by their counsel Mark H. Richards of Bennett Tueller Johnson & Deere; and Defendant being represented by Richard G. Allen, and the Court having reviewed the file and the trial briefs submitted by counsel, and having heard the evidence presented, and having reviewed the exhibits presented, hereby FINDS and CONCLUDES as follows:

FINDINGS OF FACT

1. The Town of Fairfield is an incorporated municipality of the State of Utah located in the South-central section of Cedar Valley in western Utah County. The Town was incorporated in late 2004. The Town is located in one of the most rural, agrarian areas of Utah County. The Governor's Office of Planning and Budget, Demographic and Economic Analysis Department lists Fairfield's population at 133 residents.
2. The primary residential area of the Town is located very near State Road 73.
3. Plaintiffs all are businesses or individuals engaged in farming operations immediately East of the Town.
4. With the exception of Scott McLachlan, none of the plaintiffs own property nor operate their farming, ranching or other businesses within the Town limits.

5. Rather, all of such plaintiffs own and farm property near the eastern boundary of the Town, but located either within the unincorporated area of Utah County or within the limits of the City of Eagle Mountain.
6. The case arises out of plaintiffs' use of a road located within the Town known as 1600 North Street (the "Road").
7. The western terminus of the Road is at its intersection with State Road 73, which is a highway traversing Cedar Valley from the Lehi area of Utah county, past Cedar Fort, Fairfield and on toward Faust.
8. At its western terminus, and for the first mile or so of its length, the Road is known as 1540 North.
9. After running nearly due East from State Road 73 for approximately four town blocks, the Road leaves the primary residential area of the Town, continues East for more than one-half mile, makes a large "S" turn and then continues East for approximately one and one-half miles more. From the S-turn eastward the Road is known as 1600 North.
10. The eastern terminus of the Road is its intersection with 16000 West.
11. For many years before the incorporation of the Town, Utah County maintained the Road, including that portion of the Road that is located away from the primary residential area of the Town.
12. The County's maintenance of the Road consisted of grading the road twice per year to repair potholes and washboarding.

13. In approximately 2000, while the County was responsible for maintenance of the road, the Environmental Protection Agency conducted a study and concluded that many of the roadways in the Town had arsenic and other heavy metals in them because the roadways had been constructed, at least in part, with tailings from the Manning Canyon mines. Thus, the EPA recommended that, in order to avoid toxic dust from billowing up during road maintenance, the County should grade the Road only after soaking it with water or after a rainstorm. In order to avoid these problems, the County instead chose to install a chip seal on all the roads within the Town, including on the Road.
14. The process of installing a chip seal on a road includes coating the road with tar and then applying gravel chips over the tar. As the tar congeals it forms a surface that is generally impervious to water but only between one-half and one inch thick.
15. A chip seal does not provide significant structural integrity to a road.
16. In this case the chip seal was applied in order to minimize toxic dust clouds rising from the Town roads, not to provide structural integrity to the roads.
17. One negative of chip seal is that once a road is chip sealed, it cannot be effectively graded to repair potholes or washboarding as the chip seal provides a skin over the road that prevents grading.
18. Following the Town's incorporation the County no longer provided maintenance for the Road. Nor has the Town provided any maintenance on the Road.

19. Rather, in 2006, TNT Construction, owned by a Town resident, filled the potholes on that portion of the Road located in the primary residential area of the Town. It did not, however, make any repairs to the rest of the Road.
20. While the Town complains about the wear and tear on the Road caused by plaintiffs' heavy trucks, the portion of the Road repaired by TNT Construction, a section of Road over which the trucks must ravel to access Highway 73, has held up remarkably well with the modest maintenance that TNT performed.
21. For many years preceding the Town's incorporation plaintiffs have used the Road as their primary access to their farm properties from State Road 73.
22. While plaintiffs use the Road as a primary access for their properties, the Town asserts that plaintiffs have another access form State Road 73: Eagle Mountain Boulevard, then along the Lehi-Fairfield Road and finally onto 16000 West (hereafter referred to as the ("Alternate Route").
23. In actual mileage, the distance to plaintiffs' properties form the Lehi area, traversing the Alternate Route is several miles shorter than traveling on State Road 73 to Fairfield and then along the Road to the farm properties.
24. Though the distance is much shorter, plaintiffs do not find the Alternate Route to be an acceptable alternative for access to their farm properties.
25. One of the plaintiffs, Valley Turf Farms, owns a sod farm operation located at the intersection of the Road and 16000 West (at the eastern terminus of the Road).

26. Valley Turf Farms' business consists of growing sod on its property, harvesting the sod and then loading the sod onto flatbed semi-truck trailers and hauling the sod to customers along the Wasatch Front.
27. During the sod growing season, which runs from April until November, Valley Turf Farms usually harvest two to four semi-truck loads of sod per day and transports the sod during the later evening or nighttime hours for delivery first thing the next morning. Thus, during the growing season it is customary for Valley Turf Farms to have two to four semi-trucks make the trip on the Road each day.
28. Valley Turf Farms' management does not allow its drivers to use the Alternate Route for access to the sod farm.
29. This decision by Valley Turf Farms is based on the perception of Valley Turf Farms' management that the Alternate Route is much, much rougher, is narrower, has no road shoulder (making passing other vehicles essentially impossible without one vehicle or the other having to leave the roadway into the soft barrow ditch) and the underlying base on the 16000 West is a coarse base with sharp edges, resulting in extensive tire damage to the Valley Turf Farms vehicles. Additionally the roughness of the 16000 West and the Lehi-Fairfield road segments of the Alternate Route causes extensive jarring to drivers and to the vehicles, causing premature wear and tear on vehicles.
30. In the view of management of Valley Turf Farms, because of these complaints about else roads, the Alternate Route does not constitute an acceptable route to access the sod farm.

31. Keith Jonsson owns property that abuts on 16000 West and is located approximately one and one-half miles North of the intersection of the Road and 16000 West.
32. For a long time Jonsson would not use the Alternate Route as it created serious problems for those who use it, including damage to tires, damage to the vehicle glass from the constant jarring because of the roughness of the road, and when wet, it is not reasonably passable because it becomes extremely slick.
33. Since the preliminary injunction hearing in October and November 2005, the Town has not spent any money nor invested any time or labor in maintaining the Road after it leaves the primary residential area of the Town. Because the Road has not been maintained, it has deteriorated considerably since the preliminary injunction hearing.
34. As a result of that significant worsening in the condition of the Road, Mr. Jonsson now will not use the Road for access to his property. As well, his vendors now ask him to pick up supplies in town rather than making deliveries to the farm.
35. As the Road has continued to deteriorate following the preliminary injunction hearing, plaintiffs obtained a bid from TNT Construction for repairs to the S-turn on the Road and other repairs. Plaintiffs also agreed to pay all of the cost for these repairs. However, the Town refused this offer by plaintiffs. At the same time, the Town has not spent any funds to make any repairs to the Road.

36. Most or all of 16000 West and the Lehi-Fairfield roads are within the boundaries of the City of Eagle Mountain. Yet, the City of Eagle Mountain has not done much to maintain either of these roads.
37. Both are dirt roads and are graded only twice per year by the City.
38. In 2006 the City laid a course of road base gravel on portions of 16000 West and the Lehi-Fairfield road. It still does no more than a semi-annual grading. However, Keith Jonsson, one of the plaintiffs, has graded his new road base several times per year.
39. Because the gravel road quickly becomes rutted and rough, anytime that Mr. Jonsson is planning to bring big trucks to his farm along the Alternate Route, he first regrades the road.
40. Scott McLachlan owns property that fronts on 16000 West and is about one mile north of the intersection of 16000 West and the Road.
41. Mr. McLachlan also leases property in the south part of the Town. In order to move cattle and hay between his two operations, the only convenient access is the Road. If Mr. McLachlan is not permitted to use the Road to travel between the two farming operations, he would have to travel many, many miles out of the way. This is not a reasonable alternative access.
42. Though Mr. McLachlan finds the Alternate Route largely unacceptable, he does use the Alternate Route to access his property some of the time. He does this because the Road has significantly deteriorated, as noted above, because the Town has done no maintenance on the

Road east of the townsite proper. Thus, Mr. McLachlan bases his decision on which road to use on the then current conditions of each roadway.

43. Zane Dansie owns a property that fronts on 16000 West and is about one mile north of the intersection of 16000 West and the Road. He runs a cattle operation from his property.
44. Mr. Dansie also leases property South of the Town on which he also runs his cattle. In order to move cattle and hay between his two operations, the only convenient access is the Road. Like Mr. McLachlan, if Mr. Dansie is required not to use the Road to travel between the two farming operations, he would have to travel many, many miles out of the way. This is not a reasonable alternative access.
45. Another problem with the Alternate Route is that the Lehi-Fairfield road intersects Eagle Mountain Boulevard at a place where the speed limit on the boulevard is 50 miles per hour. The configuration of the intersection requires that, in order to see to the right as a truck leaves the Lehi-Fairfield road, the driver of the truck must swing far to the right before then turning left. This entry onto the boulevard is very difficult to accomplish with safety as cars zoom along the boulevard at or above the posted speed limit, making it difficult for a lumbering truck to make the swinging maneuver onto the boulevard.
46. None of the plaintiffs find the Alternate Route to be an acceptable alternative to access their own properties.

47. On May 24, 2005, Earthtec Testing & Engineering, P.O., the engineering firm advising the Town ("Earthtec") reported the results of a geotechnical subgrade and pavement evaluation for the Road. Earthtec reported that the Road had asphalt thickness of from ½ inch to 2 inches and a road base thickness of from 2 to 7 ½ inches. Earthtec concluded that with this road construction, the Road would not support the reported use by between 25 and 30 heavy trucks per day.
48. Three days later Earthtec provided a letter recommending a weight limit on the Road of 3 tons per axle.
49. In response to this letter from Earthtec, the Town adopted a weight limit ordinance of 3 tons per axle. This weight limit was intended to prevent the large trucks operated by the various plaintiffs, and vendors and others providing supplies to the plaintiffs' farms, from using the Road.
50. The initial weight limit ordinance was adopted by the Town without complying with any of the requirements of *Utah Code Ann.* § 72-7-408.
51. When it first adopted the weight limit ordinance, the Town was not aware that, with limited exceptions, weight limits only can be imposed by the State and not by municipalities.
52. As originally adopted, the weight limit ordinance was so restrictive that school buses, ambulances, the Bookmobile and garbage trucks could not lawfully use the Road.
53. After the adoption of the weight limit many citations were written charging drivers for various of the plaintiffs with violations of the weight ordinance.

54. Plaintiffs complained to the Town about the citations to their employees and complained about the weight limit. They attended a number of Town Council meetings in an effort to resolve the disagreement between the parties about plaintiffs' use of the Road.
55. In response to these complaints from plaintiffs, and when it learned that the weight limit ordinance would restrict vehicles which the Town did not intend to restrict, the Town requested additional information from its engineers to assist the Town in evaluating options for the improvement of the Road.
56. During this time of discussion, the Town ceased the issuance of weight limit tickets and agreed to void all of the citations which previously had been issued.
57. The parties also considered other possible resolutions to the disagreement over plaintiffs' use of the Road.
58. In July 2005, Earthtec sent a third letter to the Town in which it recommended an alternative proposed pavement improvement for the Road. This alternative was prepared by Earthtec after the plaintiffs advised they were willing to participate to some extent in the cost of the improvement of the Road.
59. The Town did not make any of the improvements recommended in the July 2005 letter. Rather, it sought a further opinion from Earthtec.
60. On August 25, 2005, Earthtec wrote its fourth letter to the Town. It noted in the letter that many of the vehicles needing to use the Road exceeded the 3 ton per axle weight limit and that some of the vehicles of Town residents also exceeded the weight limit. It thus

recommended that the Town modify the weight limit to 4 tons per axle and a maximum weight per vehicle of 18 tons.

61. For the first time, the August 25, 2005 letter also included a paragraph attempting to link the pavement deterioration of the Road to the climate.
62. It is unmistakable that the August 25, 2005, Earthtec letter was written by Earthtec to support the Town's intention to prohibit use the Road by plaintiffs while not impacting the residents of the Town and also to come within the provisions of *Utah Code Ann.* § 72-7-408(1).
63. In reliance on the August 25, 2005, letter from Earthtec, on that same date the Town adopted a new weight limit ordinance fixing a weight limit on the Road of 4 tons per axle.
64. Shortly thereafter plaintiffs filed this action and sought a preliminary injunction preventing the Town from enforcing the ordinance.
65. In November 2005, following a two-day hearing on the matter, this court issued a preliminary injunction which prevented the Town from enforcing the weight limit ordinance.

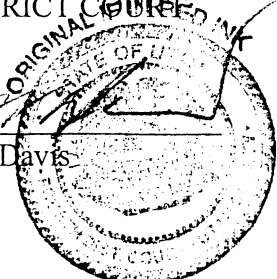
CONCLUSIONS OF LAW

1. The only exception by which the Town could alter truck weight limits within the Town is provided by *Utah Code Ann.* § 72-7-401.
2. The weight ordinance adopted by the Town was not due to an emergency condition and the Town did not enact the ordinance as a temporary measure.
3. Further the Town does not claim that *Utah Code Ann.* § 41-6a-208(1)(s) applies to this case.

4. The Town has not met the remaining exception provided by *Utah Code Ann.* § 72-7-408.
5. None of the four letters from Earthtec, including the August 25, 2005 letter which is the first time Earthtec referred to the impact of the climate on the Road, provide the necessary opinion and specifically engineering inspection required by *Utah Code Ann.* § 72-7-408.
6. Because the foundations underpinning the Town's weight ordinance are faulty, the presumption of validity which would normally be given to Town ordinances has been overcome.
7. Based on the condition of the Alternate Route and the needs of the Plaintiffs, the Alternate Route is not a reasonable alternative to Plaintiffs' need to use the Road.
8. Because the Town did not meet the requirements of *Utah Code Ann.* 72-7-408(1) the Town weight ordinance is not entitled to a presumption of validity and therefore it is not enforceable and should be permanently enjoined.

DATED this 24 day of ^{Sept}~~August~~, 2007.

FOURTH DISTRICT COURT
ORIGINAL COURT
JUDGE LYNN W. DAVIS




CERTIFICATE OF SERVICE

I hereby certify that I caused to be delivered by the method indicated below a true and correct copy of **FINDINGS OF FACT AND CONCLUSIONS OF LAW**, in Civil No. 050402661, postage prepaid, this 29 day of August, 2007 to:

☐ FEDERAL EXPRESS
☒ U.S. MAIL
☐ HAND DELIVERY
☐ TELEFAX TRANSMISSION

Richard G. Allen
2975 West Executive Parkway #509
Lehi, Utah 84043

Mark H. Richards
BENNETT TUELLER JOHNSON & DEERE
3865 South Wasatch Boulevard, Suite 300
Salt Lake City, Utah 84109


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JOSEPH C. RUST (2835)
KESLER & RUST
McIntyre Building, 2nd Floor
68 South Main Street
Salt Lake City, Utah 84101
Telephone: (801) 532-8000

*Attorneys for Plaintiffs Hogs R Us, Scott C. McLachlan,
Zane Dansie & Keith Jonsson*

MARK H. RICHARDS (9018)
BENNETT TUELLER JOHNSON & DEERE
3865 South Wasatch Boulevard, Suite 300
Salt Lake City, Utah 84109
Telephone: (801) 272-5600

*Attorneys for Utah Valley Turf Farms, L.C.
and Ault Farms, LLC*

IN THE FOURTH DISTRICT COURT FOR UTAH COUNTY

STATE OF UTAH

HOGS R US, a Utah corporation, SCOTT C.
MCLACHLAN, an individual, UTAH
VALLEY TURF FARMS, L.C., a Utah
limited liability company, AULT FARMS,
LLC, a Utah limited liability company, ZANE
DANSIE, an individual, and KEITH
JONSSON, an individual

Plaintiffs

v.

TOWN OF FAIRFIELD,

Defendant.

ORDER

Civil No. 050402661
Judge Lynn W. Davis

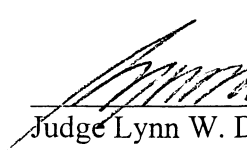
The Court having heretofore entered its Findings of Fact and Conclusions of Law, and having heretofore entered its ruling dated May 30, 2007.

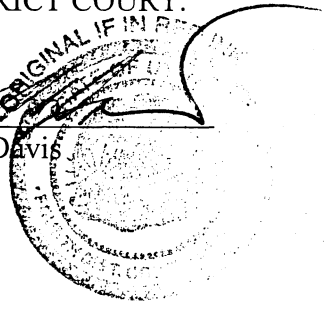
IT IS HEREBY ORDERED, ADJUDGED, and DECREED as follows:

1. Defendant Fairfield's weight limit ordinance is declared to be invalid, and the Town of Fairfield is permanently enjoined from enforcing the same.
2. Plaintiffs are awarded their costs of court.

DATED this 24 day of ^{Sept}~~August~~, 2007.

FOURTH DISTRICT COURT:


Judge Lynn W. Davis



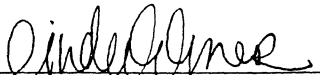
CERTIFICATE OF SERVICE

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