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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 City, and Donna Adams, Ogden City Recorder :
Brief of Appellant

Utah Supreme Court

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**IN THE SUPREME COURT
OF THE
STATE OF UTAH**

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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,

*Plaintiffs and
Appellants,*

vs.

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

*Defendants and
Respondents.*

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

Case No.

13647

BRIEF OF APPELLANTS

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

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IN THE SUPREME COURT OF THE
STATE OF UTAH

M. L. SEARS, JOSEPH BEHLING,
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and JAMES L. LAVENDER, on
behalf of themselves and all
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Plaintiffs and
Appellants, /

Case No.

vs. /

13647

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

Defendants and
Respondents. /

BRIEF OF APPELLANTS

STATEMENT OF THE KIND OF CASE

This is an action for declaratory and
injunctive relief brought by the Appellants on

behalf of themselves and all other persons similarly situated, both as taxpayers of the City of Ogden and as residents and homeowners in a dedicated subdivision of Ogden City.

The Appellants seek a determination as to whether or not an ordinance passed by Ogden City closing and vacating a public street, which is a part of the dedicated subdivision in Argonne Park Plat, and the giving of that 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 the Ogden City Council, and further, whether the closing off 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 and without payment of consideration constitutes the taking of property

without Due Process of Law.

RELIEF SOUGHT ON APPEAL

The Appellants, who were the Plaintiffs in the Lower Court, having filed a class action as provided for under 78-33-1, Utah Code Annotated, as amended in 1953, seek a determination of the right of the Respondents, who were the Defendants in the action in the Lower Court, to vacate the aforesaid public and dedicated street and the authority of Ogden City to give said street by Quit Claim Deed to the Ogden City Board of Education without the payment of any compensation whatsoever to any of the property owners residing in the dedicated Plat, wherein the City street is a part thereof, and without the consent of the electorate for the giving of said property to the Ogden City Board of Education.

The Lower Court, at the time of a hearing on a Motion for a Temporary Restraining Order

and Complaint for Declaratory Judgment, granted an Order and Judgment granting dismissal of the class action of the Plaintiffs with prejudice, thereby validating the action of the Ogden City Council in the closing of the street and the giving of same by Quit Claim Deed to the Ogden City Board of Education.

The Appellants seek a reversal of the dismissal in the Lower Court and a Declaratory Order from the Supreme Court of the State of Utah as to the matters set forth in the Complaint of the Appellants.

STATEMENT OF FACTS

On June 31, 1921, a dedication Plat was submitted to Ogden City for the purpose of additioning Argonne Park to Ogden City, requesting that the same be dedicated and that the annexed Plat be set apart and the dedicated streets be used as a public thoroughfare forever. (R-26)

The Plat was accepted by Ogden City as an addition and the street in question, which is 29th Street from Harrison Boulevard to Tyler Avenue was a part of Argonne Park, together with an area from Harrison Boulevard to Polk Avenue and from 28th Street through to 29th Street. The dedicated plat contained streets and many lots. (R-26) The City Recorder certified the annexed plat of Argonne Park Addition as accepted by the Board of Commissioners of Ogden City on the 1st day of February, 1921. (R-27)

The Plaintiffs herein, as well as the class represented, in the instant cause of action before this Court represents persons who are homeowners in the area dedicated as Argonne Park, as well as other citizens who reside on the East Bench of Ogden City and have reason to use 29th Street as an arterial thoroughfare in order to traverse to their

homes and property. (R-112, Pl.Exh.B and C)

The Ogden City Mayor and Council passed an ordinance No. 1-74, which ordinance would vacate 29th Street as a public street from the east line of Harrison Boulevard to the west line of Tyler Avenue on the east and did convey said property by Quit Claim Deed to the Ogden City Board of Education. (R-27, R-75)

The Ogden City Board of Education maintains a high school, which is in an abutting area on both sides of 29th Street between Harrison Boulevard and Tyler Avenue, and desires the acquisition of said property and its use for the purpose of preventing its use as a public thoroughfare. Conveyance of the City dedicated street was made by a Quit Claim Deed to the Ogden City Board of Education and no consideration was paid by said Board of Education for the acquisition of said public street. (R-80)

That at a regular session of the Ogden City Planning Commission held January 2, 1974, a resolution was adopted, that the request of the Ogden City School Board for the closure of the 29th Street area be denied, in that the advantages to be derived from closure of said street was not sufficiently substantial to warrant the closure of an established, improved, and long-used street. (R-4)

The Weber County Planning Commission, in its report of August 31, 1973, in its response to a request to review the Ogden City Board of Education's Petition, to vacate said street, advised that the vacating was not in the best interest of the citizens of Ogden City, in that the use of said street would not constitute a safety hazard to the students using the facilities of the school abutting said street and that the closure was being sought on the basis of esthetic values. (R-49, -50)

A traffic engineering study was made by the Ogden Area Transportation Study Staff and submitted by Donald E. Godfrey, recommended that after a traffic engineering study, that the study was supportive of the position taken by the Traffic Department in a joint memorandum to R. L. Larson, Ogden City Manager, dated August 31, 1973, wherein the study showed that the aforesaid street did not constitute a hazard necessitating its closure. (R-44)

The Greater Ogden Chamber of Commerce Board of Directors, at a meeting held September 21, 1973, passed a resolution that the Board of the Chamber was opposed to the closing of the aforesaid street.

That the exhibits presently before the Court consisting of the Petition of the residents of the area of Argonne Park, together with the Petition of citizens who are residents of the area adjacent to Argonne Park and who are users

of said street, as well as an editorial in the Ogden Standard Examiner, all objecting to and in opposition to the closure of said street. (R-49, R-58)

ARGUMENT

POINT I

APPELLANTS HAVE VESTED RIGHT IN DEDICATED STREET.

The Appellants herein are persons who are homeowners and are the purchasers of lots which was originally dedicated in the Argonne Park, and that as a part of the dedicated plat contained as one of the streets therein, the public street which the City of Ogden has quit claimed to the Ogden City Board of Education. (R-55, R-59)

This Court had reason to decide the ownership rights of individual lot holders in a dedicated plat in the case of Tuttle vs. Sowadzki, et al, 126 P. 959, (1912). This

Court stated that the Law was to the affect that purchasers who buy lots with reference to a map or plat, which is authorized by the owner of the ground and which shows streets which are dedicated in said plat, gives to the lot purchasers a right to have such street maintained and the right to prevent the owner from vacating or obstructing the same. This Court further held that in addition to the public easement, that the individual purchaser of the lots also acquire a private easement and constitutes a property right which can only be taken from them or obstructed by making proper compensation therefor.

This Court further held in the Tuttle case, that it is a well settled law, that a public street or highway may be vacated against the wish of abutting owners provided that just compensation is made to such owners.

This Court determined similar questions

previously in Sowadzki vs. Salt Lake County,
104 P. 111, (1909). The Court held in
Sowadzki, that in the dedication of a street,
a fee that is conveyed to the city is to the
surface only and this is only for public use
for all purposes of a street or highway, and
that such fee is a limited or a determinable
fee and is created only for a special purpose
or purposes only.

This Court had reason to recall the previous
decisions of the Supreme Court in dealing with
the abandonment or transfer of title to city
streets in the case of Boskovich vs. Midvale
City, 243 P.2d 435, (1952), wherein the Midvale
City Corporation enacted an ordinance giving
to the Board of Education which abutted on
both sides of a particular public street title
to said street and the right to close same.
The street had been created by a private,
recorded, and accepted subdivision in Midvale.

This Court held in the Boskovich case, that a city by ordinance may vacate or abandon streets, even in a subdivision, if public exigency requires and if procedure is followed satisfying the statutory requirements and requirements of Due Process and the consideration of any substantial rights involved thereby. This Court holding that where a street is closed by ordinance, that the enactment itself of the ordinance is not sufficient, nor is the taking without just compensation.

This Court distinguished the Boskovich case on the basis that it was a duly private subdivision containing streets and alleys. The easement of the owners of lots in a dedicated subdivision have a private easement even upon the City's abandonment of its public easement and the taking of the private easement requires, in addition to valid Due Process hearings, the payment of just compensation. That the method

to be employed by the City in such an instance is through the proper use of the rights and powers under the statute pertaining to eminent domain.

This Court had occasion to make a distinction as between the use of a street which constitutes a privilege and the use of a street which constitutes a property right in making its determination in the case of Stringham vs. Salt Lake City, 201 P.2d 758, and this Court quoted from McQuillan, Municipal Corporations, 2nd Ed., Vol. 3, Sec. 981, p. 217:

"***In the control of streets and public ways, a municipality is a trustee for the entire public, and as such trustee, it should permit nothing to be done that will interfere with the condition of the streets or of their free use by all alike***."

This Court further emphasized the distinction as to the distinction between use and property rights, in citing from the case of Thompson vs. Smith, 155 Vt. 367, 154 S.E. 579, wherein

it stated:

"Use of streets for ordinary purposes of life is a right. It is not a mere privilege like the privilege of moving a house in the street, operating a business stand in the street, or transporting persons or property for hire along the street, which a city may permit or prohibit at will."

The Lower Court in its bench ruling in the instant matter (R-123, -125) summarized all of the arguments of the Appellants as to the vested rights of the Appellants in their claim of vested property rights to the dedicated street by the Court stating:

"This is a legislative debate and decision and not a judicial decision at all. The Court refuses to take any action. It's strictly a legislative decision. The powers and persons aggrieved must direct their grievance to the legislative branches of the government."

The Appellants suggest that this Court, as well as the Lower Court, has a judicial right as well as a duty in a Complaint seeking a Declaratory Judgment and interpretation of

the action of a city governing body, to determine the meanings of statutes cited by the Appellants, as well as to make a determination of the rights and privileges of the aggrieved Appellants and to weigh the equities of the taking of the public property from its citizens and giving of such property without compensation to a Board of Education.

The Court, in its bench ruling (R-123), stated that it took judicial notice of the State's statutes in the series 10-8-8, Utah Code Annotated, as amended 1953, and in the series of statutes commencing at 10-8-8.1, which was enacted in 1955 and which the Court alleged set up definite procedures for vacating streets. The Court, thereupon, stated in the instant matter before this Court:

"There is no merit in this case insofar as statutes are concerned. I believe the statutes have been ruled on by the Utah Supreme Court in Stone vs. Salt Lake City and other decisions in 1960 and later.

There is no question that a legislative body either County Commissioners or City fathers can vacate dedicated streets if they follow normal procedures, otherwise government can never change and that this can be done." (R-123)

It is submitted to this Honorable Court, that the holding in Stone vs. Salt Lake City, 356 P.2d 631, (1960), is not at all pertinent to the instant matter before the Court, in that in the Stone case there were two issues involved, one being the purchase of city property by a church and whether or not there was a violation of statutory or constitutional law in regards thereto, the other question involved was whether or not a building owned by the city and for which it had no longer any use could be sold to the United States government directly or indirectly for the purpose of allowing the erection of a federal building on such street.

This Court did not allege that the statutes dealing with streets, alleys, avenues, boulevards

sidewalks, parks, airports, and public grounds was not pertinent to the use by a municipal government of its conduct in relation to such streets, alleys, etc., but ruled that in the Stone case, the particular statutes referred to were pertinent only as to such streets, parks, etc., but did not have application to the sale of a public building to which the city no longer had a valid use.

The Court, in ruling in the Stone case, did not refer at all to the statutory series 10-8-8.1, Utah Code Annotated, as amended 1955, but did refer to 10-8-8, Utah Code Annotated, 1953, after setting forth the wording of the statute, this Court stated:

"The familiar and universally recognized rule is that general terms following specific terms are interpreted to mean things of like character. While those cases are sound as to streets and parks, (emphasis added) we can see nothing in that statute which would require the sale of the public safety building to be considered as coming within its terms, nor do we find any expressed

provision in our statutes which would prohibit the procedure followed here."

POINT II

APPELLANTS WERE DEPRIVED OF PROPERTY RIGHTS WITHOUT DUE PROCESS OF LAW.

In Hall vs. North Ogden City, 166 P.2d 221, (1946), the Supreme Court traced the beginnings of the history of establishing dedicated tracts of land, commencing with the Compiled Laws of 1876 under the Teritorial Town Site Act, setting forth in that and subsequent laws, such as the Compiled Laws of 1888, a manner and method of dedicating town sites and subdivisions therein, together with the vesting of a trusteeship rights in the municipality or county governments providing for the vested rights of those who acquire lots in dedicated town sites as to the use of public streets, set forth in the dedication of such town sites or subdivisions.

The Courts have consistently noted throughout

the entire chain of cases, such as in Tuttle vs. Sowadzki, supra; Knight vs. Thomas, 101 P. 383, (1909); Sowadzki vs. Salt Lake City, supra; White vs. Salt Lake City, 239 P.2d 210, (1952); Stringham vs. Salt Lake City, 201 P.2d 758, (1949); Premium Oil Company vs. Cedar City, 187 P.2d 199, (1947); Bonner vs. Sudberry, 417 P.2d 646, (1966); Mallory vs. Taggart, 470 P.2d 254, (1970), and in many other cases too numerous to necessitate the listing herein, that there are specific Utah Statutes which grant specific rights to a governmental body, as well as stressing the proprietary and property rights existing in particular classes of persons who are part of a town site, subdivision, or abutters to property, and the legislature of this State, as well as the previous territorial government, set forth specific methods of taking of private property, including streets of governmental bodies, providing at all times for

a Due Process method of hearing, notice, and compensation where there is a vested right in a owner of property affected.

Other states had early developed laws along this line which have been subsequently adopted by other states from already existing laws of sister states in order to perfect the method of Due Process taking of property or in the dedication of streets in such states.

Payne vs. City of Laramie, Wyoming, 398 P.2d 557, (1965), the Supreme Court of Wyoming in an appeal from a lower Wyoming Court which had denied to Plaintiffs and Appellants the right to a vacated street, the City had by Quit Claim Deed sold a street that had been vacated, and held that the City of Laramie did not have a fee simple in the street, and held that where property had been dedicated, the City had a title in trust for the public to the street, and upon being vacated, the City could

not sell the street by a Quit Claim Deed.

The Court held:

"We remain of the view, that a dedication thereunder, absence some other applicable statute, does not vest in a municipality a fee in the premises set apart for streets which, upon vacation of the streets, can be bartered and sold by the municipality."

In Mochel vs. Cleveland, 51 Id. 468, 5 P.2d 549, the Court affirmed the doctrine, that acknowledgement and recording while equivalent to a deed in fee simple is not a deed in fee simple and does not give the public the same right to sell or dispose of the same that a private party has to land for which he holds the title in fee simple. The Court held, that there was at best a title in trust for the public granting the city the right to hold, use, occupy, and enjoy the premises for public use as a street, and that once that right was terminated by vacation pursuant to authority delegated to the city by the legislature, the

city no longer had any title or interest in the premises and had nothing to sell or convey.

In the instant matter before this Court, we have the undisputed evidence of the dedication of a plat upon which were set forth certain specific streets, wherein the dedication itself as set forth in the official records of the Ogden City Recorder, stated as follows (R-2, -3):

"We, the undersigned owners of the land mentioned and shown on the annexed plat of Argonne Plat Addition, do hereby dedicate, grant, and convey unto Ogden City all those parts or portions of said land belonging to us and lying and being embraced within the boundaries of the streets and avenues as shown on the annexed plat, to be set apart and used as public thoroughfares forever."

The legislature of the State as set forth in 10-8-8, Utah Code Annotated, 1953, et seq., as well as 10-8-8.1, et seq., set out the manner of petitioning and hearing for the closing of a street. Nowhere among the quoted statutes

is there a direct authority by the legislature for the taking of private property of others, such as a dedicated street, without compensation

The Legislature has also seen fit by the Municipal Planning Enabling Act, 10-9-19, Utah Code Annotated, 1953, et seq., to provide for planning by commission, together with input from the citizens of the community affected, as well as a long range master plan to be conformed to by both city and county governments to provide for an orderly use of property in the growth and development of communities, and prevent the surreptitious destruction of the rights of the citizenry without professional planning and hearings in the use of areas within a governmental body.

10-9-20, Utah Code Annotated, 1953, specifically provides that it is the function and duty of the Planning Commission after holding public hearings to make and adopt a master plan

for the physical development of a municipality, and the statute further provides in 10-9-23, that before there is an addition of new streets or vacating of a street, that before any such action can be taken by the legislative body, there shall be a public hearing thereof and shall be submitted to the Planning Commission for its approval. It is provided in 10-9-24, Utah Code Annotated, amended 1953, that there shall be a public hearing held by the Board prior to its adopting any action.

In the instant matter before the Court, the Planning Commission of Ogden City held the closure of the street as not being in the best interest of the citizens of the community. (R-45) That the only public hearing held on the matter was held by the Ogden City Council, whereby they invited the Planning Commission to be present at a joint meeting, which the Appellants submit to the Court is not the equivalent of a

private public meeting held by the Planning Commission to obtain the input from its citizens.

The Weber County Planning Commission through its planning chairman, Graham Shiria, its public work director, Rulon Sorenson, and its traffic engineer, Don Godfrey, made a report to R. L. Larsen, Ogden City Manager, opposing the vacating of 29th Street, suggesting that if the school desires to enhance its campus continuity, that there are other esthetic solutions available which would provide campus continuity and still maintain a public street. (R-49, -50)

The Ogden Standard Examiner editorial (R-54) sets forth in general the perspective of what the closure of 29th Street means to the general citizenry as well as can be obtained from the exhibits (R-51, R-53, and R-55 through R-58), all setting forth the opposition of Argonne

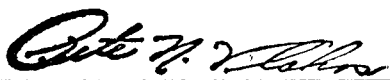
Park Plat residents and homeowners who are opposed to the loss of their arterial thoroughfare.

CONCLUSION

It is, therefore, submitted to this Honorable Court, that the refusal of the Lower Court to make a ruling on the Complaint in Declaratory Judgment, and to allow an evidentiary trial and argument as to the merits and meaning of the statute and constitutional principles involved in the taking away and closing of a dedicated public street, together with the giving of same by Quit Claim Deed to the Ogden City Board of Education, all without compensation to the persons damaged and aggrieved by such conduct and without Due Process hearing, was not a legislative matter but was a matter for the judiciary to determine or to allow to proceed to a determination, and that upon the failure of the Lower Court to so act, that

the Supreme Court of the State of Utah has the power and duty to enter a Declaratory Judgment based upon the admitted facts and record before this Honorable Court, and that this Court should declare the taking of such dedicated public street without compensation or proper Due Process hearing to the Appellants and the class represented by the Appellants, as in contradiction of the Constitution and Statutes of the State of Utah, and declare the act of the City of Ogden giving a Quit Claim Deed to said street to the Ogden City Board of Education as a nullity.

Respectfully submitted,

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CERTIFICATE OF MAILING

Copies of the above and foregoing Brief of the Appellants was posted in the U.S. mail postage prepaid and addressed to the Attorney for the Respondents, L. Kent Bachman, Chief Assistant Corporate Counsel, 527 Municipal Building, P. O. Box 1639, Ogden, Utah 84402, and copies were delivered to the Clerk of Utah Supreme Court on this 20 day of May, 1974.


PETE N. VLAHOS, ESQ.