

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 : Reply Brief

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca3](https://digitalcommons.law.byu.edu/byu_ca3)

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

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.

---

### Recommended Citation

Reply Brief, *Hogs R Us v. Town of Fairfield*, No. 20070872 (Utah Court of Appeals, 2007).  
[https://digitalcommons.law.byu.edu/byu\\_ca3/534](https://digitalcommons.law.byu.edu/byu_ca3/534)

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

---

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.

**REPLY BRIEF**

Case No. 20070872

Subject to reassignment to the Court of Appeals

---

APPEAL FROM THE FOURTH DISTRICT COURT IN AND FOR  
UTAH COUNTY, STATE OF UTAH  
JUDGE JAMES R. TAYLOR

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*

FIL  
UTAH APPELLA.

MAR 24 2008

---

**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.

**REPLY BRIEF**

Case No. 20070872

Subject to reassignment to the Court of Appeals

---

APPEAL FROM THE FOURTH DISTRICT COURT IN AND FOR  
UTAH COUNTY, STATE OF UTAH  
JUDGE JAMES R. TAYLOR

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*

## **TABLE OF CONTENTS**

SUMMARY OF JUDGMENT .....	
ARGUMENT .....	
INTRODUCTION .....	1
I. APPELLANTS HAVE STANDING TO PURSUE RELIEF UNDER RULE 65B.....	3
III. THE RELIEF SOUGHT BY APPELLANTS' PETITION IS OF THE NATURE AND MEETS THE STANDARDS OF RELIEF AVAILABLE UNDER RULE 65B. ....	10
IV. UTAH LAW IMPOSES UPON MUNICIPALITIES A CLEAR, MANDATORY DUTY TO MAINTAIN AND REPAIR THEIR STREETS IN A SAFE AND USEABLE CONDITION THE PERFORMANCE OF WHICH CAN BE COMPELLED THROUGH RULE 65B. ....	11
A. <i>Contrary to the Town's Argument, Utah's Statutes Do Not State that the Duty to Maintain Is a Discretionary Duty</i> .....	11
B. <i>Contrary to the Town's Argument, Performance of the Common Law Mandatory Duty to Maintain May be Compelled Through Mandamus-Type Relief</i> .....	17
V. THE TOWN'S CLAIM REGARDING ITS FINANCES IS NOT PROPERLY BEFORE THE COURT AND, IN ANY EVENT, DISINGENUOUS .....	24
CONCLUSION .....	25

## **TABLE OF AUTHORITIES**

### **CASES**

<i>Braithwaite v. West Valley City</i> , 860 P.2d 336 (Utah 1993).....	14
<i>City of Philadelphia v. Pennsylvania Public Utility Comm'n</i> , 676 A.2d 1298 (Pa. Cmwlth. 1996) .....	19
<i>Copeland v. Huff</i> , 261 S.W.2d 2 (Ark. 1953) .....	19
<i>Harris v. Turner</i> , 96 Utah 342 (Utah 1938).....	22
<i>Jamison v. City of Zion</i> , 834 N.E.2d 499 (Ill. Ct. App. 2005) .....	20
<i>Kansas v. Lake Koen Navigation, Reservoir &amp; Irr. Co.</i> , 65 P. 681(Kan. 1901).....	19
<i>Mamolella v. First Bank of Oak Park</i> , 423 N.E.2d 204 (Ill. Ct. App. 1981).....	21
<i>Morris v. Salt Lake City</i> , 101 P. 373 (Utah 1909) .....	13
<i>Niblock v. Salt Lake City</i> , 111 P.2d 800 (Utah 1941) .....	14
<i>People ex rel. Faulkner v. Harris</i> , 67 N.E. 785 (1903) .....	21
<i>Renn v. Utah State Bd. of Pardons</i> , 904 P.2d 677 (Utah 1995).....	22
<i>Rollow v. Ogden City</i> , 243 P. 791 (Utah 1926) .....	14
<i>Southern Bell Tel. &amp; Tel. Co. v. Beach</i> , 8 Ga. App. 720 (Ga. Ct. App. 1911) .....	19
<i>State v. Ogden Rapid Transit Co.</i> , 112 P. 120 (Utah 1910).....	18
<i>Terracor v. Utah Board of State Lands &amp; Forestry</i> , 716 P.2d 796 (Utah 1986).....	7
<i>Trapp v. Salt Lake City</i> , 835 P.2d 161 (Utah 1992).....	16
<i>Utah Chapter of Sierra Club v. Utah Air Quality Board</i> , 2006 UT 73, 148 P.3d 975 .....	3

**STATUTES**

Utah Code Ann. § 10-8-8..... 11

Utah Code Ann. § 63-30d-301..... 15

**RULES**

Utah R. Civ. P. 65B ..... 2

**OTHER**

## ARGUMENT

### **I. INTRODUCTION**

The Town argues that this case “centers” on a municipality’s purported right to “exercise its discretion on behalf of its residents in determining if, when, and how to repair the roads within its municipal boundaries.” Appellee’s Brief at p. 11. The Town’s argument is, however, misplaced. This case, in fact, centers upon the issue of whether a Utah court has the authority to compel a municipality to perform a mandatory, nondiscretionary, and nondelegable duty, particularly where the municipality’s failure or refusal to perform such duty causes the deprivation of a judicially recognized right held by the party seeking to compel performance of that duty.

The Trial Court concluded upon its review of the evidence presented at trial that the Road at issue in this case is the only reasonable route currently available to Appellants by which they can access their properties. It therefore granted Appellants the right to use the Road for purposes such purpose. This Court has repeatedly and uniformly held for more than 100 years that every municipality in Utah owes a mandatory and nondiscretionary duty to repair and maintain the roads under its jurisdiction and control in a reasonably safe and useable condition. Despite the duty to maintain, the Town has flatly refused to maintain or make any repairs to the Road at issue in this case, which is indisputably under its jurisdiction and control and which, as the Town readily admits, is in significant disrepair and in a

substantially dangerous condition. The Town's failure to perform its duty to maintain the Road not only impedes (and threatens to destroy) Appellants' right to use the Road to access their properties, but also poses to them a serious risk of injury and damage. In order to preserve their right to safely use the Road to access their properties, Appellants have requested that the Town be required pursuant to Rule 65B to perform its duty to maintain the Road. The Town's claim as to the focus of this case, ignores all of the foregoing issues and facts.

In response to Appellants' arguments in favor of their petition, the Town presents four arguments which it claims demonstrate that the Appellants are not entitled to relief under Rule 65B of the Utah Rules of Civil Procedure. First, the Town argues that Appellants lack standing to pursue relief under Rule 65B. Second, the Town contends that Appellants' petition for relief under Rule 65B fails to satisfy the standard established for granting such relief. Third, the Town argues that even if Appellants met all of the conditions for obtaining relief under Rule 65B, Utah law does not grant a court authority to compel municipalities to perform the duty to maintain their roads in a safe and useable condition. Finally, the Town asserts that regardless of whether it has a mandatory duty to maintain its roads in a safe condition, it cannot be compelled to perform such duty because it lacks the funds necessary for such performance. Each of the Town's argument's are addressed below.



## II. APPELLANTS HAVE STANDING TO PURSUE RELIEF UNDER RULE 65B

The Town's first argument is that Appellants lack standing to pursue relief under Rule 65B. The Town correctly notes that it has not disputed Appellants standing in this case until now. Indeed, from commencement of this action through the close of trial, Appellants have pursued their claims with presumptive and unchallenged standing to do so, which fact strongly indicates that neither the parties nor the Trial Court, at any time during this case, found any reason or necessity to directly address, or even question, Appellants' standing. Nevertheless, since, as the Town correctly notes, the issue of standing can be raised at any time, even *sua sponte*, Appellants refer the Court to the Record in this case which is replete with evidence that Appellants have met the requirements for standing to pursue relief under Rule 65B of the Utah Rules of Civil Procedure set forth in each of the three alternative tests for establishing standing annunciated by this Court.

Under the first (or "traditional") test for establishing standing, Appellants must have "suffered or will 'suffer[] some distinct and palpable injury that gives [Appellants] a personal stake in the outcome of the legal dispute.'" *Utah Chapter of Sierra Club v. Utah Air Quality Board* ("*Sierra Club*"), 2006 UT 73, ¶ 12, 148 P.3d 975 (alteration in original). The Town argues that Appellants have failed to establish or even allege that they have suffered a particular injury which directly resulted from the condition of the Road and thus have not established standing under the traditional test. The Town's exceedingly narrow

interpretation of what constitutes a “particular injury” under the traditional test and its argument that Appellants have failed to allege or demonstrate such an injury lack merit

The Town acknowledges in its Brief, among other things, that: (1) “[f]or years preceding the Town’s incorporation, Appellants used the Road as their primary access to their farm properties” Appellee’s Brief at p. 6; (2) “Appellants do not find [the Alternative Route] to be an acceptable alternative for access to their farm properties” *id.* at p. 7; and (3) in their Amended Complaint, “Appellants alleged their dissatisfaction with the Alternative Route as well as general harm they would incur if the weight limitation ordinance were enforced.” *Id.* at p. 9. The Town argues, however, that despite these particular allegations, Appellants failed to allege standing because their Amended Complaint contained no allegation that “they had suffered or would suffer any injury as a result of the condition of the Road.” *Id.* The Town apparently hopes that by calling the harm that Appellants alleged in their Amended Complaint (and demonstrated at both the preliminary injunction hearing and trial) would result if they were not permitted to use the Road to access their farms for any reason, including prohibition under the Town’s weight limitation ordinance, a “general harm,” the Court will automatically accept the Town’s characterization of such harm, ignore the Record in this case, and make no inquiry into whether Appellants have alleged any particular injury. The Town has, however, failed to cite to anything in the Record or case law that either supports or explains its baseless and ill-founded assertion the harm asserted by Appellants in this case constitutes “general harm” only and is insufficient to demonstrate

standing under the traditional test.

A review of the Record in this case clearly and unequivocally establishes that Appellants initiated this action and sought (and are seeking) the relief it has requested for the central purpose of protecting their right to use the Road to access their farm properties. The other fundamental purpose of this action for Appellants was to avoid, through the preservation of their right to use the Road, suffering the ruinous and irreparable injury that would result to each of their businesses if Appellants were unable to use the Road or, as a result, access their properties. Every action taken by Appellants in this case or in connection with this case has been consistent with these central purposes.

Therefore, when the Town enacted its weight limitation ordinance which had the effect of preventing Appellants' lawful use of the Road, Appellants sought and obtained a preliminary injunction preventing the Town's enforcement of the ordinance while the parties conducted discovery and prepared for trial thus allowing Appellants to continue their use of the Road uninterrupted. These purposes also served as the basis for Appellants' offer to the Town, shortly after obtaining the preliminary injunction, to pay for the costs of the repairs needed to the Road. They are also the reason why Appellants argued to the Trial Court that the sole alternative route available to Appellants was in an unusable condition and failed to meet the requirements of a "reasonable alternative route" under Utah law. Importantly, recognizing that their efforts to have the Town's weight limitation ordinance declared invalid would be meaningless if thereafter the Town, through its inaction, permitted the

Road to deteriorate into such a condition that Appellants could no longer use it to access their properties, Appellants amended their Complaint and added their petition that the Town be compelled to perform its mandatory duty to maintain the Road. Accordingly, preservation of their right to use the Road and avoidance of the irreparable injuries that would befall Appellants if their efforts for such preservation failed, constitute the sole reasons that Appellants amended their Complaint in order to add its petition for relief under Rule 65B. These facts are clear from even a cursory review of the Record in this case.

The Town simply cannot in good faith argue that the goal and intent of all of Appellants' actions in connection with the case have been for any other purpose than those described above. Thus, while Appellants' Amended Complaint may not, in specific terms, state that "the particular injury Appellants have or will suffer is\_\_\_\_," a review of the Record indisputably and unequivocally establishes that Appellants have consistently and continually alleged and asserted throughout the course of this case that if they are prevented from using the Road (either by (a) the Town's weight limitation ordinance or (b) (as later claimed) the Town's failure to perform its clear legal duty to repair and maintain the Road which failure results in the Road deteriorating into such a condition that is no longer traversable or is use is otherwise rendered too unsafe) they will suffer irreparable damage because they will have no reasonable access to their Road (and no reasonable alternative route exists). Despite the Town's contrary claim, the harm alleged and established by Appellants is distinct, palpable, particular and clear and the personal stake of each Appellant

in this case is beyond refute. The Court should thus uphold Appellants standing in this case which has, for good reason, not been disputed by any of the participants hereof until now.

Even if Appellants could not demonstrate that they have standing in this case under the traditional test, this Court has also recognized that standing may be demonstrated if “no one else has a greater interest in the outcome of the case and the issues are unlikely to be raised at all unless that particular plaintiff has standing to raise the issue.” *Terracor v. Utah Board of State Lands & Forestry*, 716 P.2d 796, 799 (Utah 1986). The Trial Court’s findings in this case, as contained in its Findings of Facts and Conclusions of Law (the “*Findings and Conclusions*”) demonstrate that Appellants have standing under this second test. In particular, the Trial Court found that:

- “[After about four 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,” Findings and Conclusions at ¶ 9 [R. at 522].
- “[Appellants] have used the Road as their primary access to their farm properties from State Road 73,” *id.* at ¶21 [R. at 520].
- “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,” *id.* at ¶ 33 [R. at 518] (emphasis added).
- “[T]he Town asserts that [Appellants] have another access form [stet] State Road 73: Eagle Mountain Boulevard .... (hereafter referred to as the “Alternative Route”),” *id.* at ¶ 22 [R. at 520], and thus concluded that:
- “Based on the condition of the Alternative Route and the needs of the Plaintiffs, the Alternative Route is not a reasonable alternative to Plaintiffs’

need to use the Road,” id. at ¶ 7 [R. at 512].

Thus, the Findings and Conclusions establish that: (1) Appellants have been the principal users of the majority of the Road, (2) because there is no other a reasonable alternative route, the Road is the exclusive means by which Appellants may access their properties and Appellants therefore have a right to use the Road, and (3) because the Town has failed and refused to conduct any repairs on the Road, it has deteriorated considerably since 2005. Collectively, these facts demonstrate that Appellants have the greatest interest in the outcome of the issues presented in this case and thus have standing to pursue their claims.

The residents of the Town only regularly use, at most, the roughly four blocks upon entry to the Town from State Highway 73. It is beyond dispute that the remaining larger portion of the Road is used almost solely by Appellants, who also regularly and continually use portion of the Road used by the Town’s residents. Thus, with regard to the greater portion located beyond the residential areas of the Town, Appellants are indisputably the ones most directly affected by the Road’s serious disrepair. Because, as the Trial Court found, Appellants must use the Road to access their properties, Appellants possess the greatest interest in the outcome of an action directed at compelling the repair and maintenance of the Road. The Town’s residents’ interest in the repair and maintenance of the Road, which they use, at most, sporadically, is nowhere near as strong. Indeed, the Town has made no indication appearing in the Record or elsewhere that its residents even

care if the Road is maintained. Thus, the Town can point to nothing in the Record which supports its statement that its residents have a greater interest in the Road than the Appellants. The Record simply provides no justification or support to such assertion. Appellants can therefore demonstrate that they also have standing under the second test.

The third standing test allows the Court to find standing if “the issues are unique and of such great public importance that they ought to be decided in furtherance of the public interest”, even if the first two prongs are not met. *Sierra Club*, 2006 UT 74, ¶ 20. In this case we have seen petitions for amicus briefs seeking to be on both sides of the case, clearly evidencing a serious issue of public importance. It can be further noted that this Court decided to hear this matter rather than referring it to the Court of Appeals, generally an indication that important principals are at stake. When a municipality’s refusal to perform a duty imposed upon it by the law has the effect of jeopardizing citizen safety, denying the property rights of a group of individuals, and likely destroying their businesses, such refusal poses an extremely important public issue. This issue appears to be one of first impression in this State and deserves to be heard.

In short, to claim that the Appellants did not have standing to raise the instant matter is to ignore everything asserted by Appellants and found by the Trial Court below. The Court should therefore find that the Town’s argument lacks merit and that Appellants continue to clearly have standing to pursue their claims in this matter, including their petition for relief under Rule 65B.

### **III. THE RELIEF SOUGHT BY APPELLANTS' PETITION IS OF THE NATURE AND MEETS THE STANDARDS OF RELIEF AVAILABLE UNDER RULE 65B.**

Various sections of Appellee's Brief severely mischaracterize Appellants' requested remedy in attempt to redefine Appellants' position in a way that makes it easier for the Town to defeat. The straw man the Town has selected is to suggest that Appellants ask the Court to force the Town to perform the repairs on the Road in a manner dictated by Appellants. That is not the case, and in fact is contrary to the manifest position taken by Appellants at every stage of these proceedings. Far from seeking to dictate spending allocations or legislative functions, Appellants merely ask the Court to require the Town to make the Road safe through reasonable repairs thereof.

In seeking to understand the purpose of this mischaracterization, it is important for the Court to see the underlying aims of the Town in this matter. Since the beginning of this dispute, the Town has maintained a deliberate effort to drive Appellants away. Refusing to repair the Road is, following the Trial Court's ruling that Appellants have a right to use the Road, merely the only remaining tactic available to the Town in pursuing this quest. This was the purpose the Town's imposition of weight restrictions on the Road, just as it is the purpose of their deliberate refusal to make any repairs to same. The Town has failed to make any repairs to the Road during the entire time it has been incorporated as a Town.

In furtherance of this aim, the Town also completely ignores or mischaracterizes efforts of Appellants to provide funding for repairs on the Road. Appellees now take the unsupported position that Appellants wanted to perform the road repairs themselves. This is



completely contrary to all documentary and testimonial evidence presented in this case, as well as the findings of the Trial Court below. In the proposal at issue, Appellants wished to provide some funding to the Town for it to perform reasonable repairs to the Road, using someone who had already had permission to make repairs thereto. There was nothing in any of the material submitted in response to the Appellants' offer of payment that indicated that Appellants insisted on or even suggested doing the repairs themselves. Rather than accepting these funds and performing reasonable repairs to the Road, the Town absolutely refused to make any repairs unless Appellants agreed to pay for a completely new heavy duty road to replace the existing Road. Given the Town's history of attempting to chase Appellants away from the Town, it is questionable whether the Town would have followed through with this plan even if Appellants agreed to pay for the Road.

#### **IV. UTAH LAW IMPOSES UPON MUNICIPALITIES A CLEAR, MANDATORY DUTY TO MAINTAIN AND REPAIR THEIR STREETS IN A SAFE AND USEABLE CONDITION THE PERFORMANCE OF WHICH CAN BE COMPELLED THROUGH RULE 65B**

##### ***A. Contrary to the Town's Argument, Utah's Statutes Do Not State that the Duty to Maintain Is a Discretionary Duty***

As its initial argument, the Town relies on Utah's Municipal Code in an attempt to demonstrate that Utah law does not impose upon a municipality a clear, mandatory duty to maintain and repair its roads in a safe and useable condition. In particular, the Town points to language contained in section 10-8-8 of the Utah Municipal Code, which the Town argues grants municipalities the "discretionary" responsibility to make "decisions regarding

all road *improvements*.” See Appellee’s Brief at p. 22 (emphasis added). Section 10-8-8 provides, in relevant part:

A municipal legislative body may lay out, establish, open, alter, widen, narrow, extend, grade, pave, or otherwise improve [its] streets...

U.C.A., § 10-8-8. The Town’s reliance on section 10-8-8 is misplaced for the following several reasons.

First, the Town apparently ignores the fact that conspicuously absent from section 10-8-8’s language is any mention whatsoever that a municipality also “may” “maintain” or “repair” its roads. Appellants do not dispute the Town’s assertion that it possesses the discretionary right under section 10-8-8 to “improve” its roads. This discretionary right to “improve” its roads does not, however, transform its mandatory duty to maintain and repair its roads into a discretionary one. The Town has not, and cannot, point to any language in section 10-8-8, the Utah Municipal Code, or elsewhere in the law that provides in this context that the terms “maintain” and/or “repair” are subsumed in the meaning of the term “improve.”

Second, the Town also apparently ignores (or is unaware of) the fact that this Court has, in numerous decisions dating back more than a century, expressly explicated the clear distinction between a municipality’s duty to improve and its duty to maintain and repair and uniformly held that while a municipality possesses the right under Utah’s Municipal Code to exercise discretion regarding whether or not to improve a road within its boundaries, once it

has exercised its discretion and improved such a road, the municipality thereafter has a mandatory duty to maintain that road in a safe and useable condition.

For example, in *Morris v. Salt Lake City*, 101 P. 373 (Utah 1909) this Court noted that “under the statutes of this State,” a municipality is authorized “to exercise [its] own judgment in establishing street or sidewalk grades and in formulating plans for improvements of that or any other public character.” *Id.* at 376. It further noted that because the state had “intrusted such work to the municipal authorities, the court cannot impose upon them its own ideas of utility, taste, or beauty.” *Id.* The Court therefore found that “[t]he courts may not control the city in the exercise of its rights in making public improvements, nor can the courts ordinarily review the actions of the city authorities in their determination of what the improvement shall be and how its plans shall be executed. Nor is the city liable for any defect in planning a public improvement.” *Id.*

The Court then, however, made a clear distinction between this discretionary duty to make improvements and a municipality’s mandatory duty to maintain its streets. In particular, the Court found 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” and that such duty is “***constant, continuing, and nondelegable.***” *Id.* at 377. The Court noted that under this duty, if a “mere stranger” had caused damage to a city’s street or placed a dangerous object in that street, “it would have been the duty of the city to exercise

reasonable diligence to discover it, and to exercise ordinary care to remove it or to make it reasonably safe.” *Id.* at 378. It thus concluded that in contrast to the duty to improve, wherewith a court had no authority to control or review a city’s performance of such duty, a court could hold a city liable for failing to discharge its duty to maintain its streets in a safe condition. *Id.*

Later, in *Rollow v. Ogden City*, 243 P. 791, 794 (Utah 1926), the Court reiterated the distinction between the two duties, and held that

Nothing is more clearly or better settled than that in *locating and opening streets and in regulating travel thereon* within the limits of incorporated cities and towns they *exercise a discretionary power*. It is, however, equally well settled that in *maintaining the public streets and highways* within the limits of such cities and towns a *positive legal duty is imposed* to maintain them in a *reasonably safe condition for travel*.

*Id.* at 794 (emphasis added); *see also Niblock v. Salt Lake City*, 111 P.2d 800, 803-04 (Utah 1941) (holding that Utah statutes “do not authorize recovery from a municipality for the negligence of its servants engaged in repairing or constructing streets, but only where there has been a failure on the part of the municipality to perform its duty to keep its streets free from unsafe, dangerous, defective or obstructed conditions.”).

Finally, the Court more recently upheld the distinction between the duties in *Braithwaite v. West Valley City*, 860 P.2d 336 (Utah 1993), where it noted that while “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,” no Utah court has held that “a

municipality in discharging its obligation to maintain its streets in a reasonably safe condition for travel is obligated to build sidewalks for pedestrian travel.” *Id.* at 338. In making its distinction between the two duties, the Court cited section 10-8-8 and noted that “the statute was drawn to authorize but not require the building of sidewalks.” *Id.* The Court then summarized its holding by again marking the distinction between the discretionary duty to improve and the mandatory duty to maintain, stating that “neither our statutes nor our case law has ever required that a municipality build sidewalks to meet its legal duty of providing reasonably safe conditions for pedestrian travel on its streets.” *Id.* at 339.

An additional problem with the Town’s reading of section 10-8-8 is that it also ignores the fact that the Utah Legislature has, pursuant to section 63-30d-301(3)(a)(i) of Utah’s Governmental Immunity Act (the “*Act*”), waived immunity for a municipality’s failure to fulfill its duty to maintain its roads in a safe and useable condition. Liability under the Act is not imposed on a municipality for damages that result either during its discretionary performance of the duty to maintain or the discretionary manner in which it performed such duty. Instead, the sole basis for liability under section 63-30d-301(3)(a)(i) is the “defective, unsafe, or dangerous condition” of, among other things, a road under the control and jurisdiction of the municipality, which condition is caused by (or is a result of) the municipality’s *failure* to fulfill its duty to maintain such road in a safe and useable condition.

In this regard, the Court explained in *Trapp v. Salt Lake City*, 835 P.2d 161 (Utah 1992), that “[f]or almost a century, Utah statutes have implicitly recognized” the duty imposed upon municipalities to maintain their “streets in a reasonably safe condition” by, among other things, “conferring upon persons who have been injured or damaged as a result of a city or town’s *failure to fulfill this duty* the right to present a claim for such injuries or damages.” *Id.* at 161-62. If the duty to maintain was, as the Town argues, truly a discretionary duty, it would be grossly unfair and inconsistent for the Legislature or this Court to then impose liability on a municipality that determined, in its discretion, to refuse, forego, or delay the performance of that duty. The Town has made no attempt to explain this contradiction to the Court except to disregard the Act as irrelevant because it pertains to claims of negligence rather than a court’s enjoinder of a municipal duty. Regardless of the primary purpose of the Act, it does, as this Court noted in *Trapp*, “implicitly recognize” the duty to maintain and by its terms demonstrates that the duty is not discretionary.

As demonstrated above, the Town’s reliance on section 10-8-8 is misplaced and its argument that Utah statutes define the duty to maintain as discretionary duty entirely lack merits. Moreover, Appellants’ argument that “nothing in the [Utah] Code provides that a municipality ‘may’ be responsible for the ... maintenance of [its] streets” is not, as the Town contends, “disingenuous.” What is disingenuous is the Town’s misleading, “red herring” argument that attempts to redefine and broaden the meaning of the term “improve” to include the term “to maintain in a safe condition” in order to bootstrap (and somehow

convert) its mandatory duty to maintain its roads into its discretionary duty to improve its roads. Again, nothing in section 10-8-8 or elsewhere in the Utah Code provides that a municipality “may” maintain or repair its roads once such roads have been improved by the municipality. Likewise, contrary to the Town’s assertion, Appellants did not simply “ignore” section 10-8-8 in their Opening Brief. Appellants made no reference to section 10-8-8 because, as thoroughly established above, it is irrelevant to the Town’s mandatory duty to maintain and repair its roads.

***B. Contrary to the Town’s Argument, Performance of the Common Law Mandatory Duty to Maintain May be Compelled Through Mandamus-Type Relief***

The Town next argues that while Appellants “correctly note” that this Court has repeatedly held that Utah municipalities have a duty to maintain their streets in a safe and useable condition, the Town’s performance of this purported “tort law” cannot be compelled through mandamus. The Town provides no basis either for its characterization of the duty to maintain as merely a tort law or for its conclusion that as such, performance cannot be compelled through mandamus. In fact, the only basis the Town provides in support of its argument is that “chaos” would result if private citizens were “suddenly free to petition the court for a writ compelling a municipality to affirmatively act as that citizen desires, based on any one of the innumerable ‘duties’ which can form the basis of a negligence claim.” Appellee’s Brief at p. 28. Even then, the Town fails to explain how or why this supposed “chaos” would ensue if this Court were to grant the relief sought by Appellants.

Appellant's demonstrated in their Opening Brief that numerous jurisdictions have concluded that the duty to maintain is the type of duty that a court can enforce through mandamus. Rather than attack the principal, the Town attempts to distinguish the cases relied upon by Appellants from the present action by arguing that in each of the cases the duty to maintain was contained in a statute rather than the common law. Apparently, by raising this distinction, the Town is asserting that mandamus cannot be used to enforce a common law duty. Even if the Court were to find that Utah statutes impose no mandatory duty to maintain on municipalities, the Town fails, however, to point to any case decided either by a Utah court or any other jurisdiction wherein it was held that only statutory duties may be enjoined through mandamus. In fact, this Court and numerous other courts have repeatedly held that mandamus can be used to compel performance of a common law duty.

For example, in *State v. Ogden Rapid Transit Co.*, 112 P. 120 (Utah 1910), which Appellants cite in their Opening Brief and the Town completely ignores, this Court held that it is "beyond question" that a court possesses the power to "coerce" the discharge of a duty imposed by solely by the common law where it is clear that such common law duty is mandatory (*i.e.* performance of such duty may be compelled). *Id.* at 124.<sup>1</sup>

---

<sup>1</sup> While the Court ultimately concluded in *Skeet* that a court did not possess the authority to control the particular type of activity which plaintiff argued the defendant had owed a duty under the common law to perform, the Court reiterated that other common law duties such as the defendant's duty, as a common carrier, not to discriminate could be compelled through mandamus. As demonstrated in Appellants' Opening Brief, numerous courts have held that a municipality's duty to maintain its streets in a safe condition is a duty that can be enforced through mandamus-type relief. *See, e.g., Lank v. Hughes*, 167 A.2d 268, 286-87 (Pa. 1961); *St. Louis & S.F.R. Co. v. Sutton*, 119 P. 423, 428 (Okla. 1911).



Many other jurisdictions have also long maintained that common law duties may be enforced by mandamus. See, e.g., *Kansas v. Lake Koen Navigation, Reservoir & Irr. Co.*, 65 P. 681, 682 (Kan. 1901) (holding that “if the performance of a duty is enjoined by law, ***either by express statutory enactment or by the rules of the common law***, its performance may be compelled by mandamus” and concluding that it could compel performance of a common law duty, existing “independently of statutory provisions,” to repair a damaged highway to accommodate public travel); *City of Philadelphia v. Pennsylvania Public Utility Commission*, 676 A.2d 1298, 1305-06 (Pa. Cmwlth. 1996), *petition for allowance of appeal denied*, 546 Pa. 657, 684 A.2d 558, *cert. denied*, 520 U.S. 1115 (1997) (holding that the common law duty to maintain and repair a highway the railroad bridges crossing overhead was imposed to “enable the public to safely use the highway” and as an “imperative” duty “could be enforced by mandamus.”); *see also Copeland v. Huff*, 261 S.W.2d 2, 3 (Ark. 1953) (holding that “***mandamus lies to enforce a clear legal right, whether it arises by statute or by common law.***”) (emphasis added); *Southern Bell Tel. & Tel. Co. v. Beach*, 8 Ga. App. 720, 722 (Ga. Ct. App. 1911) (finding that mandamus may be used to compel performance by a telephone company of “its common-law duty” to not discriminate when such duty is breached).

The Town also argues that Appellants, in demonstrating in their Opening Brief that mandamus has routinely been recognized and employed as an appropriate means to compel performance of the duty to maintain, fail to cite any authority relevant to this matter because,

according to the Town, “in *each* case” cited by Appellants “a state statute created [the] mandatory duty.” See Appellee’s Brief at p. 26, n. 6 (emphasis added). The Town’s argument is inaccurate and misleading. Significantly, the Town ignores, as it must, the *Jamison v. City of Zion*, 834 N.E.2d 499 (Ill. Ct. App. 2005) case, which, as described by Appellants in their Opening Brief, held that a “mandamus type action was proper to compel a city to fulfill its common-law duty to remove obstruction from a city roadway.” Appellants Opening Brief at p. 20. Given the Town’s position that common law duties are not enforceable through mandamus, Appellants believe that a more extensive description of the *Jamison* decision is necessary.

In *Jamison*, the plaintiff filed an action against the defendant city after the city failed to require his neighbor to remove their lilac bushes, which the plaintiff claimed created a dangerous condition by blocking motorists’ view of oncoming traffic on the road the plaintiff used to access his home. The plaintiff sought a writ of mandamus against the city compelling it to perform (i) its duty to abate the encroachment under the city’s nuisance ordinance and the Illinois criminal nuisance statute and (ii) its common law duty to remove dangerous obstructions from its roads. After the district court dismissed the plaintiff’s action, holding that any duty the city owed to plaintiff was discretionary, the plaintiff appealed.

On appeal, the Illinois Court of Appeals upheld the district court’s decision with regards to the city ordinance, finding the appearance of the term “may” therein meant that

the city's duty to abate an encroachment was discretionary. *Id.* at 501. The Court also agreed with the district court that the city owed the plaintiff no duty under the state criminal nuisance statute because the state's attorney, not the city, had the authority to prosecute the crime of nuisance. *Id.* The Court, however, disagreed with the district court's decision that the city's "common-law duty to remove obstructions from the roadway" was discretionary. *Id.*

In particular, the Court found that it was "[l]ong-settled case law" that a city "has a mandatory, rather than discretionary, duty to remove [ ] obstruction[s] from [its roads]" and that "courts have long held that an action for mandamus will lie to compel a municipality to discharge its duty to remove encroachments and obstructions from public streets." *Id.* at 503, citing *Mamolella v. First Bank of Oak Park*, 423 N.E.2d 204 (Ill. Ct. App. 1981). The Court then quoted the Illinois Supreme Court's explanation of the source of this duty:

When a public highway is once established all the beneficial uses of it vest in and devolve upon the public, and where, as in incorporated cities, the title to the streets is vested in the municipality, they are nevertheless charged with the public right. . . . The city could have no authority to accept public streets upon any other conditions than that they should be for public use, and what is meant by public use is that the public shall have the uninterrupted, unimpeded and unobstructed use of every portion and part of such public highway.

*Id.*, quoting *People ex rel. Faulkner v. Harris*, 67 N.E. 785 (1903).

It is also important to note that in addition to the Court's express acknowledgment in *Skeet* that common law duties may be enforced through mandamus, Appellants have been unable to find a single decision by this Court in which it held that only statutory duties may

be compelled through mandamus. Indeed, while the Court references statutory duties from time to time in its decisions regarding the use of mandamus, when making a pronouncement of which duties may be enforced by mandamus under Utah law, the Court has stated only that the duty must be a clear “legal,” “nondiscretionary” duty “imposed” or “required by law.” See, e.g., *Renn v. Utah State Bd. of Pardons*, 904 P.2d 677, 682 (Utah 1995) (Mandamus is “designed to compel a person to perform a **legal duty** incumbent on him by virtue of his office or as **required by law**. . . Mandamus is “available to compel the performance of a **nondiscretionary duty**.”) (emphasis added); *Harris v. Turner*, 96 Utah 342, 347 (Utah 1938) (“Whenever action by a court or other officer is sought to be compelled by mandamus, it must be shown that there is a **clear legal duty** to act as requested. The duty to so act must be clear, free from doubt, imperative, and **without discretion** to act or refuse.”) (emphasis added). It is beyond dispute that the duty to maintain clearly meets this definition and, therefore, mandamus is available to compel its performance.

Finally, and perhaps most importantly, Rule 65B of the Utah Rules of Civil Procedure contains language that clearly demonstrates Utah courts have the authority to order that a municipality, among others, perform both the statutory duties and the common law duties imposed on such municipality. In particular, Rule 65B(d) which sets forth the grounds for relief under the Rule in circumstances related to, among other things, the “failure to comply with duty,” reads, in relevant part, as follows:

(d)(2) **Grounds for relief**. Appropriate relief may be granted: (A) [...]; (B)

where an inferior court, administrative agency, corporation or person has failed to perform an act required by law as a duty of office, trust or station; (C) [...]; or (D) where the Board of Pardons and Parole has exceeded its jurisdiction or failed to perform an act required by constitutional or statutory law.

U.R.C.P., Rule 65B(d)(2).

Thus, relief is available under subsection (d)(2) of Rule 65B where a municipality (*i.e.* a “corporation”) has “failed to perform an act *required by law as a duty*.” *See* U.R.C.P., Rule 65B(d)(2)(B) (emphasis added). Subsection (d)(2)(D), however, contains a far more restrictive basis for relief than that set forth in subsection (d)(2)(B), in that the availability of relief under subsection (d)(2)(D) is expressly limited to the Board of Pardons and Parole’s failure to perform “an act *required by constitutional or statutory law*” rather than “an act *required by law*.” *See* U.R.C.P., Rule 65B(d)(2)(B) and (D) (emphasis added). Had this Court, at the time it drafted Rule 65B, intended that only duties imposed on a municipality by statute, rather than the common law, provide a basis for relief under subsection (d)(2)(B) in the event that the municipality fails to perform such statutory duty, the Court could have simply included that limitation in the language it chose for Rule 65B. This is evidenced by the fact that this Court included precisely such a limitation in subsection (d)(2)(D).

Accordingly, subsection (d)(2)(B)’s language, which provides that a failure by a municipality to perform any act “required by law as a duty” constitutes a basis for relief under Rule 65B (as opposed to subsection (d)(2)(D)’s language, which expressly limits the

availability of relief to the Board's failure to perform only actions "required by constitutional or statutory law"), further disproves the Town's argument that mandamus-type relief is only available to compel a municipality to perform its statutory duties and that mandamus is not available to compel performance of common law duties.

**V. THE TOWN'S CLAIM REGARDING ITS FINANCES IS NOT PROPERLY BEFORE THE COURT AND, IN ANY EVENT, DISINGENUOUS.**

As its final argument, the Town asserts that even if Utah law imposed a mandatory duty on it to maintain its road in a safe condition, the Town cannot be compelled to perform this duty because it lacks the funds to do so. The Town's argument is misplaced for two independent reasons.

First, the record for this matter before the Court contains no evidence or finding by the Trial Court that the Town does, in fact, lack the funds to perform its mandatory duty to maintain. The record is silent as to this issue because the Town presented no evidence during either the preliminary injunction hearing or the trial of this matter and, indeed, failed to even allege, that it lacked the funds to repair the Road. Even now, the only support for the Town's claim, is its bald assertion that it lacks the funds. Because the Town failed to make any attempt to demonstrate that it lacks the funds to perform its duty to maintain, and as a result, the record in this case is silent as to such issue, the Town cannot, for the first time, present its argument regarding its purported lack of funds to the Court on appeal. Accordingly, the issue is not before the Court.

Second, the Town's claim that it lacks the funds to repair the Road is belied and

negated by the undisputed fact that the Appellants repeatedly offered to pay for all necessary repairs to the Road. While the Town will undoubtedly argue that Appellants offered only to pay for repairs to the Road that did not meet the recommendations of the Town's engineer, this argument is also disingenuous given the fact that the Trial Court found that the Town permitted the contractor, who submitted the estimate in Appellants' offer, to perform precisely the same type of repairs to a portion of the Road as those for which Appellants had offered to pay and that such repairs had held up "remarkably well." The Town cannot, in good faith, argue that it lacks the funds necessary to perform its duty to maintain the Road in a safe and useable condition, when it flatly rejected repeated offers in amounts sufficient to have covered the costs of repairs which had they been conducted, would have returned the Road to a safe and useable condition.

### **CONCLUSION**

For the reasons set forth above and those contained in Appellants' Opening Brief, this Court should reverse the Trial Court's decision that it lacked the authority to compel the Town to perform its legal duty to repair and maintain the Road in a safe and useable condition.

DATED this 24<sup>th</sup> day of March 2008.

BENNETT TUELLER JOHNSON & DEERE

A handwritten signature in black ink, appearing to read 'Mark Richards', written over a horizontal line.

Mark Richards

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

KESLER & RUST

Joseph C. Rust

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



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 APPELLANTS REPLY BRIEF, in Case No. 20070872, postage prepaid, this 24<sup>th</sup> day of March, 2008, to:

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

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

  
F:\DATA\JRUST\MCL\ReplyBrief.Fairfield2.wpd