

1948

I. R. Stringham, et al. v. Salt Lake City : Brief of Appellant

Utah Supreme Court

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In the Supreme Court of the State of Utah

I. R. STRINGHAM, J. S. SMITH, J. D. GARDNER, CENTRAL LAND COMPANY, a corporation, UTAH MOTOR PARK, a corporation, IVA PARKIN, E. F. ZEYER, L. O. HUNTER, ART J. CARTER, FRED MUSE, IVY RAE PITMAN, E. A. CHAMBERLIN, FRANK B. BOWERS, MRS. DEAN R. DAYNES, MRS. HUGH W. LAW, KENNETH E. SMITH, GLEN C. BILLS, ALBERT P. HOLT, LEWIS HUMPHRIES, GOMER O. THOMAS, UTAH CREDIT CO., a corporation, CAPITOL CHEVROLET CO., a corporation, HOME ACCEPTANCE CORP., a corporation, and JOE JOHNSON,

Appellants,

—vs—

SALT LAKE CITY, a municipal corporation,

FILED *Respondent.*

MAY 20 1948 RICHARDS AND BIRD

Attorneys for Appellants.

CLERK, SUPREME COURT, UTAH

**Appellant's
Brief**

Case No.
7162

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* * * *

In the Supreme Court of the State of Utah

I. R. STRINGHAM, J. S. SMITH, J. D. GARDNER, CENTRAL LAND COMPANY, a corporation, UTAH MOTOR PARK, a corporation, IVA PARKIN, E. F. ZEYER, L. O. HUNTER, ART J. CARTER, FRED MUSE, IVY RAE PITMAN, E. A. CHAMBERLIN, FRANK B. BOWERS, MRS. DEAN R. DAYNES, MRS. HUGH W. LAW, KENNETH E. SMITH, GLEN C. BILLS, ALBERT P. HOLT, LEWIS HUMPHRIES, GOMER O. THOMAS, UTAH CREDIT CO., a corporation, CAPITOL CHEVROLET CO., a corporation, HOME ACCEPTANCE CORP., a corporation, and JOE JOHNSON,

Appellants,

—VS—

SALT LAKE CITY, a municipal corporation,

Respondent.

**Appellants'
Brief**

Case No.
7162

STATEMENT OF FACTS

This appeal is from the order of the district court

dismissing the complaint for failure to state a cause of action (Tr. 32) following the election of appellants to stand on their complaint upon sustaining of a demurrer thereto. The demurrer (Tr. 26) was based on a failure to state a cause of action or state a case for injunctive relief. The order sustaining the demurrer (Tr. 32) denied the right to amend the complaint and ordered a dismissal thereof, thus indicating that the ruling of the court was for failure to state a cause of action for any relief whatever. It will therefore be assumed that the complaint stated grounds for equitable relief but that it failed to state a cause of action entitling appellants to any relief whatever.

By stipulation and order the complaint was subsequently amended in minor details and the order of the court was made applicable to the complaint as amended by interlineation (Tr. 31).

Since the appeal is on the judgment roll there is no transcript of evidence and no statement of the court's reasons for sustaining the demurrer of the respondent. The complaint alleges that the action of respondent was taken without evidence, without finding, without reasonable support, and that it was not promotive of the public health, safety, morals, or welfare of Salt Lake City or its people by alleging that none of those interests would be promoted by the action of the respondent.

There follow the complaint as amended, without the title and verification (Tr. 1), and Exhibits "A", "B", and "D" attached to the complaint (Tr. 11, 13, 16). Ex-

hibits "C" and "E" (Tr. 13, 17) are not reproduced as they will be referred to only generally in the argument herein.

" For their cause of action plaintiffs allege:

1. Plaintiffs, I. R. Stringham; J. S. Smith; J. D. Gardner; Central Land Company, a corporation; Utah Motor Park, a corporation; Iva Parkin; E. F. Zeyer; L. O. Hunter; Art J. Carter; Fred Muse; Ivy Rae Pitman; E. A. Chamberlin; Frank B. Bowers; Mrs. Dean R. Daynes; Mrs. Hugh W. Law; and Kenneth E. Smith, are owners or operators of motor courts in Salt Lake City, Utah, which motor courts offer lodging accommodations to visitors, to transient persons, and to residents of Salt Lake City, usually on a daily or weekly basis.

2. Plaintiffs, Glen C. Bills; Albert P. Holt; Lewis Humphries; Gomer O. Thomas; Utah Credit Co., a corporation; Capitol Chevrolet Co., a corporation; Home Acceptance Corp., a corporation; and Joe Johnson, are owners or operators of service stations or other facilities servicing or relating to motor cars and situated in Salt Lake County, Utah.

3. The defendant is a municipal corporation existing under the laws of the State of Utah and situated in Salt Lake County, Utah; and corporate plaintiffs are corporations of the State of Utah.

4. Each of the plaintiffs is the owner of a sign or signs advertising the business of such plaintiff and inviting patronage of said business from members of the

public who travel upon and use the streets of Salt Lake City, and each of said signs is situated upon that portion of the public streets known as the curbing or parking area lying and being between the curb or edge of the portion of the street used for vehicular traffic and the sidewalk or the portion used for pedestrian traffic, and each of said signs is mounted upon a support which is affixed to or rests upon said portion of the public street. None of said signs protrudes over or is above any portion of any public street which is customarily used by pedestrians for walking, by vehicular traffic for travel or movement, or by any other group of persons except these plaintiffs, who care for the lawn, flowers, shrubs, and trees in said parking areas and service said signs as and when service is needed.

5. All of the aforementioned signs were constructed after obtaining, and pursuant to, permits issued by the defendant upon application of the plaintiffs and pursuant to Section 5720 of the Revised Ordinances of Salt Lake City, Utah, 1944, copy of which is marked Exhibit "A," attached hereto, and by this reference made a part hereof. Plaintiffs have information which they believe and therefore allege as the fact that no objections have been made to the existence of the aforesaid signs for any reasons of health, safety, morals, general welfare, unsightliness, nuisance, or as being contrary to the best interests of the public residing within Salt Lake City, and the only objection against said signs which is known to plaintiffs is that an official of the Road Commission of the State of Utah is reported to have said that there

should be no signs on any state highways in the State of Utah, which objection would be applicable to a part only of the signs owned by plaintiffs, namely, to those signs situated on streets of Salt Lake City which are also designated as state highways. This alleged objection of an official of the Road Commission would be applicable to a great number of overhanging signs, marquees, and presumably to obstructions and encroachments on and under the sidewalks of streets of Salt Lake City which are designated as state highways, none of which said signs and other structures and obstructions are affected by the revision of Exhibit "A," hereinabove referred to and none of which defendant is endeavoring to curtail or prohibit.

6. Twice during the year 1947 officials of the defendant notified groups of the plaintiffs that signs on parking or curb areas of the streets of defendant city should be removed and that permits for a continued use of said signs would not be renewed.

7. At the request of plaintiffs named in paragraph 1 hereof the Board of Commissioners of defendant gave notice of a hearing relative to promulgation of an ordinance designed to amend Section 5720 of the Revised Ordinances of Salt Lake City, 1944, which notice is attached hereto as Exhibit "B" and by this reference made a part hereof.

8. Pursuant to Exhibit "B," representatives of the plaintiffs named in paragraph 1 appeared before the said Board of Commissioners and voiced objections to the proposed revision of the ordinance aforesaid for the

reason that such revision would be discriminatory, contrary to the best interests of the residents of Salt Lake City, and not pursuant to any of the authority vested in the Board of Commissioners of defendant. At said hearing no person appeared in support of the revision of said ordinance and the said Board of Commissioners indicated no request from residents of Salt Lake City, Utah, for such a revision and indicated no reason of public need or policy requiring or permitting the proposed revision of said ordinance, except that said Board of Commissioners had long considered the advisability of withdrawing licenses for signs for such as those owned by plaintiffs, as aforesaid, and that it would be a good thing if such a revision were made and said signs removed, and also that a representative of the Road Commission of the State of Utah had mentioned that no signs, including some of the signs of plaintiffs, should be allowed to exist on or over the public highways of the State of Utah.

9. Despite the objections of these plaintiffs, voiced as aforesaid, and the lack of any public or private support for a revision of said ordinance in the manner threatened, the Board of Commissioners of Salt Lake City has purported to pass and promulgate a revised ordinance No. 5720 of Salt Lake City, Utah, a copy of which is attached hereto as Exhibit "C" and by this reference made a part hereof.

10. At the hearing aforesaid no evidence was given and no reason or authority except as stated hereinbefore for changing signs situated in, on, or over the

city property from “structures” to “obstructions” simply by rewording an ordinance, as has been attempted by the defendant acting by its duly elected Board of City Commissioners.

11. Exhibit “C” is beyond and in excess of any lawful authority vested in the said Board of Commissioners of defendant and is discriminatory, unlawful, unreasonable, and void as being unrelated to any legitimate object of the defendant city, as is more fully shown by the following facts:

(a) The said signs of plaintiffs are not such obstructions as to require prohibition or as to permit of discriminatory prohibition or regulation for the reason that the said parking areas throughout Salt Lake City and outside of the congested district are planted with trees, which trees are much more of an obstruction of view and an interference with the safe use of streets than are said signs; the streets of Salt Lake City have placed in said parking areas numerous utility poles, which said poles are more unsightly and are greater obstructions to the safe use of said streets than are the signs of plaintiffs; there are over and above the streets of Salt Lake City, and particularly in the congested portion of said city, numerous overhanging signs and advertisements, some of which are affixed and attached to buildings and others of which are not, and which extend and protrude over and above the streets of said city, which said signs are more dangerous to the safe use of the streets and particularly the sidewalks thereof than are the signs of plaintiffs and which said signs are

greater obstructions to the free and safe use of said streets than are the signs of plaintiffs; and none of the aforesaid uses, structures, and obstructions are prohibited by the ordinances of Salt Lake City, and the aforementioned signs are specifically permitted under Section 5731, shade trees by Section 4315, and poles by Sections 6001, 6002, 6005, and 6006 of the Revised Ordinances of Salt Lake City, Utah, 1944.

(b) Said signs of plaintiffs do not encroach upon the use of the streets of Salt Lake City for the reason that said signs do not extend over any of the traveled portions of said streets or over any of the portions used by pedestrians; and there are many other uses of said streets which are permitted by Salt Lake City and which constitute encroachments upon said uses and, more particularly: Innumerable trees; hanging signs, as above mentioned, and other advertisements; delivery chutes, elevators, and receptacles placed in the sidewalks of said streets at innumerable places and, particularly, in the congested areas; and portions excavated under the sidewalks in the congested areas and used for business purposes by the abutting owners.

(c) Prohibition of the signs of plaintiffs cannot be related to traffic control because most of said signs are in areas where trees have been planted in the parking areas, and placing the signs back from the street onto private property would be a greater traffic hazard than having them where located; furthermore, overhanging signs permitted throughout Salt Lake City are equally distracting and because greater in number, are more dis-

tracting to traffic and are, therefore, a greater danger and hazard than are the signs of plaintiffs; furthermore, the regulations and the enforcement policies enacted and in effect by the defendant permit advertising signs on utility buses, on delivery trucks, and on sound trucks and permit the use of sound trucks over and along the streets of Salt Lake City, all of which attract the attention of drivers of vehicles on the public streets and constitute a greater traffic hazard than do the signs of these plaintiffs, none of which uses is prohibited as is attempted by the ordinance here in question.

(d) The said ordinance is unreasonable as a safety regulation since the signs of these plaintiffs are soundly constructed of non-combustible materials, are not above the traveled portions of the streets or sidewalks and are, therefore, less dangerous to the traveling and walking public and less dangerous as a fire hazard than are the permitted overhead signs, utility wires, guy wires, trees, and the above-mentioned delivery chutes, elevators, receptacles, and similar obstructions and encroachments placed in the sidewalks.

(e) Said regulation is not reasonable as motivated by aesthetic considerations because said signs of plaintiffs are attractive and well-kept and are not less attractive than are other signs permitted to be over the streets by said defendant and are more attractive than uses permitted by private property owners, including the display of unattractive signs and the construction and maintenance of barns, sheds, garages, and commercial

plants in the areas where the signs of plaintiffs are maintained.

(f) Said regulation is unrelated to health of the people of Salt Lake City, there being nothing injurious, noxious, or deleterious about the signs of plaintiffs.

(g) Said signs of plaintiffs are not fire hazards and are not susceptible to regulation as fire hazards for the reason that said signs are not in sufficiently close proximity to buildings or residences, and for the further reason that said signs are made of non-combustible materials of good construction with a low voltage of electricity, for the further reason that said signs meet all of the requirements of said defendant for electrical construction and are therefore not a fire hazard or otherwise dangerous.

(h) Said signs of plaintiffs are unrelated to the morals of Salt Lake City and are not injurious to morals because the copy on said signs advertises motor courts and automobile services or automobiles in a clean, wholesome, business-like manner.

(i) Regulations of said signs is not justified because of congestion in Salt Lake City for the reason that most of said signs are located outside the business or congested area, in which area innumerable hanging signs and other advertising structures are permitted by the defendant.

(j) Regulation of said signs is not supportable as an interference with residential uses of the property in Salt Lake City for the reasons that said ordinance makes no effort to regulate use of the abutting property, there

have been no complaints of the signs of plaintiffs because of such interference, and because some of said signs exist in commercial and business districts as well as in residential districts; and said ordinance makes no reference to use of the property abutting the signs.

12. This action is brought in behalf of all persons situated similarly to plaintiffs or any of them, which persons may join as plaintiffs in this cause or have the benefit of this proceeding without joining.

13. Plaintiffs have constructed the aforesaid signs pursuant to permission of defendant at great expense.

14. Defendant has given notice to plaintiffs and to all of them that their existing signs must be removed on or before February 15, 1948, and that unless so removed the defendant will take action against each plaintiff for removal of said signs.

15. Permitting the maintenance of this action and issuance of an injunction against the defendant's enforcing said revised ordinance will avoid a multiplicity of suits.

16. Unless an injunction issues against defendant's enforcing Revised Ordinance, marked Exhibit "C," plaintiffs will suffer great and irreparable injury in that if the signs of the plaintiffs are removed defendant will not permit their replacement and these plaintiffs have no remedy by law to compel defendant to permit the re-erection of said signs should they be taken down and new and original application be made for a permit under a discretionary ordinance.

17. Plaintiffs have offered to pay the annual li-

cense fees for 1948 required for the continued existence of said signs, which fees defendant has refused to accept solely upon the ground that the revised ordinance does not permit continued existence of said signs and not for any reason of hazard, obstruction of traffic, encroachment upon property of the city, lack of beauty or attractiveness, or acceptability of the copy on said signs or the appearance thereof, or for failure to maintain said signs in a safe and adequate manner, and plaintiffs further allege that none of said potential objections exists as to any of said signs.

18. The Deputy City Recorder of defendant has furnished information which plaintiffs believe and therefore allege as the fact that the latest official finding, order, or action taken by defendant with reference to Exhibit "C" and the ordered removal of plaintiffs' signs, was taken on January 6, 1948, as shown by the document on file in the City Recorder's office, of which a copy is attached hereto as Exhibit "D" and by this reference made a part hereof; and plaintiffs further allege that the said amended Ordinance 5720, referred to as Exhibit "C," has not been duly and officially signed or published by defendant's officers and that the threatened action of defendant above referred to is for this further reason arbitrary, discriminatory, unreasonable, and void.

19. Plaintiffs further allege that, should this Honorable Court find that Exhibit "C" has not been enacted by defendant and that the action of defendant referred to in paragraph 14 is taken pursuant to Ordinance

5720 referred to as Exhibit "A," then plaintiffs allege that said action is unlawful, discriminatory, unreasonable, and void for all of the reasons alleged in paragraphs 11 and 18 and for the additional reason that subsection "g" of said Exhibit "A" is unlawful, unreasonable, discriminatory, and void and does not contain or indicate any standard or standards to govern the removal of structures erected pursuant to permission contained in said Section 5720 permitting defendant to act arbitrarily and capriciously as defendant is doing in the matters alleged herein, thereby damaging and threatening to damage plaintiffs as aforesaid and discriminating against plaintiffs in respect to their signs referred to herein as against other signs and other structures erected above, over, in, or around any part of any street of Salt Lake City pursuant to Section 5731, Revised Ordinances of Salt Lake City, Utah, 1944, copy of which is attached hereto as Exhibit "E" and incorporated herein, which section does not provide for arbitrary or discriminatory removal unless and until said signs shall become unsafe or dangerous, and defendant has made no finding, order, or determination in the premises except as shown by Exhibit "D."

WHEREFORE, plaintiffs pray that this court issue a restraining order against the defendant and its officers, agents, employees, and attorneys restraining it and them from enforcing Revised Ordinance 5720, attached to this complaint as Exhibit "C," and that this court issue an order to defendant to show cause on a day certain why an injunction should not issue against the de-

fendant and its officers, agents, employees, and attorneys enjoining the enforcement of said ordinance pending final determination of this proceeding by this court, and that a bond be fixed in such form and amount as to indemnify defendant against damage from said injunction;

And plaintiffs pray further for a permanent injunction against the defendant enjoining the enforcement of said Revised Ordinance 5720, for such further relief as shall be appropriate to protect and preserve the rights and property of plaintiffs, and for their costs incurred herein.

(Signed) RICHARDS AND BIRD,

Attorneys for Plaintiffs."

“

Exhibit "A"

SEC. 5720. Obstructions. Permits. Fees. The following words when used in this ordinance shall have the meanings respectively ascribed to them:

(a) "STREET." All parts of a public street between the boundary lines, including parkings, sidewalks, gutters, and roadways.

(b) "OBSTRUCTION." Any rubbish, glass, material, wood, ashes, tacks, metal, earth, stone or other object, thing or substance which may interfere with or obstruct the free use or view of the street by travelers, or injure or tend to injure or destroy or render unsightly the surface of a street, or which may cause or tend to

cause such street to become unsafe or dangerous for travelers thereon.

(c) "STRUCTURE." Any sign, sign post, advertisement, merchandise, material, flag, banner, rack, fence, vehicle, object or structure which shall be erected, located, deposited or placed in or upon any street, except those objects affixed to any building and extending over a street which are licensed or regulated under Section 5731 of the Revised Ordinances of Salt Lake City, Utah, 1944.

(d) It shall be unlawful for any person to place, cast, deposit, permit or suffer to remain in or upon any street in Salt Lake City any obstruction as herein defined.

(e) It shall be unlawful for any person to erect or place upon any street or to suffer or permit to remain on any street any structure as herein defined without first obtaining from the Board of Commissioners of Salt Lake City permission so to do, and then only in strict accordance with the terms and conditions of the express permission granted. The Board of Commissioners of said city may *grant or deny* such permission or imposed additional conditions *when it deems it to the best interests of said city* in regulating the use of its streets and may when it deems it necessary require that a surety bond in any reasonable amount BE POSTED AND MAINTAINED. The sum of \$25.00 shall be charged and collected annually from every person to whom such permission is granted, to cover the cost of the regulation and inspection of any structures erected or maintained in any street.

(f) Every application for permission to place a structure upon any street in said city shall be accompanied by the fee required for one

year, together with plans and specifications of the same, and shall state the name and address of the applicant, the place proposed to erect such structure, the length of time it is proposed to maintain the same and such other information as the Board of Commissioners may require.

(g) All permits granted by Salt Lake City may be revoked, altered, or modified by said city *at the will* of the Board of Commissioners thereof *whenever said board shall deem it to be to the best interests of such city*, and it shall be unlawful for any person to fail to comply with any order or condition imposed by said city. Every structure or obstruction maintained upon any street of said city in violation of this section is hereby declared to be a nuisance and it shall be the duty of the police department and such other officers and employees of said city as said department may call upon to forthwith remove the same.

Litter in streets. 15-8-24, U.C.A. 1943.

Garbage in streets. 15-8-23, 61, U.C.A. 1943.

Offensive liquid or refuse in streets. Sec. 1123''

“

Exhibit “B”

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that on Thursday, December 18th, 1947, at 11 o'clock a. m., in Room 302 City and County Building, a public hearing will be held before the Board of Commissioners on request of J. E. Christie and others on proposed ordinance amending or concerning Section 5720 of the Revised Ordinances of Salt Lake City, Utah, 1944, which by its terms prohibit signs of motor lodge operators upon City proper-

ty, or in any manner affect the use of said signs.

All persons interested and present at said meeting will be given an opportunity to be heard in this matter.

By order of the Board of Commissioners of Salt Lake City, Utah, November 25th, 1947.

IRMA F. BITNER,
City Recorder.

First Publication December 3d, 1947.

Last Publication December 5th, 1947. ”

“ “*Exhibit “D”*”

Salt Lake City, Utah, Jan. 6, 1948.

I move that Petition No. 1079 of '47 of J. E. Christie, et al., be filed and petitioner notified that the Bureau of Mechanical Inspection has been instructed to notify all owners of advertising signs and other obstructions now in City parking, to remove them immediately and that suitable action be taken to make the amendment to the City ordinance effective.

EARL J. GLADE

Chairman Committee of the Whole.

ROLL CALL

	AYE	NAY
Voting	x	
Affleck	x	
Matheson	x	
Romney	x	
Tedesco	x	
Mr. Chairman	x	

Passed by the Board of Commissioners of
Salt Lake City, Utah, Jan. 6, 1948.

IRMA F. BITNER,
City Recorder.

EARL J. GLADE, ”
Mayor.

STATEMENT OF APPELLANTS' CASE

Statutes of the State of Utah (15-8-11, 23, 26, U.C. A., 1943) delegate to cities control over the streets within their territorial limits, authorizing the cities either to regulate or prohibit use of the streets and sidewalks for signs and signposts or for obstructions and encroachments. Since Section 15-8-26 refers specifically to signs and signposts, that is presumably the section under which this case falls, although Exhibit "A" indicates an effort of the city to regulate curb signs under Section 15-8-11 as an obstruction or an encroachment. In either event, the authority is to regulate or prohibit.

Appellants concede that the respondent could prohibit the placing of any sign on or over the streets and sidewalks of Salt Lake City. Appellants concede that respondent could order the removal of present signs and thereafter prohibit the placing of any and all signs on or over the streets and sidewalks of Salt Lake City. But if some signs are to be allowed to remain it is the position of appellants that the line of distinction between the signs to remain and signs to be removed must be reasonable, based upon regulation which is reasonable and

based on a classification designed to promote interests of Salt Lake City as to which the Board of Commissioners has authority. This is the ultimate question appellants sought to raise in the district court on the merits of their case. The ruling on the demurrer necessarily holds that regardless of the evidence in support of appellants' allegations the action of the respondent is not reviewable or open to question.

Antecedent to the ultimate question of the city's authority appellants present certain procedural problems which the respondent should have met before compelling the appellants to resort to legal action and which should now be met by this court before the ultimate question of the city's authority need be examined.

Appellants contend that the action intended by the Board of Commissioners of respondent (hereinafter called Commissioners) was an amendment of Exhibit "A" to the complaint which would have made all curb signs obstructions and automatically have compelled their removal and that the direction contained in Exhibit "D" to remove signs was premature until the ordinance was amended and was solely in anticipation of that amendment which was never completed. Appellants further contend that the language of the ordinance which is Exhibit "A" contemplates a determination or finding by the respondent before any sign is ordered removed, which is entirely lacking in this case. Beyond that, and assuming that no finding or determination must be made or evidence taken before ordering a removal, there is still the right to show that the ordered removal is arbitrary,

capricious, and discriminatory, which right appellants have been denied by the order sustaining the demurrer. And finally, appellants contend that the ordinance which is Exhibit "A" is void insofar as its provisions for the removal of a sign are concerned because it contains no standard or rule to guide the respondent or members of the public, such as appellants, and therefore permits arbitrary, capricious, and discriminatory action by the Commissioners without restraint or right of review or obligation of consistency.

This argument is advanced under four points.

POINTS OF APPELLANTS' ARGUMENT

I. No present order of the respondent requires that appellants remove their signs.

II. Assuming that respondent made an order, then because the order was made without a finding or determination and in the absence of evidence of reason or need the order was void and cannot be deemed to be in the best interest of Salt Lake City.

III. Assuming that no finding, determination, or consideration of evidence must precede issuance of an order of removal, then the order is still arbitrary, capricious, and void because not supported by any reason, logic, lawful classification, or legitimate objective.

IV. Section 5720, Revised Ordinances of Salt Lake City, 1944, is void because it contains no standard or rule to guide the Commissioners or the public in the matter of removal of licensed signs.

I. NO PRESENT ORDER OF THE RESPONDENT REQUIRES THAT APPELLANTS REMOVE THEIR SIGNS.

Paragraph 18 of the complaint alleges that the latest official action taken by the respondent with reference to the matters involved in this action was taken on January 6, 1948, when the resolution attached as Exhibit "D" was made. This resolution plainly contemplates that the removal of the signs is to be concomitant with the effectiveness of the amended ordinance, which is alleged as Exhibit "C." There is no authorization for the removal of the signs apart from the amendment of the ordinance and no intimation that the action of removal was to be taken independently of the amendment.

This conclusion is borne out by Exhibit "B," which is a notice of hearing on the proposed ordinance to amend Section 5720 of the Revised Ordinances. And according to the allegations of the complaint no other action was before the Commissioners and there was no basis for any action independent of the amendment of the ordinance.

It therefore appears that until the amended ordinance has been passed appellants are not required by the respondent to move their signs. If and when an order to that effect has been authorized by the respondent will be time enough to consider the validity of the action.

It must be borne in mind that Exhibit "D" directed the Bureau of Mechanical Inspection to notify all owners of "advertising signs and other obstructions now in

city parking” to remove them. Under the original Section 5720 (Exhibit “A”) an advertising sign was not an “obstruction” but a “structure” under Subsection (c) and it would be grammatically and logically incorrect for the Commissioners to refer in Exhibit “D” to “advertising signs and other obstructions.” That language becomes apt only on the assumption that the amended Section 5720 was to be placed in effect since under that amendment, which is Exhibit “C,” advertising signs such as those involved in this suit were made “obstructions.” Plainly, the intent was to amend the ordinance and then remove signs which would have become “obstructions.”

II. ASSUMING THAT RESPONDENT MADE AN ORDER, THEN BECAUSE THE ORDER WAS MADE WITHOUT A FINDING OR DETERMINATION AND IN THE ABSENCE OF EVIDENCE OF REASON OR NEED THE ORDER WAS VOID AND CANNOT BE DEEMED TO BE IN THE BEST INTEREST OF SALT LAKE CITY.

The argument under this point assumes that the respondent intended the order for removal of the signs to be put into effect quite apart from and independently of the action amending the ordinance. This assumes that the order was made pursuant to Exhibit “A,” the original Section 5720.

The order, therefore, would be under Subsection (g) of Exhibit “A,” which contemplates revocation of per-

mits issued to such persons as applicants “at the will of the Board of Commissioners thereof whenever said board shall deem it to be to the best interest of such city *****.” If this language permits the Commissioners to revoke a license without reason and “at will” then it permits arbitrary and capricious action, which is considered under point III of this argument.

Appellants suggest, however, that the words “whenever the Commissioners shall deem it to be to the best interest of such city” contemplate action which is not arbitrary and capricious but which is reasonably believed by the Commissioners to be in the city’s best interest. To permit the five of them to act, the will of the Commissioners must be expressed, which expression must indicate that the Commissioners find their action to be in the best interest of the city, and by making such a finding or determination the Commissioners will have “deemed” the action to be in the city’s interest.

This verb “deem” could conceivably refer to an unexpressed and inarticulate will of the Commissioners; but this is not likely since the Commissioners must act by resolutions either oral or written, and there is no way of determining the will of the Commissioners unless that will is expressed. It must therefore be that the board “shall deem” a certain thing only when they have indicated by their official action that they have “deemed” it. The official action of the board in this instance (Exhibit “D”) indicates no intention whatever to further the best interest of the city and there is no indication that the best interest of the city was ever consider-

ed. If the order recited that the Commissioners “deem it to be in the best interest of the city,” that order might be presumed to stand in the absence of proof of capricious action. In *Jackson v. James*, 97 Utah 41, 46, 89 Pac. 2d 235, the court considered the meaning of the phrase “shall be deemed” and held that it is not intended to be mandatory or conclusive when it appears in a legislative enactment but procedural or evidential and subject to being overcome by contrary evidence. And if used in this sense, if the board had deemed the order to be in the best interest of the city by stating that they so regarded it, the question would arise which was presented in *Jackson v. James* and as to which Mr. Justice Wolfe dissented and stated that “deem” in that statute should be regarded as foreclosing the matter. As applied to this case, *Jackson v. James* would permit a review of the determination of the Board of Commissioners under the majority opinion but not under the dissenting opinion.

This view is consistent with definition of the word “deem” in Webster’s Unabridged Dictionary as follows:

Deem — verb transitive.

1. To sit in judgment over or upon; to judge; also, to pronounce judgment upon; to decide (a case) or give (sentence); sometimes, specif., to judge adversely;
2. To conclude or believe on consideration; to form a judgment upon; to hold in opinion; to regard; esteem; think.
- 3, 4, 5, Not useful.

In the interest of reasonable, orderly government this court should interpret the language of Subsection (g) of Exhibit "A" to require the Commissioners to make a determination that certain action is in the best interest of the city. It is not asking much to require that a board go on record that they have deemed certain action to be to the best interest of a city and not permit them to take the position, when their own failure to make a record is brought before a court, that in the backs of their minds the Commissioners at all times had the best interest of the city as a guiding light and that it must therefore be assumed that in taking certain action they deemed the action to further such interest. If the board deems it to be in the best interest of the city they should so say, either by using the word "deem" or by making a determination or a finding or a statement that certain action is in the best interest of the city.

III. ASSUMING THAT NO FINDING, DETERMINATION, OR CONSIDERATION OF EVIDENCE MUST PRECEDE ISSUANCE OF AN ORDER OF REMOVAL, THEN THE ORDER IS ARBITRARY, CAPRICIOUS, AND VOID BECAUSE NOT SUPPORTED BY ANY REASON, LOGIC, LAWFUL CLASSIFICATION, OR LEGITIMATE OBJECTIVE.

Under this point appellants, for the sake of argument, make further concessions that Subsection (g) of Exhibit "A" does not require that the Board of Com-

missioners express anything with reference to the best interests of Salt Lake City but that all they need to do is think it, and although there is no way of determining their thoughts except from their expressions, we will assume that in this case the Commissioners had the best interest of the city in mind. Appellants respectfully urge that even on this assumption the Board of Commissioners is not entitled to act arbitrarily and capriciously and that their action must be reasonable and have some relation to a legitimate objective to be accomplished. In other words, we take the position of *Jackson v. James* that even though the city fathers have deemed something to be in the best interests of the city the matter is not concluded by such "deeming" and, if it appears plain from an examination of the surrounding facts that the action was not in the best interests of the city, then the effect of the word "deem" will have been overcome and the action of the Commissioners will have become reversible on review.

The complaint alleges that no logical reason, basis, or objective exists which would make the action of the respondent through its Board of Commissioners supportable; and attempt has been made to consider this action from the standpoint of all possible legitimate objectives. If any of those successive points of view motivated the action then it was ill-conceived, ineffective to accomplish the objective, and therefore unreasonable and arbitrary.

Perhaps the court can think up a reason or an objective which would support the action of the Commis-

sioners. Appellants allege that no such reason exists and further allege that when the Board of Commissioners was asked to state a reason (paragraph 8 of the complaint), the Commissioners indicated only that they had long considered the advisability of revoking the licenses "and that it would be a good thing" and, also, that a representative of the Road Commission of Utah had mentioned that no signs should be allowed to exist over public highways. It hardly seems a reason to suggest that something "would be a good thing" and even though it be admitted that "good" is positive and should be encouraged, it hardly seems a sufficient answer to a body of taxpayers and citizens which is asking its government to support intended action by reason. And the other answer given in paragraph 8 of the complaint is wholly insufficient because it appears in paragraph 5 of the complaint that the proposed action of the city fathers was ill-adapted and wholly inadequate to carry out such direction from the Road Commission of the State of Utah.

It may be conceded that appellants do not have what could properly be called a property interest in the location of their signs. It is conceded that under Sections 15-8-11, 23, 26, U.C.A., 1943, the right to regulate the portion of the streets where appellants' signs are located has been vested in the municipal authorities. Appellants submit that the same right of regulation exists as to signs, awnings, trees, marquees, advertising on buses, trucks, and private cars and that regulatory action of a municipality with reference to these things cannot

be arbitrary, capricious, and unsupported or unsupportable by reason. Various courts in a number of cases have passed upon comparable problems and have held that the position of a licensee is not completely devoid of right, that the city's authority in such matters is not absolute, and that a citizen and licensee or prospective licensee has the right to require that his municipal legislative body act reasonably in such matters.

City of Portland v. Yates (1921) 199 Pac. 184, 186, 187, 102 Ore. 513, was a criminal case for violation of a municipal ordinance. The defendant had erected a sign on the street pursuant to a permit, which sign was secure and did not interfere with the use of the street or the sidewalk. The city amended the ordinance, making minor changes with which defendant's sign did not comply, whereupon the prosecution resulted when the defendant refused to take down his sign. It was held that the city was not damaged and that no public need for taking the sign down was made to appear and that the amended ordinance as applied to defendant's sign was invalid.

“The sign in question in the present case, having been erected pursuant to a permit issued by the municipal authorities, was not illegal or a nuisance. The question for consideration is whether or not the change required by the new ordinance, prescribing the size and specifications for such a sign, tended to promote the public health, safety, morals, or welfare. The new ordinance requires a few inches difference in the size of the sign, a slight difference in the height from

the sidewalk, and a change in the style. It is shown by the testimony that the sign in question was securely hung. It has been inspected annually. It in no way caused inconvenience to the public, and did not interfere with the personal or property rights of any person. It cannot be conceived that a sign in conformity with the new ordinance would tend to promote the health of the inhabitants of the city any more than the old one. The safety of the public is not claimed to be in any way impaired by the sign as now constructed, and the new arrangements would not tend toward safety. It cannot be claimed that the new requirement is in the interest of the morals or general welfare of the public. It is not shown and cannot be comprehended that there has been any material change in the conditions and surroundings of the sign since its erection. While the cost of the sign, \$350, was not great, it having been installed pursuant to a regular law of the city, the rule adopted at the time of its erection became, in a sense, a rule of property, and without some reasonable cause for the condemnation of the structure it should not be held to be unlawful.

“Every intendment should be made in favor of the validity of a municipal law, passed to promote the public welfare. Yet when it is shown that there is no reasonable basis for the adoption of the amendatory ordinance, and that the enforcement of the ordinance in the manner attempted in the present case would be, in effect, a deprivation of property unnecessarily and illegally, the court should so construe the enactment as to prevent a wrongful destruction of property. The ordinance should be upheld and enforced as far as it is reasonable, and not to the unreasonable encroachment of private rights or property. As to

the sign in question, which was already erected when the city law was enacted, and is in perfect condition, the ordinance is in the nature of an ex post facto law. It tends to impair the obligation of a contract. The sign in question was not unlawful at the time it was erected. It has not been made so by any valid enactment of the legislative department of the city.”

In *Pickrell v. Carlisle*, 135 Ky. 128, 131, 121 S. W. 1029, the plaintiff sought an injunction to restrain the town from interfering with the placing of steps in front of his house which would encroach upon the sidewalk at that point. The court of appeals reversed the trial court and held that the injunction should issue because the encroachment was not unreasonable in view of all circumstances, saying:

“It is old and familiar law that the streets, including the pavements of a town, belong to the municipality for the use of the public traveling upon them for their whole length and width; likewise, that any permanent structure built upon any part of the public streets so far as to interfere with their use by the public for travel may be per se a nuisance, and may be abated by the municipality, or be abated by the courts at the instance of the town. But it is not true that the municipality and the traveling public have the right to the exclusive use of the public streets. The owners of abutting lots have rights in the streets in addition to those enjoyed by the general public, and it may be in spite of their rights, for example, the abutting owner has a particular easement in the street immediately fronting his lot, or leading

to it, of ingress or egress, to a not unreasonable extent, although the exercise of his right might interfere with the public use. If it were not so, then towns could not exist, for the title to the street would in effect, or could, absorb the value of the abutting lot as a city lot. This right of ingress and egress must be exercised in a reasonable manner, so as to interfere not excessively with the public right of travel.***** The dominant idea of the common law is "reasonableness." Neither the city nor the abutting lot owner is allowed to act the dog in the manger—at least there will be given the aid of a court of equity in so acting. It is therefore that a lot owner is confined to a reasonable use of his right of ingress, and egress, of ornamentation of his lot and the street in front of it (as by planting and maintaining shade trees, awnings, lamp posts, and the like), and the city and public will not be heard in equity to complain of the abutting owner's act which does not unreasonably interfere with the public's use of the street for travel."

Chicago Park District v. Canfield (1943), 382 Ill. 218, 223, 224, 47 N. E. 2d 61, involved an ordinance of the City of Chicago which provided that no person shall operate any vehicle, display any placard notice or advertisement in any park or on any public way within the park district. There were then five specific exceptions, the fifth of which was the basis of holding the ordinance invalid.

"By the fifth exception it is provided that the ordinance shall not apply to common carriers and taxicabs. This brings us to the second ques-

tion, viz: Does not the exception of common carriers and taxicabs from the operation of the ordinance render it invalid? In determining this question we must keep in mind that a regulation of this kind can be sustained, only if it promotes and protects the public welfare and has a definite relation thereto. It must contain some element connected with the safety of traffic. It can be sustained only on the ground that it promotes the safety of public travel and the use of the park and park system. Such advertising can only be prohibited on the ground that it tends to distract the attention of drivers, or others, in such manner and to the extent that it slows up or congests traffic or increases traffic hazards.***** The Park District has been expressly authorized to enact traffic regulations in the parks and on the boulevards under its jurisdiction. This power is subject only to the limitation that such power must be exercised for the promotion of public health, safety, morals, or general welfare, in accordance with the purposes for which the Park District is organized. If a regulation falls within this classification it is no objection to its validity that it may also promote aesthetic purposes if its reasonableness may be sustained on other grounds. *Neef v. City of Springfield*, 380 Ill. 275.

“It is apparent, however, that the ordinance here involved creates an unlawful classification, discriminatory in its nature, which renders the ordinance invalid. The fifth exception provides in substance that the regulation shall not apply to common carriers and taxicabs. There is no reasonable ground upon which this classification can be made. It bears no relation to the object and purposes of the ordinance.”

French v. Cooper (1945), 133 N. J. L. 246, 34 Atl. 880. The plaintiff applied for a building permit to construct an awning which was refused under a section of the zoning ordinance of Ocean City prohibiting metal, wood, or cloth awnings extending more than five feet from any main building wall or less than seven feet above the sidewalk and prohibiting support from or by any post, fixture or device resting on or attached to any street or board walk. The court held the ordinance invalid and that plaintiff was entitled to his permit, saying:

“It is settled that a municipality has no power to limit the use to which property may be put unless the regulation is designed to promote public health, safety and general welfare. *Durkin Lumber Company v. Fitzsimmons*, 196 N. J. L. 183. We fail to see in what respect the erection of this awning can adversely affect public health, safety or general welfare. The absence of a brief on behalf of respondent suggests that they, too, experience the same quandry. The fact that nearby property owners have expressed themselves as favoring the proposed erection and that none objects, weighs against the reasonableness of the decision to refuse the permit.”

Brahan v. Meridian Home Telephone Co., 97 Miss. 325, 62 Southern 485, 486, was a suit for damages for destruction of trees brought against the telephone company. The defendant obtained a directed verdict which was reversed and remanded for new trial on appeal.

“The ownership of trees between the sidewalk and the street is as sacred as any other property right. Of course, the paramount purpose of sidewalks and the streets is for a public use as such, and when trees obstruct the free use of the street the city undoubtedly has the power to carry out the paramount purpose, and to remove or destroy the trees, if such action be necessary to complete its use to the public; but this power belongs alone to the city, and can be exercised only when it seeks to make the street or sidewalk useful for its legitimate purposes.”

City of Mt. Carmel v. Shaw, 52 Ill. App. 429, 435, 436, likewise involved shade trees. The city council passed an ordinance narrowing the width of streets by donating two feet on each side to the property owners and by establishing sidewalk space for six feet adjoining that two feet, requiring removal of trees in the sidewalk area. The appellees brought suit to enjoin destruction of valuable shade trees alleging that there was sufficient room in the street area to build sidewalks without damage to the trees and that destroying them would result in irreparable damages to the lot owners as well as the public. A writ of injunction was issued which was sustained on appeal with one modification. The court said:

“Shade trees standing just within the curbing of a sidewalk in a street do not constitute a nuisance, and the city may be enjoined from destroying them.

“While the decree of the court enjoining the city from destroying the trees will be affirmed, it will have to be modified. The injunction is per-

petual. Conditions may so change, that in time public interest may require that the sidewalk should be much wider than six feet; should this property by the growth of the city become a business part, then a sidewalk might be required of twelve feet in width. In such case, the trees would be an obstruction to travel, and the city would have a right to remove them when they became so.”

Sproul v. Stockton, 73 N. J. L. 158, 160, 62 Atl. 275, is a similar case involving shade trees.

In *City of Yale v. Davenport* (Okl. 1936), 54 P. 2d, 335, the court held void an ordinance requiring a permit to move a house across or along a street upon plaintiff's suit to have the ordinance declared invalid. The ordinance had some provisions reasonably related to safety and convenience and regulation of traffic and had other provisions not so related, including one that no house could be moved unless special assessments on the property had been paid. The court said:

“Under certain provisions of this ordinance, the court was justified in finding that its adopted regulation had nothing to do with protection of the streets or their use.”

In *Bueneman v. Santa Barbara*, 8 Cal. 2d 405, 65 P. 2d 884, 109 A. L. R. 895, it was held that a license tax on laundries making distributions in the city but not having plants in the city was arbitrary, discriminatory, and void as against a laundry which distributed in the city and had its plant located outside the city.

In *Lewis v. Pingree National Bank*, 47 Utah 35, at pages 45, 46, 47, 52, 53, 151 Pac. 558, the court passed on the right of a private citizen to enjoin as constituting a public nuisance the continued use of a bank front which protruded onto the sidewalk and was a portion of the public street. The court held it had ample authority to enjoin the continued use of this bank front, but felt constrained to consider the need of the public and balance that against private interests in determining whether the bank front should be allowed to remain. The court thus indicated its views on the factors determining whether the encroachment should remain, indicating that reasonable encroachments are to be permitted.

“There is nothing in any of the cases, therefore, which necessarily requires the removal of the front of defendant’s bank building under the undisputed facts and circumstances of the case at bar, although it be conceded that projecting the front into the street constitutes a public nuisance which the courts have full power to abate, and it be further conceded that the plaintiff’s property is substantially damaged by the pillar next to the show window in his store building. The real question to be determined, therefore, is whether in this case a court of equity should exercise its full power in requiring the removal of the nuisance

“Here we have a case where the street is of the generous width of 132 feet from lot line to lot line, twenty feet of which on either side is devoted to a concrete sidewalk for pedestrians. The public, therefore, in the nature of things, cannot be inconvenienced to any great extent by

an obstructed passageway*****.

“Further, the evidence is to the effect that the front of the building as now constructed is an ornament to any city, and to now tear down and remodel it will entail an expenditure of at least \$15,000, and, as we have seen, the architect says that even then the building will not answer the purposes for which it was planned and designed*****.

“If, therefore, a tenant, or the owner, for that matter, in the second story of an adjoining building, wants to look down upon the street or sidewalk, his view will be interfered with and obstructed by plaintiff’s projecting awning. This, however, is not such an impairment of the usefulness of a building as the law can recognize. If such were the case, all awnings, signs, and other obstructions would have to be removed. No appreciable or substantial damage can result from the mere projection of defendant’s cornice into the street*****.

“The Legislature, and, when duly authorized by the Legislature, cities and towns may to some extent, at least, authorize encroachment on public streets; but they may do that only to a reasonable extent, and then only subject to the right of any aggrieved person to sue and recover such damages as he may sustain by the encroachment.”

The Supreme Court indicated respect for the same considerations in *Salt Lake City v. Schubach*, 108 Utah 266, 159 P. 2d 149. That case was a suit for damages brought by a woman who tripped over a trap door in a sidewalk of Salt Lake City and the appeal involved determination of who was responsible for the defect. On

pages 272-3 of 108 Utah, the court noted that abutting owners do not have an absolute right to make openings in the sidewalk for their convenience; but the court said:

“The legislature may, however, authorize such limited use of the sidewalks for the more convenient and beneficial use of the adjacent property. (Citing cases). Such special privileges or rights are justified as in the public interest by increasing business facilities, improving and making practicable better buildings and improvements on the property and adding to the taxable value. (Citing cases). The legislative power to permit such use of the sidewalks has been delegated to the municipalities. This follows from the grant to the cities of control over the streets and sidewalks.” Secs. 15-8-23 and 15-8-11, U. C. A. 1943.

The Schubach case stated the following limitation on authority of the cities to permit use of sidewalks by private individuals:

“It seems to us that the Cohn case and those following it, what we shall call the Illinois line of cases, overlook one fundamental essential to a sound rule of liability in this situation, namely: The fact that the sidewalks are part of the public highway, dedicated to use by the public, and the municipal corporations have no right or authority to grant individuals the use thereof which would in any way interfere with the use by the public. (Brough v. Ute Stampede Ass’n., 105 Utah 446, 142 P. 2d 670). However, a properly constructed coal hole, grating, or vault light, kept in good re-

pair, does not interfere with such use in any way, so that the municipal corporation may grant abutting landowners the right to make such use of the sidewalk; but only, however, on condition that the owner of the abutting property properly construct the grate, coal hole, or vault light, and that he maintain such structure in such condition that the public may safely use the sidewalks thereover.”

The subject is discussed generally by McQuillin, *Municipal Corporations*, 2d Ed., in Sections 986, 1438, and 1453, as follows:

“BILLBOARDS AND STRUCTURES FOR ADVERTISING. To promote the public safety, convenience, comfort, morals and welfare of the inhabitants, the police power, to regulate the use of streets and public ways, confers ample authority to enact and enforce, by ordinance, reasonable and nondiscriminatory regulations, general and uniform in their nature, respecting the erection and maintenance of billboards and other structures used for advertising purposes and placed at or near the street lines. Such regulations are salutary and necessary, are not in restraint of trade, nor unlawful restrictions upon the legal and beneficial use of property. The general welfare clause, it has been held, will support necessary, reasonable and uniform regulations. But aesthetic consideration alone, it is generally held, will not sanction unreasonable restrictions relating to the erection and maintenance of such structures.” (Section 986).

“Another point to be considered is whether the encroachment is on the surface of the street

or is above or below the surface. Much greater latitude is generally conferred on the municipality in regard to encroachment above or below the surface of the street, and the reason is clearly apparent, since ordinarily, minor encroachments above the surface such as bay windows, awnings, and the like, or below the surface, do not in any way obstruct the use of the street and sidewalk for travel or interfere therewith.

“The general rule is that a municipality may require the removal of an obstruction on a street notwithstanding there is still ample room left for passage of teams and travelers. On the contrary, it is held in some cases that the mere partial obstruction of a street, when as a matter of fact such obstruction does not interfere with the public use, is not a nuisance.” (Section 1438).

“On the theory that the use of the street is for public and not private use, strictly speaking it would seem that, unless expressly authorized, an abutting owner has no absolute right to put up awnings or signs projecting over the sidewalk or to build bay or oriel windows extending into the street or to attach anything to his building which projects beyond the street line, and such projections are sometimes expressly forbidden by city ordinance. Such ordinances are clearly valid. On the other hand, an awning erected over the sidewalk is not necessarily a public nuisance per se. Such structures are so common as to be almost universal, and, unless prohibited by ordinance, they are almost invariably permitted unless, as an actual matter of fact, they become dangerous or annoying to pedestrians. However, it has been held that certain kinds, at least, may be prohibited in the exercise of municipal police power, and it is well settled that they may be well regu-

lated and a permit required, although not as a matter of fact dangerous or annoying to pedestrians or others." (Section 1453).

See, also, *State v. Higgs* (1900), 126 N. C. 1014, 1023, 1024, 1025, 35 S. E. 473, (ordinance held invalid which prohibited hanging signs without regard to danger; overruled in part by *Small v. Edington*, 146 N. C. 527, 60 S. E. 413); *People ex rel Wineburgh Advertising Company v. Murphy* (1909), 195 N. Y. 126, 129, 130, 131, 132-133, 135, 88 N. E. 17, 21 L. R. A. (NS) 735, where an ordinance relating to sky signs was held discriminatory as unrelated to safety, health, or morals; *Laura Vincent Co. v. City of Selma*, 43 Cal. App. 473, 11 P. 2d 17, (regulation of awnings must have reasonable relation to the public safety or convenience); *Ivins v. Trenton*, 68 N. J. L. 501, 502, 503, 504, 53 Atl. 202; *State v. Wong Hing*, 176 Minn. 151, 222 N. W. 639, which discusses the bases upon which an ordinance regulating awnings over sidewalks can be upheld; *Mallory, Inc., v. City of New Rochelle*, 53 N. Y. S. 2d 643, sustaining ordinance prohibiting all signs extending over the sidewalks except for marquees of theaters, hotels, or public buildings with rationalization of its classification.

It therefore appears that licensees and permittees who are using the streets or a portion of space over the streets or sidewalks for a private purpose are not altogether without rights and that ordinances regulating such uses or prohibiting such uses in part (which is really a regulation) must be reasonable and based upon

distinctions and reasons which have substance. There is no power in municipalities to regulate streets and the use thereof arbitrarily, capriciously, and unreasonably. Therefore, quite apart from procedural questions involved, and assuming that no formal order is required it still appears that the action of the Board of Commissioners of respondent is unlawful and arbitrary and should not be allowed to stand. If the city has a defense to the charges made by the allegations of the complaint, it should be required to prove that the allegations are erroneous.

IV. SECTION 5720, REVISED ORDINANCES OF SALT LAKE CITY, 1944, IS VOID BECAUSE IT CONTAINS NO STANDARD OR RULE TO GUIDE THE BOARD OF COMMISSIONERS OR THE PUBLIC IN THE MATTER OF REMOVAL OF LICENSED SIGNS.

Under this point of our argument appellants respectfully urge and contend that the power conferred on respondent by the Utah Legislature requires not only reasonable exercise but that if the respondent sets up by ordinance the regulation which will govern use of the streets and sidewalks then that ordinance must have a reasonable basis, must indicate how the problem will be handled by the city and give a criterion or standard which is usable by reasonable citizens.

The provision in Section 5720 of the ordinances establishing as the only criterion that an act shall be "in

the best interest of the city'' is so vague and general as to be useless and does not meet the requirements for such an ordinance as laid down by the authorities.

On the other hand, Exhibit ''E'' is Section 5731 of the Salt Lake City ordinances and regulates signs above, over or in the streets and is pursuant to Section 15-7-26, U. C. A., 1943. This ordinance is the one which, appellants contend, should have been applied to appellants. It provides a reasonable standard to guide respondent and citizens in the removal of signs:

''If any sign be found by the bureau of mechanical inspection to be unsafe or dangerous, the same shall be forthwith repaired and rendered safe by the owner thereof or the person maintaining and controlling it;*****.''

This is a standard which is understandable and susceptible of good administration. It lets permittees know what is required of them.

In 37 Am. Jur., page 778, the general rule is thus stated:

''In accordance with settled principles that no American legislative body can constitutionally and validly delegate to administrative officers an exercise of discretionary power which is arbitrary, it is established that any municipal ordinance which vests an arbitrary discretion in public administrative officials with reference to the rights, property, or business of individuals, without prescribing a uniform rule of action, making the enjoyment of such rights depend upon arbi-

trary choice of the officers without reference to all persons of the class to which the ordinance is intended to be applicable, and without furnishing any definite standard for the control of the officers, is unconstitutional, void, and beyond the powers of a municipality.”

In *Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 9, 51 N. E. 758, 42 L. R. A. 676, 68 Am. St. Rep. 155, the plaintiff obtained an injunction against town officials’ enforcing an ordinance which invalidly gave them uncontrolled discretion to permit other than pleasure vehicles on those streets from which such vehicles were otherwise excluded. The ordinance excluded traffic other than for pleasure purposes “except private wagons conveying families, or upon special permission of this board.” In holding the ordinance void because not indicating standards upon which permission would be granted, the court said at page 765 of 51 N. E.:

“In other words, the discretion is lodged with the board of trustees to permit or not to permit traffic vehicles to be used upon the boulevards in question. The ordinance, in so far as it invests the board of trustees with the discretion here indicated, is unreasonable. It prohibits that which is in itself, and as a general thing, perfectly lawful, and leaves the power of permitting or forbidding the use of traffic teams upon the boulevards to an unregulated official discretion, when the whole matter should be regulated by permanent local provisions operating generally and impartially.”

State v. Coleman (1921), 133 Atl. 385, 387, 96 Conn.

190, held an ordinance invalid which prohibited speech making in the public square "without first obtaining a permit from the chief of police." On this point the court held:

"The only effective way of protecting the citizen against the abuse of an unlimited discretion is to declare void any grant of an unlimited discretion to control the exercise of privileges which all citizens have a common right to enjoy on equal terms."

Rizzo v. Douglas (1923), 201 N. Y. S. 194, upheld an ordinance making it unlawful to drive a taxicab without obtaining a license, pointing out the definite guides that were laid down to control the official discretion and applicants for licenses, and holding at page 196 that without such guides the ordinance would be void.

In *People v. Rathje*, 33 Ill. 304, 164 N. E. 696, at page 698 the court said:

"Unlimited power, to be exercised in accordance with the whim or caprice of public officials, is inconsistent with our system of government."

Village of Granville v. Krouse, 228 N. Y. S. 204, holds a municipal building code void for failure to establish standards.

City of New Orleans v. Palmisano (1920), 83 Southern 789, 146 La. 518, holds void an ordinance regulating portable gas tanks on the ground that it vested arbitrary power in the commission where the ordinance required

a permit from the commission before pulling a portable gas tank in the city.

And likewise, in *City of New Orleans v. Bodie*, 83 Southern 826, 146 La. 550, an ordinance provided that no taxicab would be allowed on the streets of the city “without an official permit from the department of public safety.” The court held that such an ordinance was void since it conferred arbitrary power on the department of public safety “without some uniform system by which all in the same class may avail themselves thereof by complying with the regulations so imposed.” It was observed that the city could lawfully prohibit all taxicabs on the streets but that if any were permitted it must be on a reasonable basis.

In *Breinig v. County of Allegheny*, 332 Pa. 474, 482, 483, 2 Atl. 2d 842, 848, 849, the plaintiffs had received a permit to cut the curb for a private driveway to their place of business, which permit was revoked before the driveway was finished. The court held that this was too drastic and that the authorities had not properly conceived the requirement of balancing the needs of the public and the needs of the plaintiffs, saying:

“But the public authorities have the undoubted right to regulate the manner of the use of driveways by adopting such rules and regulations, in the interest of public safety, as will award some measure of access and yet permit public travel with a minimum of danger. The rules and regulations must be reasonable, striking a balance between the public and the private interest. *****

“We agree with the court below that the action of appellants was unreasonable and oppressive. The circumstances did not require an absolute prohibition of driveways to appellees’ property.”

Livingston v. Wolf, et al., 136 Pa. 519, 20 Am. St. Rep. 936, 20 Atl. 551, 552. This was a suit by a property owner to enjoin construction of a bay window which would jut into the street 27½ inches in front of the house of defendant, plaintiff’s neighbor. The city had an ordinance prohibiting “any jut or bulk window projecting into the street more than 28 inches.” The court held that cities have the right to regulate streets and sidewalks and encroachments thereon and that the regulation was reasonable, and as to the extent of the power to regulate streets and sidewalks the court stated:

“The foot ways no less than the carriage ways are under municipal control, and the authorities may determine the extent to which the walks and pavements may be obstructed by cellar doors, doorsteps, awnings, projecting windows, cornices, and the like. This power must be exercised by regulations that are general and uniform; that are reasonable and certain; and that are in conformity with the constitution and laws. When so exercised it is binding on all the inhabitants of the municipality. These general propositions are supported by many cases*****. That the courts must judge of the reasonableness of the action of the municipality, and that such action is not binding, if it is unreasonable, was held in *Knudler v. Norristown*, 100 Pa. St. 368, and

that its action must be general, bearing equally upon the citizens, was ruled in Reimer's appeal, 100 Pa. St. 182."

In *Ex Parte Tomlinson*, 54 Okl. Cr. 367, 22 P. 2d 398, 400, an ordinance was held invalid which required owners of ambulances, before making any trip in the city, to call the police station and obtain permission to respond to the call, the ordinance providing that the first one to call would be authorized to make the trip. This was held to be arbitrary, unreasonable, and discriminatory, the court saying:

"This court has been extremely liberal in its interpretation of police power of municipalities, but the effect of the ordinance in question is to carry such regulations to an absurd, unjustifiable, and unreasonable extreme, and beyond the police power of the city. The administration of the ordinance in question is left entirely to the radio dispatcher, and, if that radio dispatcher should see fit to favor a certain funeral home, whether for profit, friendship, or because of malice toward others, it would be easy for him to do so. It matters not how urgent the emergency call, under the terms of this ordinance the owner of the ambulance cannot answer without being subjected to a fine, unless he first secured permission of the radio dispatcher to make the call."

"Under the police power of the city it has the right to regulate the use of its streets in a reasonable manner by prohibiting reckless driving, establishing stop lines, and prohibiting undue noises and other things of like character, but the city may not in the exercise of its police power

place arbitrary, unreasonable, and discriminatory regulations upon any business.”

People ex rel. Schimpff v. Norvell, et al., 368 Ill. 325, 13 N. E. 2d 960, 961, was a writ of mandamus to compel issuance of a building permit under an ordinance forbidding buildings except where its principal frontage was “upon a street or officially approved place,” as required by the ordinance. The court held this ordinance invalid as conferring unlimited discretion:

“Any ordinance which invests arbitrary power in a public official which may be used in the interests of some to the exclusion of others is unreasonable and void. Cicero Lumber Co. v. Town of Cicero, 176 Ill. 9, 51 N. E. 758, 42 L. R. A. 696, 68 Am. St. Rep. 155; City of Chicago v. Trotter, 136 Ill. 430, 26 N. E. 359. The ordinance before us prescribes no conditions or terms upon which the commissioner of buildings is to determine what shall be an “officially approved place.” In this respect his action is neither controlled, limited, nor guided by any rules, definitions, or requirements in the ordinance. So far as that enactment is concerned, he is left free to approve a private way proposed by one citizen while disapproving a similar one for someone else.”

Annotations at 12 A. L. R. 1435 and 54 A. L. R. 1104 point out that statutes or ordinances cannot vest discretion in a public official or body without establishing standards to guide them and the public. These annotations note an exception where mere privileges are in-

volved in such prohibitable businesses as selling liquor, operating pool rooms or public dance halls. In this type of case the discretion may be more broad than in other types of cases. These annotations also point out a distinction where immediate action will be required and where the circumstances which may be controlling are too numerous and too difficult to classify. The annotator refers to *Eureka City v. Wilson*, 15 Utah 53, 48 Pac. 41, affirmed 173 U. S. 32, 43 L. Ed. 603, 19 S. Ct. 317, as such a case. That case holds that a city may prohibit the moving of houses on streets of the city and also that it may prohibit such acts conditionally and confer on a municipal official the power to determine whether a permit shall be granted in a particular case. This court held that such use of the streets is extraordinary and permissive and that no standards need be set up as it will be assumed that the discretion will not be abused.

This case is an exception to the general rule and makes plain the position of appellants and their right to complain of this ordinance. It is plain from the number of appellants and from the complaint (Par. 8) that the city has granted permits for curb signs over a number of years' time, thus indicating that there is nothing extraordinary about such use. Discretion of the Commissioners has been exercised with reference to these permits and, as indicated in *City of Portland v. Yates* (supra) and *Breinig v. County of Allegheny* (supra), the fact of continued use has given a sort of vested right in these appellants. Our case is therefore far removed from the *Eureka City* case and there is no case here for un-

controlled discretion in the Board of Commissioners. The ordinance, requiring no standard or rule of conduct other than it be in the "best interest of the city" and which may mean anything or nothing, does not fall within the exception to the general rule.

The danger of such uncontrolled authority with no directions or standards to guide either the Commissioners or the public is plain from the facts of this case. In and upon the streets of Salt Lake City there are innumerable signs, marquees, trees, utility poles, signs on trucks, signs on buses, advertisements from sound trucks, advertising clocks, and a theatre sign across the street, elevators, delivery chutes, sidewalk basements, all of which constitute uses for the benefit of abutting owners (except the signs on buses, trucks, and sound trucks) and all of which involve use of the street for a business purpose. In the face of all of these uses, and without effort to classify such uses or the reason for discriminating against curb signs of these appellants, Section 5720 would permit the Commissioners to revoke the permits of appellants when they find it to be in the city's best interest without indicating why it is so or against what the signs of appellants offend where all of the multifarious uses referred to do not offend.

Perhaps some signs should be removed as being unsafe, unattractive, offensive to adjoining property owners, or as being generally run down. Any reasonable rules of the city with reference thereto could be applied by appellants and could be adhered to by the city. But under the present ordinance the Board of

Commissioners for a number of years permits erection of these signs in a manner which is presumably carrying out the best interests of the city and then, without rhyme nor reason ascertainable to appellants, decides that the best interest of the city has become different and now requires removal of the signs. Such uncontrolled power should not be permitted.

CONCLUSION

The lower court erred in sustaining the general demurrer and respondent should be required to disprove the allegations of the complaint or else take lawful measures by ordinance to regulate use of the streets for advertising.

The threatened action of respondent is at best premature. Exhibit "D" contemplates amendment of Section 5720 of the Ordinances before curb signs shall be removed thereunder. And should the court hold that respondent intended removal of the signs under Section 5720 without amendment then it should follow that there has been no finding or determination that the best interest of the city will be subserved by removal of appellants' signs. And in any event, respondent has acted arbitrarily, capriciously, and has discriminated against appellants. And lastly, Section 5720 vests too broad authority and uncontrolled discretion in the Board of Com-

missioners and is therefore void for want of standards or guides. The case should be remanded for further proceedings.

Respectfully submitted,

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