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M. L. Sears, Joseph Behling william S. Heitz, Frank A. Salimeno, Robert G. Hartmann, and James L. Lavender, on behalf of themselves and all other taxpayers similarly situated v. Ogden City, a Body Politic, Mayor A. Stephen Dirks, Council of Ogden, and Donna Adam, Ogden City Recorder : Petition for Rehearing

Utah Supreme Court

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BRIEF

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STATE OF UTAH

M. L. SEARS, JOSEPH BEHLING
WILLIAM S. HEITZ, FRANK A.
SALIMENO, ROBERT G. HART-
MANN, and JAMES L. LAVEN-
DER, on behalf of themselves and all
other taxpayers similarly situated,

Plaintiffs and Appellants,

vs.

OGDEN CITY, a Body Politic,
MAYOR A. STEPHEN DIRKS,
COUNCIL OF OGDEN, and
DONNA ADAM, OGDEN CITY
RECORDER,

Defendants and Respondents.

Case No.

13647

PETITION FOR REHEARING

**APPEAL FROM THE JUDGMENT OF THE
DISTRICT COURT OF WEBER COUNTY,
HONORABLE JOHN F. WAHLQUIST,
JUDGE**

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FILED

APR 14 1975

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

M. L. SEARS, JOSEPH BEHLING
WILLIAM S. HEITZ, FRANK A.
SALIMENO, ROBERT G. HART-
MANN, and JAMES L. LAVEN-
DER, on behalf of themselves and all
other taxpayers similarly situated,
Plaintiffs and Appellants,

vs.

OGDEN CITY, a Body Politic,
MAYOR A. STEPHEN DIRKS,
COUNCIL OF OGDEN, and
DONNA ADAM, OGDEN CITY
RECORDER,
Defendants and Respondents.

Case No.
13647

PETITION FOR REHEARING

Ogden City, Mayor A. Stephen Dirks, Council of
Ogden City and Donna Adam, Ogden City Recorder,
as defendants and respondents, respectively, petition

the above entitled court for a rehearing in the above entitled matter decided by this Court on the 11th day of February, 1975. These petitioners request a rehearing of this appeal because they feel that the issues before the Court in those briefs filed by both appellants and respondents were not fully understood and resolved, and that the decision of this Court was such that it created a misunderstanding with regard to the powers and duties of all cities to vacate streets, alleys, etc. to such an extent that acts of vacation both past and future are in jeopardy. The following issues are in point in this petition:

I

THE FAILURE TO RULE ON THAT
ISSUE BEFORE THE COURT ON
APPEAL.

II

RIGHTS AND POWERS OF CITIES
TO VACATE WITHOUT COMPENSA-
TION. 10-8-2 to 10-8-8.1, ET AL.

III

ISSUES BEFORE THE COURT ON
ITS APPEAL AS SET FORTH IN
THE ORIGINAL BRIEFS OF APPEL-
LANTS AND RESPONDENTS.

WHEREFORE, these petitioners request the

above Court to grant to the respondents the right and privilege to be reheard on those issues set out in the record and in the appellate briefs now on file in this Court.

L. KENT BACHMAN
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BRIEF IN SUPPORT OF PETITION
FOR REHEARING

STATEMENT OF THE KIND OF CASE

An action brought by the Appellants asking for declaratory and injunctive relief brought on behalf of the Appellants and all other persons similarly situated as both taxpayers of the City of Ogden and as residents and homeowners in the dedicated subdivision of Ogden City.

The Appellants have sought a determination as to the validity of an ordinance passed by the Ogden City Council closing and vacating a public street which the Appellants believe was a part of a dedicated subdivision known as the Argonne Park Plat, and the giving of the closed and vacated public street to the Board of Education of Ogden City without any compensation whatsoever being paid to the City of Ogden or to the Appellants, wherein the Board of Education of Ogden City was, and is, the only abutting landowner on said dedicated and said closed and vacated public street; and whether said action by the City of Ogden and by the Ogden City Council was a valid exercise of the authority and power of the Ogden City Council and; further, whether the closing off and taking away of a dedicated street in an allegedly private platted addition without the consent of the qualified electors of the City of Ogden or the homeowners of a platted subdivision without

compensation constitutes the taking of property without due process of law.

The Appellants are seeking the reversal of a lower court decision wherein the Respondents were favored with the dismissal of the Appellants', then Plaintiffs' action. The lower court at a hearing on a motion for temporary restraining order and on a complaint for declaratory judgment held that the action of the Ogden City Council in the closing of the street and the giving of the same by Quit Claim deed to the Board of Education of Ogden City was not an abuse of authority of the Ogden City Council acting for the City of Ogden, and that the City of Ogden had complied with the charter upon which it was founded together with the statutes of the State of Utah which set forth the procedures as to public hearings and as to the procedure for the vacating of a public street where the exigency existed in the public interest and with public good and welfare.

RELIEF SOUGHT ON APPEAL

The Respondents seek by defending this action on appeal a sustaining of the dismissal in the lower court and an order from the Supreme Court of the State of Utah dismissing the action of the Appellants as set forth in their demand to this Court.

RELIEF SOUGHT ON REHEARING

That these petitioners request a rehearing of this appeal because they feel that the issues before the court,

in those briefs filed by both the appellants and respondents, were not fully understood and resolved and that the decision of this court was such that it created a misunderstanding with regard to the powers and duties of all cities to vacate streets, alleys, etc. to such an extent that acts of vacation, both past and future, are in jeopardy of creating defects of titles for untold numbers of property owners in Ogden City and in the State of Utah.

ISSUE NO. I

THE FAILURE TO RULE ON THAT ISSUE BEFORE THE COURT ON APPEAL.

Respondents believe that there has been a failure to rule on those issues before the court on appeal. The appellants, in their appeal, sought a determination as to whether or not an ordinance passed by the City of Ogden, closing and vacating a public street which was the part of a dedicated subdivision and the deeding of said street to the Ogden City Board of Education without any compensation whatsoever being paid to the appellants was a valid exercise of the authority and power of Ogden City and the Ogden City Council. Secondly, the appellants sought to determine whether the closing and taking away of a dedicated street, in a private dedicated subdivision, without the consent of the qualified electors of the City of Ogden or the homeowners of the platted subdivision without payment of consideration

constituted the taking of property without due process of law.

The respondents sought to refute the issues of the appellants by setting forth an argument that the appellants did not have an absolute perpetual right in a dedicated street and that the City of Ogden could vacate and did have the authority to vacate based upon The Ogden City Charter and the laws of the State of Utah with regard to the vacating of streets where it was determined that the benefit to the public would be enhanced. Secondly, respondents sought to show that the appellants were not deprived of any property rights without due process of law, inasmuch as the respondents had complied with the procedures set forth in the Ogden City Charter and those sections of the Utah Code 10-8-1, as amended, 1953, and 1955, et al. Finally, that the City of Ogden and all respondents were not in such a position to have abused their discretion or had acted fraudulently or in any illegal manner in the vacating of said street.

This court on appeal did cite Section 10-8-2, U.C.A., 1953, as the controlling section wherefrom the city received its powers and authorities to acquire and dispose of property when it cited, as follows: "They may appropriate money for corporate purposes only, and provide for payment of debts and expenses of the corporation; may purchase, receive, hold, sell, lease, convey and dispose of property, real and personal, for the benefit of the city, both within and without its cor-

porate boundaries, improve and protect such property, and may do all other things in relation thereto as natural persons," This court decided, based upon the foregoing statutory section that the City of Ogden did not have the authorization to dispose of its property by gift. In the briefs of both the appellants and respondents there is no claim that such was the issue and the appellants claim no error by reason of the City's action in vacting the street to the Board of Education. It is consented that the cities and towns have the powers and authorities to vacate and otherwise dispose of properties pursuant to those rights granted to them within their charters or within those statutes as codified under the powers and duties of all cities, Chapter 8 of the Utah Code Annotated.

ISSUE NO. II

RIGHTS AND POWERS OF CITIES TO VACATE WITHOUT COMPENSA- TION. 10-8-2 to 10-8-8.1, ET AL.

The rights and powers of cities to dispose of property is unquestionably granted to the cities in Section 10-8-2, U.C.A. as amended, 1953. In that section, the cities are granted the right "to purchase, receive, hold, sell, lease, convey and dispose of property, real and personal for the benefit of the city both within and without its corporate boundaries, improve and protect such property and may do all things in relation thereto as natural persons," This section grants to the cities

and the towns the rights and powers with regard to the holding and management of its properties and specifically grants to the cities and the towns the right to do any of the following: Purchase, receive, hold, sell, lease, convey and dispose of property. Nowhere does it limit the cities and towns to only sell property; or only lease property; or only dispose of property by sale. "Dispose of" is defined as: "exercising finally, in any manner, one's power of control over; to pass into the control of someone else; to alienate, relinquish, part with, or get rid of; to put out of the way; to finish with; to bargain away." *Carpenter v. Lothringer*, 224 Iowa 439, 275 N.W. 98, 103; *Roe v. Burt*, 66 Okl. 193, 168 P. 405, 406, Black's Law Dictionary, 4th Edition. Although, I am sure, that "dispose of" could in a restricted sense be the sale only of property, in the instant statutory section, sale is only another alternative way in the management of property.

Section 10-8-8.5, U.C.A., as amended, 1953 and 1955.

*"Effect of vacation or narrowing of street or alley.—*The action of the governing body vacating or narrowing a street or alley which has been dedicated to public use by the proprietor, shall operate to the extent to which it is vacated or narrowed, upon the effective date of the the vacting ordinance, as a revocation of the acceptance thereof, and the relinquishment of the city's fee therein by the governing body, but the right of way and easements therein, if

any, of any lot owner and the franchise of any public utility shall not be impaired thereby.”

This section describes the effect of the vacation of a street or alley by setting forth that the disposition of said property was the relinquishment of the City's fee therein. There is no limitation imposed upon the city that compensation must be received by the City in consideration of the relinquishment of this fee interest which the City does possess.

If the ruling, of this Court, were to stand, you would make it difficult for municipalities to dispose of streets and alleys which were no longer beneficial to the cities and which, if released to the abutting land owners, as is the case in a vacation of a street, and compensation were required, the abutting land owners may feel that to pay for said property of whatever value, may not be in their own best interest, because of said questionable use.

This ruling, if permitted to stand, would effectively prevent abandoned and vacated streets and alleys from being returned to the county tax rolls for revenue purposes; would create title questions on all those vacated alleys and streets which have been vacated and would create strips and ribbons of land throughout all cities from being taxed or conveyed without great difficulty and expense to both the city and abutting land owners.

ISSUE NO. III

ISSUES BEFORE THE COURT ON

**ITS APPEAL AS SET FORTH IN
THE ORIGINAL BRIEFS OF APPELLANTS AND RESPONDENTS.**

The issues should be reheard by the above entitled court as to whether the appellants have a vested right in a dedicated street and whether the appellants were deprived of property rights without due process of law which issues were submitted by the appellants and which were countered by the respondents issues of No. 1: Whether the appellants do have an absolute and perpetual right in a dedicated street; No. 2, Whether the appellants were deprived of property without due process of law; and No. 3, Whether there was any factual finding that respondents had abused their discretion or acted fraudulently or in any illegal manner in the vacating of said street.

It is submitted that these issues and these issues alone should be what the Court should concern itself with in making its decision. The cases and statutory sections as cited in the original briefs should apply and be reconsidered by the above Court.

CONCLUSION

It is submitted by the respondents that the issues to be tried before this Court be those which were outlined in the briefs of both the appellants and the respondents. It is further submitted that the issue of whether the City has the right to vacate streets and alleys and dispose of these same properties with or with-

out consideration, should not concern this Court except to that extent that these statutory sections, as cited, be examined to determine if the City of Ogden had abused its discretion. If the ruling of this Court, as presently written, were to stand then all the municipalities in the State of Utah who had vacated property, in the past, would be placed in jeopardy as to having created clouds on the title of all properties so conveyed. Further, the municipalities, including the respondents, would be placed in such a jeopardized position as to have effectively lost their rights of vacation as are described in both their Charters and the laws of the State of Utah.

Those issues which should be squarely met are those issues which are outlined within the briefs and arguments of the appellants and respondents. Those same issues, in addition to the issues raised here, should be the issues that should be primary before the Court and which should be heard before this Court on this Petition for Rehearing. It is submitted that if these issues are considered by the Court that this Court will sustain the judgment of the lower Court in favor of the respondents.

Respectfully submitted,

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