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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, and individual v. Town of Fairfield : Amicus Brief

Utah Court of Appeals

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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, and individual

Plaintiffs/Appellants

v.

TOWN OF FAIRFIELD

Defendant/Appellee.

CASE No. 20070872

Subject to reassignment to the Court of Appeals

BRIEF OF AMICUS

ON APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT OF UTAH
COUNTY, STATE OF UTAH
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STATEMENT OF INTEREST OF *AMICUS*

The governmental entities of the City of Orem, City of Provo, and Utah County have sole jurisdiction and authority to maintain and control designated streets and roads located within their respective municipalities. Further, the citizens of the Cities and County use motorized vehicles, including regular passenger vehicles and trucks to travel upon such roadways. The *Amici* governments are duly designated to protect the interests of their citizens through representative government. *Amici*'s discretionary duties to maintain, improve, and repair roadways directly depend upon the legal determination of the case at bar. Further, the appeal raises concerns with the *Amici* governments' legislative and executive road and street maintenance decision-making process. Therefore, the interests of *Amici* are directly implicated by this action as discussed herein.

SUMMARY OF ARGUMENT

Hogs R Us and other plaintiffs seek extraordinary relief in the form of a writ of mandamus. Such extraordinary relief is not merited as there is no clear and plainly prescribed duty. Moreover, there are other adequate remedies for actual damages resulting from negligent maintenance of roadways. This Court should not extend jurisdiction in this case as Hogs R Us lack standing to bring suit. Further, the statutory scheme asserted does not provide an implied right to compel political subdivisions to perform maintenance upon roadways; this Court should not create such right absent statutory language or intent. Finally, the action is barred by the Utah Governmental Immunity Act, as Fairfield's decision to allocate funds to repair residential roads and defer action on the roadway in contention until appropriate funds were available is a discretionary function.

ARGUMENT

A writ of mandamus is an extraordinary remedy only available where the "duty sought to be exercised [is] a positive command and so plainly prescribed as to be free from doubt." McCurdy v. Steele, 353 F.Supp. 629, 638 (D.Utah 1973); see also Morgan v. Fourth Judicial District Court of Wasatch County, 105 Utah 140, 141 P.2d 886 (Utah 1943). While Utah courts recognize mandamus as a remedy, the courts are reluctant to issue such writs. See Ryberg v. Lundstrom, 70 Utah 517, 261 P. 453 (Utah 1927) (holding "[w]here the issue of the writ would disturb official action, or create disorder or confusion, it may be denied; and this is so even where the petitioner has a clear legal right for which mandamus would be an appropriate remedy"). As such, the petitioner must

“show a clear legal right to the performance of the act demanded and a plain duty of the officer, board, or other tribunal to perform as demanded.” Garcia v. Jones, 29 Utah 2d 409, 410, 510 P.2d 1099, 1100 (Utah 1973). However, if “the duty to perform the act is doubtful, or where a discretion is imposed or involved in the performance of it, mandate ordinarily will not compel the performance of it in a particular way or manner.” Id.; see also Tuttle v. Board of Education of Salt Lake City, 77 Utah 270, 285, 294 P. 294, 300 (1930); Haslam v. Morrison, 113 Utah 14, 190 P.2d 520 (1948).

Moreover, pursuant to Rule 65B, extraordinary relief, such as a mandamus, is only allowed where no other plain, speedy and adequate remedy is available. See U.R.C.P. Rule 65B(a). In order to obtain such a writ, litigants must plead and prove the absence of any other adequate remedy before asking a court to issue such a writ. This Court held that it may not use its discretion to issue an extraordinary writ unless the petitioning party has “no other plain, speedy and adequate remedy” at law. State v. Stirba, 972 P.2d 918, 921 (Utah App. 1998); see also In re McCarthy, 368 F.3d 1266, 1268 (10th Cir. 2004). In the Appellants’ (“Hogs R Us”) brief, Hogs R Us admits that a remedy exists under the Utah Governmental Immunity Act (App.Br. at pp. 13-14) in suits for injury arising out of “a defective, unsafe, or dangerous condition of any highway, road, street” Utah Code Ann. § 63-30d-301. Therefore, if the Hogs R Us suffered a distinct injury, the Court should deny the mandamus request, as a plain, speedy, and adequate remedy is already available.

I. THE COURT SHOULD NOT EXTEND ITS JURISDICTION WHERE THE APPELLANT LACKS STANDING TO BRING SUIT.

“A petitioner for extraordinary relief must have standing, just as any other litigant must have.” Terracor v. Utah Bd. of State Lands & Forestry, 716 P.2d 796, 798 (Utah 1986); see also Startup v. Harmon, 59 Utah 329, 336, 203 P. 637, 640-41 (Utah 1921); Crockett v. Bd. of Ed., 58 Utah 303, 309, 199 P. 158, 160 (Utah 1921). The doctrine of standing protects the integrity of judicial adjudications, ensuring that “there will not ‘be significant inroad[s] on the representative form of government . . . converting the judiciary into an open forum for the resolution of political and ideological disputes about the performance of government.’” See Terracor, 716 P.2d at 799 (quoting Baird v. State, 574 P.2d 713, 717 (Utah 1978)).

The Court has set three general standards for determining whether a litigant has standing. Terracor, 716 P.2d at 799. First, a “[p]laintiff must be able to show that he has suffered some distinct and palpable injury that gives him a personal stake in the outcome of the legal dispute.” Id. (quoting Jenkins v. Swan, 675 P.2d 1145, 1148 (Utah 1983)). Second, if a plaintiff fails to meet the first threshold, standing may be found 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.” Id. (citing Kennecott Copper Corp. v. Salt Lake County, 702 P.2d 451, 454 (Utah 1985)). Third, if standing is unavailable under the preceding criteria, the Court may find standing if “the issues are unique and of such great public importance that they ought to be decided in the furtherance of the public interest.” Id.

Hogs R Us fails to meet these gate-keeping requirements. They fail to assert any “distinct and palpable injury”. The trial court, in the Finding of Facts and Conclusions of Law (“Findings”), did not make a finding of a distinct and palpable injury. See Findings at p. 12. Further, Hogs R Us does not demonstrate that their interest in the roadway is greater than any other party or citizen of Fairfield. Moreover, Utah courts recognize that a municipal corporation “may be held liable for injuries proximately resulting” from the failure to maintain streets within the corporate boundaries “in a reasonably safe condition for travel.” Bowen v. Riverton City, 656 P.2d 434, 437 (Utah 1982). Therefore, an injured party would have the greatest interest in the outcome of the case, and would likely present the same or similar issues. Last, this Court has already decided that where a party suffers an injury proximately resulting from a municipality’s failure to maintain streets in a reasonably safe condition, that party may seek recovery. Id. As such, it is well settled that when there is a distinct and palpable injury proximately resulting from a defect in a road or street, a plaintiff may maintain a suit. Therefore, the Court need not exercise jurisdiction in the furtherance of public interest, as the public is adequately protected, with rights of action to seek recovery for a real and distinct injury.

If the Court extends its jurisdiction, absent Hogs R Us meeting the threshold standing requirement, the Court will create precarious precedent. Such extension will allow private individuals to use the courts to direct municipality roadway repairs, regardless of any actual injury or statutory authority. In essence, the Court’s decision will provide the basis for future complaints against municipalities for cracks, pot holes, or any other road condition that a private individual finds unsatisfactory. *Amici* respectfully

request that the Court affirm the standing requirement and protect the representative form of government from unnecessary infringements.

II. THE COURT SHOULD NOT GRANT RELIEF ABSENT A STATUTORY PRIVATE RIGHT OF ACTION.

Absent express statutory language “indicating a legislative intent to grant a private right of action” the Court should not recognize an implied right. Machan v. UNUM Life Ins. Co. of America, 2005 UT 37, ¶ 23, 116 P.3d 342, 347-48 (Utah 2005). As this Court stated, “our criterion is legislative intent, ‘[w]hether a particular statute provides a private right of action is a question of statutory interpretation.’” Id. at ¶ 24 (quoting Buckner v. Kennard, 2004 UT 78, ¶ 41, 99 P.3d 842, 853 (Utah 2004)). Thus, the Court must look to the language and purpose of the legislation, in order to determine the availability of a private right of action under the act.

In Machan, the Court reviewed Chapter 26 of the Utah Insurance Code to determine whether to allow a private right of action brought under the act. See Machan, 2005 UT 37, ¶ 24. However, the Court also noted that “in the absence of statutory language expressly indicating a legislative intent to grant a private right of action, Utah courts are reluctant to recognize an implied right.” Id. at ¶ 23. Further, the Court specifically indicated that “whether a particular statute provides a private right of action is a question of statutory interpretation.” Id. at ¶ 24. Thus, the analysis must first begin with the plain language of the statute. Id.

While the Machan plaintiff argued for an implied right under the statute, as one of the act’s purposes was “to protect claimants under insurance policies from unfair claims

adjustment practices”, the Court noted that the act indicated other goals of “promot[ing] the professional competence of those engaging in claims adjusting . . . and encourag[ing] fair and rapid settlement of claims.” Id. at ¶ 26. Moreover, the plaintiff claimed that “the legislature intended to grant a private right of action to enforce section 31A-26-301 simply because that section omits the explicit denial of a private right contained in section 31A-26-303.” Id. at ¶ 28. However, the Court concluded that without “explicit statutory language to that effect” the Court would not grant a private right of action. Id. at ¶ 27.

Here, Hogs R Us bases their suit on two legislative acts. At issue are the Highway Jurisdiction and Classification Act, Utah Code Ann. § 72-3-101, *et seq.*, and the Construction, Maintenance, and Operations Act, Utah Code Ann. § 72-6-101, *et seq.* Further, Hogs R Us relies on the general common law concept that a municipality has a “nondelegable duty to exercise due care in maintaining streets within its corporate boundaries in a reasonably safe condition for travel.” Bowen v. Riverton, 656 P.2d 434, 437 (Utah 1982). Neither of the legislative acts provides a private right to enforce the statutes. Rather the acts are to promote uniform plans for construction and maintenance of highways, roads, and city streets.¹ These acts guide the separation of duties and

¹ See Utah Code Ann. § 72-1-201 (Creation of the Department of Transportation); 72-1-208 (Cooperation with counties, cities, towns, the federal government, and all state departments); 72-6-102 (stating Department of Transportation’s duties under the Construction Maintenance, and Operations Act); 72-6-110 (Supervision and standards of construction for class B and C roads); 72-6-109 (Class B and C roads – Improvement projects – Contracts – Retainage).

authorities, promoting the creation and maintenance of a state-wide highway and road infrastructure, not the grant of a private right to enforce these guidelines.

If the Court grants the Hogs R Us' relief, in essence the Court will use an extraordinary writ of mandamus to create a new private right of action. This private right of action would not be founded in the plain language of the statutes or in the legislative intent in the enactment of the Highway Jurisdiction and Classification Act and the Construction, Maintenance, and Operations Act. Rather, such a grant would provide a process for private individuals to seize municipalities' and other political subdivisions sole jurisdiction and control over roadways, in seeking a writ of mandamus to perform construction or maintenance of roadways irrespective of the legislative procedures and statutory order. Further, such action would strip the representative form of government of the municipalities' citizenry and prevent public comment on potential roadway development and funding. Finally, Hogs R Us' requested relief would infringe on the deeply rooted ideals of separation of powers, stripping the discretionary power from the legislative and executive branches, allowing the judiciary to substitute its judgment for that of duly appointed officials, in appropriating or diverting funds from other roadway projects to fund those provided in a writ of mandamus. Therefore, the Court should deny Hogs R Us' request for extraordinary relief, as the acts do not express a private right of action.

III. MUNICIPALITIES HAVE NOT WAIVED GOVERNMENTAL IMMUNITY FROM SUITS SEEKING WRITS OF MANDAMUS.

Unless specifically exempted, each governmental entity, including political subdivisions, is “immune from suit for any injury that results from the exercise of a governmental function.” Utah Code Ann. § 63-30d-201. The Utah legislature drafted and adopted the Governmental Immunity Act of Utah as a “single, comprehensive chapter” which “governs all claims against governmental entities. . . .” Utah Code Ann. § 63-30d-101. The waiver of immunity includes suits involving an injury caused by “a defective, unsafe, or dangerous condition of any highway, road, street, alley” Utah Code Ann. § 63-30d-301(3)(a)(i). However, “[i]mmunity from suit of each governmental entity *is not waived* under Subsections (3) and (4) if the injury arises out of, in connection with, or results from: (a) *the exercise or performance, or the failure to exercise or perform, a discretionary function, whether or not the discretion is abused.*” Utah Code Ann § 63-30d-301(5)(a) (emphasis added). Here, the Hogs R Us suit is barred by the Utah Governmental Immunity Act as the decision to maintain, improve, and reconstruct a roadway is a discretionary function.

A. A Municipality’s Decision to Make Repairs to a Roadway is a Discretionary Governmental Function.

Fairfield’s decision to allocate roadway funds to the residential roads and postpone patchwork repairs, in order to save funds to reconstruct the Fairfield road is “a governmental function and thereby entitled to blanket immunity under the Act.” Wagner v. State, 2005 UT 54, ¶ 12, 122 P.3d 599, 603 (Utah 2005). A State or political subdivision’s “activity, undertaking, or operation performed by a department, agency,

employee, agent, or officer of a governmental entity” is a governmental function. Utah Code Ann. § 63-30d-102. Further, governmental function, under the Act, “includes a governmental entity’s failure to act.” Id. The courts have held that when a governmental entity is performing a function delegated to a political subdivision, it is performing a governmental function. See AIG Aviation Ins. Serv’s, Inc. v. U.S., 885 F.Supp. 1496 (D. Utah 1995) (“operating the airport was a “governmental function for purposes of the Utah Governmental Immunity Act.”); Ledfors v. Emery County School Dist., 849 P.2d 1162 (Utah 1993) (operation of a public school is a governmental function); Johnson v. Salt Lake County Cottonwood Sanitary Dist., 20 Utah 389, 438 P.2d 706 (Utah 1968) (sanitary district disposing sewage was performing a governmental function). Therefore, municipalities’ actions pursuant to statutory grants to control roadways are governmental functions.

B. Municipalities, under the Governmental Immunity Act, Have Not Waived Immunity From Suits to Enforce Municipality Duties of Street and Roadway Maintenance.

Fairfield is “immune from suit for any injury that results from the exercise of a governmental function” unless it is waived under the Governmental Immunity Act. Utah Code Ann. § 63-30d-201. While municipalities, under the Governmental Immunity Act, waived immunity for actions arising out of injuries caused by “a defective, unsafe, or dangerous condition of any highway, road, street, alley”, municipalities have not waived their immunity from suit from actions to enforce the performance of discretionary governmental functions relating to roadways. Utah Code Ann. § 63-30d-301(3)(a)(i); 301(5)(a). Therefore, municipalities have not waived their immunity to suits involving

discretionary functions, including the maintenance of roadways, allocation of limited funds, and priority of maintenance projects.

C. Regardless, the Governmental Immunity Act Saves a Governmental Entity from Suit if Injury Arises From or In Connection With the Performance or Failure to Perform a Discretionary Function.

Governmental immunity is “essential to the daily operations of the government and enables the government to serve the interests of its constituency.” Johnson v. Utah Dept. of Transp., 2006 UT 15, ¶ 20, 133 P.3d 402, 406-07 (Utah 2006). The discretionary function exception “shield[s] those governmental acts and decisions impacting on large numbers of people in a myriad of unforeseen ways from individual and class legal actions, the continual threat of which would make public administration all but impossible.” Id. (quoting Keegan v. State, 896 P.2d 618, 623 (Utah 1995); Utah Code Ann. § 63-30d-301(5)(a). As this Court recognized, “[w]here the responsibility for basic policy decisions has been committed to one of the branches of our tri-partite system of government, the courts have refrained from sitting in judgment of the propriety of those decisions.” Little v. Utah State Div. of Family Servs., 667 P.2d 49, 51 (Utah 1983). Where the political subdivision’s decision is “regulated by the political process” the Court should not substitute its reasoning in place of the governmental entity. Johnson, 2006 UT 15, ¶ 20. Therefore, the discretionary authority of a political subdivision should not be the subject of a suit, pursuant to the Governmental Immunity Act.

A municipality has sole jurisdiction and discretion in the manner and method of maintenance, repair, and improvement of class C roads within its borders. see Utah Code Ann. §§ 10-8-8; 10-8-8.6; 10-8-11; 10-8-94. Further, the Court specifically stated, “[t]he

plain, ordinary, and accepted meaning of the word “may” is “permissive” or “discretionary,” generally indicating that an individual is either permitted or “[h]as the possibility” to do something. Holmes Development, LLC v. Cook, 2002 UT 38, ¶ 25, 48 P.3d 895, 902-03 (Utah 2002) (quoting Black’s Law Dictionary, 993 (7th ed.1999)). The decision to make improvements and repairs, including the decision to forego such operations, is clearly a governmental function. Any other reading of Utah Code Ann. § 10-8-8 would result in a tortured definition of the word “may” and legislative intent to provide local control over roadways.

1. A Municipality’s Actions and Omissions Regarding the Roadway Maintenance Involve a Basic Governmental Policy and Objective.

Public safety of the roads is a “basic governmental policy.” Id. Moreover, maintenance, improvement, and repair of roadways and streets are “basic governmental policies”. See Utah Code Ann. §§ 10-8-8; 10-8-8.6; 10-8-11; 10-8-94. Fairfield’s rejection of Hogs R Us’ offer and suggestions for repair are in accordance with municipal control over roadways. Fairfield researched and studied the deterioration of 1600 N. (Appellants Br. at p.4). As the trial court found:

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 has 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.

(Findings at p. 10). The findings clearly demonstrate Fairfield’s efforts, including working with an engineering firm, to provide safe and efficient administration of its

roadways. Fairfield's action and inaction meet the first threshold determination for discretionary function. A municipality's decision to reconstruct the roadway, provide a stable foundation, and improve the roadway, rather than accept a private individual's patchwork solution involves basic government policies and objectives, including maintenance, improvement, and safety of city streets.

2. A Municipality's Decisions Regarding Maintenance and Improvements of Roadways Are Essential to Maintaining a Safe Traffic Infrastructure.

Determinations of level of maintenance, types of improvements, and reconstruction versus minor patch repair work are essential in protecting the public safety on roadways. Johnson, 133 P.3d at 408. A municipality's decision to reconstruct a roadway, rather than provide a patchwork of repair has an identical purpose of that the Utah Supreme Court identified in Keegan. In Keegan, the Court held that the decision "not to raise a concrete median barrier 'involved a determination of not only the degree of safety that would be provided by various options considered, but also what degree of safety would be an appropriate goal given time and cost constraints.'" Id. (quoting Keegan, 896 P.2d at 624). A municipality must weigh the degree of safety of the roadway, the costs, the time constraints, and the longevity of repair work before making any decision to provide repairs, improvements and maintenance. Therefore, Fairfield's decision meets the second threshold determination for discretionary function.

3. Maintenance and Improvement Decisions Involve Basic Policy Evaluations, Judgments, and Local Government Expertise.

A political subdivision's decisions to construct, repair, improve, and maintain a roadway involves policy considerations, not operational decisions. See Johnson, 133

P.2d at 409. The Court has stated that a decision of whether or not to perform road construction and “[t]he allocation of [funds], combined with the adverse effects on public convenience, placed that decision squarely in the public policy area”. Id. However, “[t]he *manner* in which the construction occurred, however, is where the line is drawn between operational and policy decisions.” Id. Further, the Court stated that “at a minimum, a basic cost-benefit analysis and exercise of financial expertise and judgment by the city . . . is sufficient under part three of the [test]”. Id. at 409-10.

Here, Fairfield contracted with Earthtec Testing & Engineering, P.O., to conduct a geotechnical subgrade and pavement evaluation for the roadway. (Findings at p. 10.) While Hogs R Us offered to pay for the filling of potholes in the roadway, Fairfield refused and informed Hogs R Us that it wished to make repairs in accordance with the Earthtec recommendations and standards.² (Br. of Appellees at 8-9.) Further, Fairfield’s local government made the cost-benefit analysis that roadwork would be focused in the residential area and set aside a “portion of its roads funds reach [sic] year in a capital account so that it will have funds to make major repairs and construct additional road[s] in the future.” (Br. of Appellees at 9.). Fairfield’s determination to allocate funds to the residential roadways, and set aside funds to reconstruct the roadway according to the engineering firm’s recommendations is a basic policy evaluation and judgment. Failure to protect this essential operation of local governments would hinder a government’s

² While not raised below, *Amici* notes that the trial court’s admission of settlement negotiations and offers of compromise may be violative of the Utah Rule of Evidence 408 (“[e]vidence of conduct or statements made in compromise negotiations is . . . not admissible.”).

ability to serve the interest of its constituency, and would produce a continual threat of legal actions “which would make public administration all but impossible.” Johnson, 133 P.2d at 407.

4. A Municipality Possesses the Statutory Authority to Control Roadways Within its Geographic Boundaries.

A political subdivision is statutorily authorized to make determinations regarding the maintenance, improvement, repair, and construction of roadways within its boundaries. See Utah Code Ann. § 10-8-8. The parties do not deny that Fairfield has the power to make this determination. Therefore, a municipality’s decision to allocate funds to the repair of roadways within the residential areas and to set aside funds to reconstruct the roadway according to engineering recommendations is a discretionary function, not operational. As the decision is discretionary, a municipality is immune from suit relating to discretionary functions, under the Utah Governmental Immunity Act. Thus, this Court should affirm the trial courts determination, that it may not issue a writ of mandamus, forcing a political subdivision to perform contrary to a discretionary determination.

IV. THE UTAH TRANSPORTATION ACT AND THE UTAH GOVERNMENTAL IMMUNITY ACT DO NOT CREATE AN ENFORCEABLE MANDATORY DUTY TO MAINTAIN ROADWAYS.

There is no statutory duty, requiring Fairfield, or any municipality or other governmental entity, to improve, maintain, or repair its roads.³ The plain language of the

³ See Utah Code Ann. §§ 10-8-8 (Streets, parks, airports, parking facilities, public grounds, and pedestrian malls); 10-8-11 (Streets - - Encroachments, lighting, sprinkling, cleaning); 72-1-101, *et seq.*, (Department of Transportation Administration Act); 72-3-104 (City Streets - - Class C roads - - Construction and Maintenance); 72-3-109 (Division of responsibility with respect to state highways in cities and towns); 72-6-101, *et seq.*,

statutes regulating the maintenance, improvement, and control of roadways clearly provide “sole jurisdiction and control of the city streets within the municipality.” Utah Code Ann. § 72-3-104(4). The legislature clearly provided this authority to the municipalities as a discretionary authority providing that “[a] municipal legislative body may lay out, establish, open, alter, widen, narrow, extend, grade, pave, or otherwise improve streets . . .” Utah Code Ann. § 10-8-8 (emphasis added). The discretionary nature of road maintenance is reaffirmed in that “[a]ny town or city in the third, fourth, or fifth class may: (a) contract with the county or the department for the construction and maintenance of class C roads within its corporate limits; (b) transfer, with the consent of the county, its: (i) class C roads to the class B road system . . .” Utah Code Ann. § 72-3-104(7). The adoption of the aforementioned statute clearly demonstrates the legislature’s intent that the nature and proceeding of class C roads be discretionary functions of municipalities. Further, absent from all the statutory sections relied upon by Hogs R Us is the mandatory wording of “Shall” or “Must”, rather, the word “May” continually appears throughout. Last, the Governmental Immunity Act merely waives immunity, it does not create a mandatory duty of maintenance. Utah Code Ann. § 63-30d-301(3).

V. UTAH COMMON LAW DOES NOT CREATE AN ENFORCEABLE MANDATORY DUTY TO MAINTAIN A ROADWAY.

A municipality “is not an insurer against accident or a guarantor of the safety of travelers, and it need not keep its streets in a perfect or an absolutely safe condition” even though “a municipality has a duty to exercise ordinary care to keep streets ... in a

(Construction, Maintenance, and Operations Act); 63-30d-201 (Immunity of governmental entities from suit); 63-30d-301 (Waivers of immunity - - Exceptions).

reasonably safe condition for travel”. Braithwaite v. West Valley City Corp., 860 P.2d 336, 338 (1993) (quoting Pollari v. Salt Lake City, 111 Utah 25, 176 P.2d 111 (1947)). Utah Code Ann. § 63-30d-301(3)(a)(i) provides the sole remedy for injuries proximately caused by a “defective, unsafe, dangerous condition” of a street. See Braithwaite, 860 P.2d at 338. However, Hogs R Us fails to cite any Utah decision which creates such a mandatory duty, enforceable by injunction, writ of mandamus, or any other extraordinary relief.

While a municipality owes a general duty to all members of the public in regards to the safety of roadways, such duty is a general duty. See Braithwaite, 860 P.2d at 338. Therefore, the public duty doctrine provides that a general duty “does not impose a specific duty of care on the government with respect to individuals who may be harmed by government action or inaction, unless there is some specific connection between the government agency and the individuals that makes it reasonable to impose a duty.” Gabriel v. Salt Lake City Corp., 2001 UT APP 277, ¶ 16, 34 P.3d 234, 238 (Utah App. 2001). The Court recognizes four circumstances which may give rise to such a special relationship:

(1) by a statute intended to protect a specific class of persons of which the plaintiff is a member from a particular type of harm; (2) when a government agent undertakes specific action to protect a person or property; (3) by government actions that reasonably induce detrimental reliance by a member of the public; and (4) under certain circumstances, when the agency has actual custody of the plaintiff. . .

Id. (quoting Day v. State ex rel. Utah Dept. of Public Safety, 1999 UT 46, ¶ 13, 980 P.2d 1171 (Utah 1999)). The common law duty to maintain roadways in safe conditions is a

general duty. See Braithwaite, 860 P.2d at 338. Hogs R Us has not establish a special relationship between the Acts relied upon and a circumspect future harm. Granting Hogs R Us extraordinary relief will undermine this Court's public duty jurisprudence and provide grounds for parties with attenuated facts to petition the Court for relief of actions based on general governmental duties.

CONCLUSION

Based on the aforementioned reasons, *Amicus* respectfully requests that the Court deny Hogs R Us requests for a writ of mandamus. Extraordinary relief is not merited, as there is no clear and plainly prescribed duty. Moreover, there are other adequate remedies for actual damages resulting from negligent maintenance of roadways. This Court should not extend jurisdiction in this case as Hogs R Us lack standing to bring suit. Further, the statutory scheme asserted does not provide an implied right to compel political subdivisions to perform maintenance upon roadways, this Court should not create such right absent statutory language or intent. Finally, the action is barred by the Utah Governmental Immunity Act, as Fairfield's decision to allocate funds to repair residential roads and defer action on the roadway in contention, until appropriate funds were available is a discretionary function.

DATED this 14 day of April 2008.

CITY OF OREM

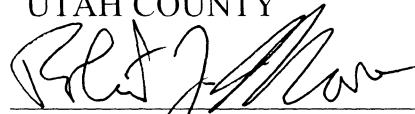


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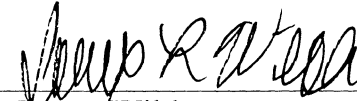


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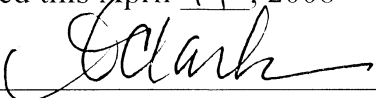
I hereby certify that on April 14, 2008, a true and correct copy of the foregoing BRIEF OF AMICUS was deposited in the United States mail postage prepaid, this 14 day of April, 2008 to:

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By ()