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The Main Parking Mall v. Salt Lake City Corporation; Salt Lake City Commission in its Capacity as Redevelopment Agency of Salt Lake City, Redevelopment Agency of Salt Lake : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE MAIN PARKING MALL,
a Utah corporation,
Plaintiff and Appellant,

vs.

SALT LAKE CITY CORPORATION; SALT LAKE CITY COMMISSION IN ITS CAPACITY AS REDEVELOPMENT AGENCY OF SALT LAKE CITY; and REDEVELOPMENT AGENCY OF SALT LAKE CITY,
Defendant sand Respondents.

Case No. 13722

APPELLANT'S BRIEF

APPEAL FROM THE JUDGMENT OF DISMISSAL
OF THE THIRD DISTRICT COURT
FOR SALT LAKE COUNTY
The Honorable Joseph G. Jeppson, *Judge*

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NATURE OF THE CASE

This is an appeal from a judgment made and entered on the 28th day of May, 1974, as amended on the 30th day of May, 1974, by the Honorable Joseph G. Jeppson, one of the Judges of the District Court of Salt Lake County, State of Utah, determining that the Appellant's amended complaint did not state a cause of action.

DISPOSITION BY THE LOWER COURT

The Trial Court, in its Judgment of Dismissal (R. 2), ordered, adjudged, and decreed that the Appellant's "amended complaint does not state a cause of action and is dismissed."

RELIEF SOUGHT ON APPEAL

The Appellant seeks review and reversal of the Trial Court's Judgment of Dismissal, and for a ruling by this Court that this case be remanded to the Trial Court so that the same may be tried on its merits.

STATEMENT OF FACTS

The Appellant has alleged in its Amended Complaint the following facts, which facts, the Appellant submits, are sufficient to state a cause of action against the Respondents.

The Appellant is a Utah corporation. Its sole business has consisted of the ownership and managing of a parking area adjacent to the real property of the shareholders of the Appellant.

The Appellant conducted a parking facility so that the general public would have access to retail establishments of the shareholders of the Appellant. The retail establishments are located on Main Street between Second and Third South Streets in Salt Lake City, Utah.

The Respondent REDEVELOPMENT AGENCY OF SALT LAKE CITY was created pursuant to the Utah Neighborhood Redevelopment Act known as Title 11, Chapter 19, Utah Code Annotated (1953 as amended). The Redevelopment Agency consists of the Salt Lake City Commission sitting in the capa-

city as the Redevelopment Agency, as provided for by Utah Code Annotated, § 11-19-2, 3.

The Respondents, in accordance with law, adopted a plan of urban redevelopment known officially as CBD West, Neighborhood Development Program, Urban Renewal Plan, hereinafter referred to as CBD West. According to Utah law the Respondents are given authority to borrow money for their projects from either public or private source, or from the state or federal government. Utah Code Ann. § 11-19-3 (1953 as amended) provides in part:

> "The agency may accept financial or other assistance from *any public or private source* for the agency's activities, powers, and duties, and expend any funds so received for any of the purposes of this act. *The agency may borrow or accept financial or other asistance from the state or the federal government for any redevelopment project within (its area of) operation and comply with any conditions of such loan or grant.* (Emphasis added).

By virtue of the Utah law and by authority thereof the Respondents, for reasons of their own, elected to borrow money for CBD West, from the federal government (U. S. Housing of Urban Development or HUD), rather than from the state or other public source or from private sources. The Utah statute requires that if the Respondents elect to borrow from the federal government then they must " . . . *comply with any conditions of such loan or grant.*" *Id.* In

this case the federal government did require the Respondents to agree to comply with certain conditions of the loan to the Respondents. These conditions are contained in what is called the *Urban Renewal Handbook*. In lending money for local projects like CBD West, the lender requires, as does the Utah Statute, that the local agencies follow the requirements of the conditions of such loan or grant. The conditions of the loan provide for the administration of federally assisted state and city programs. These conditions must be complied with by the Respondents for their local project. The obligation to follow these rules is imposed by Utah law which created the Respondent and gave it power, and by the lender, HUD (R. 69).

Sometime in 1973 the Redevelopment Agency filed an action to condemn the parking lot property owned by the Appellant. In settlement of the condemnation action the Appellant conveyed all of its right, title and interest in and to the parking area to the Respondent Redevopment Agency. The Redevelopment Agency wanted the property as project land for CBD West.

As alleged in the Amended Complaint, there are several conditions which the Respondents agreed to comply with in offering project land to private redevelopers. The Appellant alleges that as a general condition to the loan from HUD, the Respondents must afford:

> "(a) potential redevelopers the opportunity to make their interest known and (b) to consummate disposals of project land in a *fair and equitable manner* and to assure that they are open, in one way or another, to public scrutiny." (Emphasis added) (R. 70)

The Handbook (R. 69) outlines six disposal methods which are designed by HUD to accomplish these objects. (R. 213)

The Respondents by Resolution #32.02 dated February 8, 1973, which is attached as Exhibit A to the Appellant's Amended Complaint (R. 77), elected the "Competition-Negotiation" method of selecting a private redeveloper. The "Competition-Negotiation" method is one of six standard methods in the Handbook. (R. 70, 213). The Respondents, however, without authority eliminated the bid price requirement of the "Competition-Negotiation" method. (R. 69-70; 74,224). The Appellant alleges also that there are several detailed conditions which the Respondents must comply with once they have selected a method of disposal. Among these requirements are that the Respondents must "Conform to the procedures and criteria it has adopted in making the offering, and in selecting the redeveloper." (R. 224-225).

The Respondents are required to adopt a Resolution which shall:

(a) approve the offering,
(b) identify and approve the method of selecting the redeveloper,

(c) approve the price, or minimum price, and determine that such price is not less than fair value. (R. 216)

The Resolution adopted by the Respondents (R. 77) did not approve a price, or minimum price for the land being offered. The contract entered into between the Respondents and Hartnett-Shaw Development Company, Inc. (R. 83) included a minimum price which was far below the market value of the land being offered. The contract allows the Respondent to sell the property at a price far below the market value. The purpose of the price being equal to the market value is to make sure that the loan can be repaid. This condition was not met by the Respondents.

As alleged the Respondents were also required as a condition to publish a formal notice known as an "Invitation for Proposals." (R. 73, 219-220,224). Certain information must be contained in this invitation. Among other things, no formal public notice was published. The only thing published in a newspaper was an advertisement. This advertisement did not contain, for example, the identification of the disposal method, nor a general description of the criteria and procedural steps pertinent to the selected method. (R. 73, 219-220, 224). This information must be published as a formal public notice known as an invitation for proposals. In addition another condition requires that "Offering Documents" be given to the prospective redevelopers,

which also must contain certain information as alleged at R. 74 of the Amended Complaint.

The Appellant has alleged that the Respondents did not prepare offering documents which contained all the necessary information required to give a potential redeveloper a fair opportunity to present a proposed plan. (R. 74).

The "Competition-Negotiation" method selected by the Respondents was a modified method which eliminated the bid-price requirement. The Respondents did not get *prior* concurrence from the lender to change this method as is required. (R. 69, 213). The *Handbook* outlines in detail as conditions of the loan the requirements for using the "Competition-Negotiation" combination. It is a two step method "designed to assure opportunity to all potential redevelopers to submit proposals . . . " The two steps are (1) public offering which requires bidding and (2) selection by negotiation. "The selected redeveloper *must have submitted the highest bid among the bidders who met the bidding requirements.*" (R. 75, 225). In addition the invitation for proposals under this method "shall indicate the extent and status of any discussions which have been held with prospective redevelopers at the time of the offering." (R. 224). The Respondents as alleged in the Amended Complaint did not inform the Appellant of previous discussions it had had with Hartnett-Shaw Development Company, Inc. prior to the offering as they were required to do. (R. 75).

Without following any of the above described requirements, and prior to June 7, 1973, the Respondent Agency circulated and distributed what it designated as a "data sheet", a copy of which is attached marked Exhibit C to the Appellant's Amended Complaint (R. 79). In addition, the Respondent addressed a form letter dated June 5, 1973 to Mr. I. J. Wagner, a director of the Appellant corporation, a copy of which is attached to the Appellant's Amended Complaint and marked Exhibit D (R. 80). Pursuant to the data sheet and the letter, the Appellant served upon the Respondent Agency on June 6, 1973, a Notice of Indication of Interest, a copy of which is attached to the Appellant's Amended Complaint and marked Exhibit E (R.82). The Appellant obtained an architect and prepared an informal plan of redevelopment and presented the plan to the Respondent Agency on July 25, 1973.

The Respondent rejected the Appellant's proposal even though the Appellant met all the conditions of the offering and instead authorized the execution of an exclusive offer to negotiate with Hartnett-Shaw Development Company, Inc. of Chicago, Illinois. No bid was submitted by Hartnett-Shaw. The offer which was accepted by Hartnett-Shaw was dated August 22, 1973, a copy of which is attached to the Appellant's Amended Complaint and market Exhibit F (R. 83). The Respondents granted to the Hartnett-Shaw Development Company an exclusive period of 180 days to negotiate and further

provided that the said 180-day period could be extended. Several extensions have been granted since the conclusion of this initial 180-day period, and as yet the exclusive offer to negotiate is still in effect.

The Appellant commenced this action against the Respondents by filing a Complaint on November 9, 1973 (R. 200-232). An Order to Show Cause was served upon the Respondents and set for hearing on November 20, 1973, but upon motion by the Respondent, the Order to Show Cause hearing was vacated and rescheduled for November 26, 1973 (R. 197). The Order to Show Cause hearing, however, was never held. The Appellant obtained an Order under Rule 30 (a) of the Utah Rules of Civil Procedure to take the deposition of Mr. Danny Wall, Executive Director of the Redevelopment Agency of Salt Lake City, prior to the expiration of thirty days after service of the Complaint (R. 177). On November 20, 1973 the Respondents filed a Motion to Dismiss the Appellant's Complaint (R. 185). Submitted with the Motion to Dismiss were affidavits of Mayor E. J. Garn (R. 187) and Mr. Danny Wall (R. 194), and some other exhibits (R. 190-193).

Pursuant to the Order dated November 20, 1974 (R. 177-178) the Appellant served notice on November 21, 1973 to take Mr. Wall's deposition (R. 162). The Respondents objected to the notice and set a hearing on their Motion for November 30, 1973 (R. 164-161). The Respondents' Motion to Dismiss and Motion to Vacate the Order to Show Cause were also

set for hearing on November 30, 1973. Sometime prior to November 30th an Order was signed by the Honorable Joseph G. Jeppson staying all discovery procedures. This Order does not appear in the Lower Court's record. It was, however, pursuant to this Order, necessary that the Appellant file a Motion to Take Discovery, and a hearing was held before the Honorable Judge G. Hal Taylor on January 23, 1973 (R. 109). Judge Taylor in an Order signed February 6, 1974 granted the Appellant the right to take discovery (R. 101).

A hearing was held on November 30, 1973 (R. 196), at which time the Appellant asked for leave to file written briefs in support of its objectives to the Respondents' Motion to Dismiss. It should be noted that the Respondents also filed an Answer on November 30, 1973 (R. 156). At the hearing the affidavits (R. 187, 194) and exhibits (R. 190-193) attached to the Respondents' Motion to Dismiss were not excluded by the Court. One December 20, 1973 the Appellant filed its Objectives to Respondents' Motion to Dismiss and filed a written memorandum in support of its objections (R. 131-148). The Respondents filed a memorandum in support of their Motion to Dismiss on December 26, 1973 (R. 124-130).

Following Judge Taylor's Order granting the Appellant the right to take discovery, the Appellant teook the depositions of Mayor E. J. Garn, Danny Wall, and Ellis Ivory. On April 29, 1974, however, the Respondent filed a Notice of Further Hearing

and a Request for Ruling on Its Motions (R. 98). On the 14th day of May, 1974, the Appellant filed a Motion for Leave to Amend its Complaint (R. 63). Attached to the Motion was the Amended Complaint (R. 67-86) and Affidavits of W. Clark Burt (R. 65) and I. J. Wagner (R. 89). Prior to filing its Amended Complaint the Appellant filed a Notice to Take the Deposition of Mr. William F. Hartnett, Jr., President of Hartnett-Shaw Development Company, Inc. (R. 62). The Respondent noticed up these Motions for May 17, 1974 (R. 87). On May 15, 1974 the Appellant noticed the taking of Mr. Hartnett's deposition (R. 62). The Respondents filed their objections to taking this deposition (R. 58) and an affidavit (R. 59) on May 16, 1974.

At the hearing on May 17 the Appellant was granted leave to file an Amended Complaint, but was not allowed to take Mr. Hartnett's deposition (R. 54). The Court set May 24 at 2:00 p.m. as the date for hearing Respondents' motions. On May 20, 1974, the Respondents filed their Answer to the Amended Complaint (R. 51-53) and also a Motion to Dismiss and for Summary Judgment (R. 49). Incorporated in this Motion were the same affidavits of Mayor E. J. Garn and Danny Wall which had been filed with the Respondents' Motion to Dismiss the original Complaint. On May 23, 1974, one day before the hearing, the Appellant was served with a supplemental affidavit signed by Mr. Danny Wall (R. 36-47) and also with Respondents' supplementary memor-

andum in support of their motions (R. 12). The Appellant filed on May 23 a Motion to Vacate the hearing which had been scheduled for the 24th of May and also a Motion to take Mr. Hartnett's deposition (R. 10).

On May 24, 1974 the hearing was held and Judge Jeppson entered his Judgment dismissing the Appellant's Amended Complaint for failure to state a cause of action (R. 2).

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DISMISSING THE APPELLANT'S AMENDED COMPLAINT FOR FAILURE TO STATE A CAUSE OF ACTION.

The Respondent Redevelopment Agency of Salt Lake City, Utah is a creation of a Utah State Law. The Statute authorizing the creation of the Redevelopment Agency is entitled "The Utah Neighborhood Development Act", found in Title II, Chapter 19, Utah Code Annotated (1953). Section 11-19-3 Utah Code Annotated (1953 as amended) says in part:

> "Each community, by enactment of an ordinance by its legislative body may designate the legislative body of the community as a redevelopment agency of such community, which agency shall be authorized to enter into contracts generally, and shall have the power to transact the business and exercise all the powers provided for in this Act. * * * "

The legislative body in this case is the Salt Lake City Commission which has, by ordinance, designated itself as the Redevelopment Agency of Salt Lake City. Utah Code Ann. § 11-19-2(2) (1953 as amended). Pursuant to Utah law, therefore, the Salt Lake City Commission acting as the Redevelopment Agency of Salt Lake City can enter into redevelopment projects.

The "Utah Neighborhood Development Act" also allows the Redevelopment Agency to accept financial assistance from any public or private source for redevelopment activities. Utah Code Anno. (1953) § 11-19-3 also provides:

> " . . . The agency may accept financial or other assistance from any public or private source for the agencies activities, powers, and duties, and expend any funds so received for any of the purposes of this Act. *The agency may borrow money or accept financial or other assistance from the State or Federal government for any redevelopment project within conditions of such loan or grant.*" (Emphasis added).

The Appellant has alleged in its Amended Complaint that the Salt Lake City Commission acting in its capacity as the Redevelopment Agency of Salt Lake City can be sued in the Third Judicial District Court in and for Salt Lake County, State of Utah. This allegation is based upon the fact that the Redevelopment Agency of Salt Lake City is a public agency created by the Salt Lake City Commission pursuant to Utah Statute.

The Appellant's Amended Complaint does state a cause of action against the named Respondents. This Court has held in *Blackman v. Snelgrove*, 3 Utah 2d 157, 280 P.2d 453 (1955), that a complaint does not fail to state a claim, "unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim."

In this case it does not appear to a certainty that The Main Parking Mall would be entitled to no relief under any state of facts which could be proved in support of its claim. On the contrary, it does appear that the Appellant would be entitled to relief if the allegations in the Amended Complaint could be proved. The Appellant has alleged in its Amended Complaint the jurisdictional prerequisites for bringing this lawsuit in the District Court for Salt Lake County. The Respondents are public agencies existing by virtue of Utah State Laws. The Respondent Redevelopment Agency is the Salt Lake City Commission acting in another capacity. The Appellant has alleged that the Redevelopment Agency has entered into certain contracts and agreements with the U.S. Department of Housing and Urban Development for financial assistance for the Respondents' project, and that the Agency has received funds for its redevelopment projects. The Appellant is not attacking any of the agreements entered into between the U.S. Department of Housing and Urban Development and the Respondents. In fact the Appellant

admits that the Respondents have authority to " . . . borrow money or accept financial or other assistance from the state or the federal government for any redevelopment project within (its area of) operation . . . " This authority is granted by Section 11-19-3 of Utah Code Annotated (1953). The same statute, however, also provides that when this financial assistance is received from the state or federal government, the "agency", or in this case the Respondents, must " . . . comply with any conditions of such loan or grant." The Appellant has alleged in its Amended Complaint that there are certain conditions in this case which the Agency has not complied with. These conditions are the Rules and Regulations issued by the lender, HUD, in its *Urban Renewal Handbook*, which Handbook is the official statement of HUD concerning the policies and requirements for the administration of HUD assisted local urban renewal programs. The CBD West, Neighborhood Redevelopment Program, Urban Renewal Plan adopted by the Respondents is financially assisted by HUD. "The Handbook is the basic issuance used to promulgate permanent policy and *requirements* for administrative officials, and it establishes . . . *detailed requirements*." (R. 69). (Emphasis added). The local agency is required to take action in accordance with the " . . . Handbook policies and requirements," when it accepts financial assistance from the federal government. The Appellant is not alleging that the CBD West project is a federal project. It is a local project

adopted by the Respondents. For reasons of their own the Respondents elected to borrow money from the federal government to finance this local project. Utah law requires that any conditions attached to this federal money must be complied with by the Respondents. The Appellant is alleging that there are several conditions and that the Respondents did not " . . . *comply with* . . . the . . . *conditions of such loan* . . . " Utah Code Ann. § 11-19-3 (1953 as amended).

The Appellant has also alleged that pursuant to these conditions the Respondents selected a method entitled the "Competition-Negotiation" method of selecting a redeveloper, which is one of six methods outlined in the *Handbook*. As alleged the "Competition-Negotiation" method requires two steps, i.e., (1) public offering with bidding requirements and (2) selection by negotiation (R. 75, 225). According to the Handbook "(A)ny material deviations or departures . . . " from the six standard methods " . . . require *prior* Regional Office concurrence." (R. 69, 225-226).

It is also alleged in the Amended Complaint that the Respondents materially deviated from the selected method of choosing a redeveloper. In fact the Redevelopment Agency eliminated the bid price requirement (R. 190). This material deviation was made without *prior* Regional Office concurrence. The resolution adopted by the Respondents (R. 190) also failed to "approve the price (of the land to be of-

ered), or minimum price, and determine that such price is not less than fair value," as required by the conditions of the loan from the federal government. These violations of the *Handbook*, i.e., the "conditions", of the " . . . loan or grant," Utah Code Ann. § 11-19-3 (1953), are but a few of the violations alleged in the Amended Complaint. The Respondents did not comply with the *conditions* as required by § 11-19-3. The Urban Renewal Handbook makes it clear that the disposal methods were adopted by HUD to afford "(a) potential redevelopers the opportunity to make their interest known and (b) to consummate disposals of project land in a fair and equitable manner and to consummate disposals of project land in a fair and equitable manner and to assure that they are open, in one way or another, to public scrutiny." (R. 70).

The Respondents, pursuant to its resolution adopting a modified "Competition-Negotiation" method, circulated what is designated as a Data Sheet, which Data Sheet was an invitation for redevelopers to submit *informal* proposals to the Respondents (R. 79). The Main Parking Mall was interested in redeveloping the project land. They responded to the Data Sheet by sending a Notice of Indication of Interest (R. 82), and on July 25, 1973, the Appellant presented an informal proposal to the Respondent Agency. The Amended Complaint further alleges that The Main Parking Mall proposal was rejected and that The Main Parking Mall was not dealt with

by the Respondents in a fair and equitable manner, as required by law as a condition to the federal government lending money to the Respondents. The Appellant was led to believe by the information given to it by the Respondents that only informal proposals were to be presented. Instead, as alleged in the Amended Complaint, the Respondents granted to Hartnett-Shaw an exclusive right to negotiate, which offer the Respondent Redevelopment Agency did not have the authority to give. The Respondents rejected the Appellant's informal proposal without giving it the opportunity to present a formal proposal. The Data Sheet says in part:

> "The Redevelopment Agency reserves the right to reject any or all proposals, but by July 16, 1973, intends to select *developers* from whom *final* proposals will be requested." (R. 79). (Emphasis added).

Also the letter dated June 5, 1973 (R. 80) says in part:

> "Your proposal *may be in whatever detail you may wish* and is intended to assist you and the Agency in determining the extent of your interest, the feasibility of your proposal, and *whether or not the Agency wishes to request that you submit a formal proposal at a later date.*" (R. 80-81). (Emphasis added).

The Appellant admits that according to the *Handbook* the Redevelopment Agency reserves the right to reject any or all proposals. But the *Handbook* re-

quires that certain conditions must be met before a proposal can be rejected:

> "The integrity of the program, locally and nationally, and the development of a market for urban renewal land, dictate that this right (right to reject proposals) be exercised sparingly and *only* in cases *where the proposals do not meet the terms and conditions of the offering, do not provide the minimum approved prices, nor achieve the announced objectives of the offering.*" (R. 74, 214).

It is alleged in the Amended Complaint that the Appellant did meet all the terms of the offering, i.e., to present an informal proposal. The Respondents rejected the proposal without the conditions being met. There was no "minimum approved price" set nor were there any "announced objectives of the offering" as required by the *Handbook.* The *Handbook* details all the requirements to be put in the "Invitation for Proposals" and the "Offering Documents." (R. 73-74; 219-223). The Appellant was never informed, for example, of the disposal method nor the "description of the criteria and procedural steps pertinent to the selected method." (R. 74; 219-223).

If the Appellant's evidence will support its allegations, it cannot be said with a certainty that The Main Parking Mall is not entitled to the relief sought. *Blackman v. Snelgrove,* supra. It is clear that the Amended Complaint does state a cause of

action against the Respondents and the Lower Court erred in dismissing the Amended Complaint.

Count II of the Amended Complaint (R. 73) sets forth the conditions that were not followed by the Respondents in selecting the redeveloper for this project property. The Appellant is claiming that since these conditions were not complied with, it was not given a fair opportunity to compete or to present a proposal to develop the project land. The property was not disposed of in a fair and equitable manner and the Appellant was not given a fair opportunity to make its proposal and interests known. The Amended Complaint alleges that the Respondents had prior dealings with Hartnett-Shaw Development Company, Inc. and that the Appellant was not informed of any prior discussions with the other redevelopers. This in itself is a violation of the conditions of the loan. (R. 224). The Appellant is asserting its right as a potential redeveloper to be dealt with in a fair and equitable manner.

Now assuming that the Appellant could prove that the Respondents were required to comply with the conditions of the loan they received from the federal government and that they did not comply with these conditions in dealing with the Appellant, and that the Appellant was thereby damaged and severly hampered in its attempt to purchase the property for redevelopment purposes, the Appellant has a cause of action against the Respondents and

would be entitled to the relief prayed for. The Appellant is asking that the Redevelopment Agency be required to follow the Utah law, § 11-19-3 Utah Code Ann. which requires than when federal funds are being used by the Respondents organized under Utah law, that they would comply with the "conditions of such loan . . . " The Appellant is asking nothing more in its Amended Complaint than to give it a fair and equitable opportunity to submit a proposal and a bid in fair competition with other redevelopers. As a bidder the Appellant is entitled to bring this suit to require the Respondents to comply with the Utah law and the rules and regulations imposed upon them by HUD. In order to accomplish this the contract with Hartnett-Shaw must be declared to be invalid, and the Respondents must be ordered to follow the conditions of the grant which it has received from the Federal Government. The Respondents have abused their authority and powers to the detriment of the Appellant in selecting a redeveloper and granting to Hartnett-Shaw an exclusive right to negotiate. The Respondents should not be allowed to abuse their authority and then be relieved of any and all obligation to answer for their abuses. There is no other remedy available to the Appellant if the Judgment of Dismissal is allowed to stand, and the Respondents will have abused their powers without having to be subject to judicial review.

Applying the test outlined in *Blackham v. Snelgrove, supra,* it is clear that the Appellant's Amended

Complaint does state a cause of action and that the Lower Court erred in dismissing it.

POINT I (A)

THE DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, HAS JURISDICTION IN THIS CASE. THE APPELLANT IS SEEKING TO ENFORCE A UTAH STATUTE, I.E., SECTION 11-19-3 UTAH CODE ANNOTATED 1953 WHICH REQUIRES THAT A NEIGHBORHOOD DEVELOPMENT AGENCY COMPLY WITH RULES AND REGULATIONS ACCOMPANYING THE GRANTING OF FEDERAL FUNDS TO THE LOCAL AGENCY.

The Respondents in their Motion to Dismiss asserted as one of their grounds for dismissal that the Appellant had no standing to bring this action. In its Memorandum in Support of its Motion to Dismiss (R. 12) the Respondents asserted that the Appellant had no standing. In support of this contention they relied almost exclusively on *Johnson v. Redevelopment Agency of the City of Oakland*, 317 Fed. 2d 872 (9th Cir. 1963) *Cert. denied*, 375 U.S. 915 (1963). In *Johnson* the plaintiffs were being displaced as a result of an urban renewal project created by the local agency in Oakland, California. They were suing on the theory that the agency had not complied with the federal statutes governing the relocation of persons displaced by renewal projects. A comment in 9 ALR Fed. 415, Section 3 (a) says: "Standing to raise constitutional claims against urban renewal projects has been summarily denied in

other cases, which, however, appear not to represent the trend of current judicial thinking." Several cases have been decided since *Johnson* which grants standing to plaintiffs in situations identical to those of the plaintiffs in *Johnson*. Also the federal statutes have been amended since *Johnson* to make more clear the congressional intent to protect interests of residents about to be displaced. In *Western Additional Community Organization v. Weber*, 249 Fed. Supp. 433 (D. C. Cal. 1968), the plaintiffs were displaced and alleged noncompliance with federal laws made for such displacees. The court said that federal administrative action is subject to judicial review unless the statute itself precludes such review, or when agency action is commited to agency discretion under law. The Federal Housing Act of 1949, cited by the Respondents, does neither and the court ruled that the plaintiffs were entitled to judicial review. This court cited the *Johnson* case but said that since 1963 when *Johnson* was decided, the Federal Housing Act had been amended to make the congressional intent to protect interests of displaced residents more clear, and that the U.S. Supreme Court had significantly broadened the concept of standing to sue.

Judicial review of agency action is allowed except where: "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion." 5 U.S.C. Sec. 701. See also 5 U.S.C. Sec. 702, 704. The Federal Housing Act of 1949 does not either preclude judicial review or grant agency dis-

cretion. Therefore, judicial review has been allowed in several cases, such as *Norwalk Core v. Norwalk Redevelopment Agency*, 395 Fed. 2d 920 (2d Cir. 1968); and *Powelleton Civil Home Owners Association v. Department of Housing and Urban Development*, 284 Fed. Supp. 809 (D.C. Pa. 1968). Even though the U.S. Supreme Court has not expressly ruled on this question, recent decisions of that Court presage no disagreement with the position taken by some of the lower federal courts in respect of standing to seek judicial review of agency action in urban renewal projects. Respondents have admitted in their memorandum in support of its motion to dismiss (R. 12) that if the contract entered into by the Redevelopment Agency was illegal because it violated state law, then the court would have jurisdiction and power to hold such contracts invalid. That is precisely what the Appellant is submitting in this case. The Redevelopment Agency has violated state law in that it has not met the requirements of Section 11-19-3 of the Neighborhood Development Act. If the Redevelopment Agency did not comply with the conditions of the federal grant then it is in violation of the state statute. The Appellant is not claiming a violation of the Housing Act of 1949 nor claiming violation of any of the agreements between the Respondents and HUD. The Respondents' reliance upon *Johnson*, therefore, is misplaced. The Appellant is not seeking relief against a federal official or a federal agency administering federal laws.

Salt Lake City is a political subdivision of the State of Utah and is amenable to suit in the courts of this state. Utah Code Annotated, Sec. 10-7-1 (1953) says: "Cities and towns shall be bodies politic and corporate with perpetual succession. They shall be known and designated by the name and style adopted, and under such name may sue and be sued, * * *." The Respondent Redevelopment Agency of Salt Lake City exists under the provisions of the Utah Neighborhood Development Act, Title 11, Chapter 19, Utah Code Annotated (1953) and is, in fact the Salt Lake City Commission acting in the capacity as the Redevelopment Agency. The Utah Neighborhood Development Act makes no provision for administrative review of agency actions comparable to that provided in connection with other state agencies and which, in challenges to actions of such state agencies is prerequisite to judicial review. The Appellant here asserts that the Respondents, as bodies politic of the State of Utah or agencies or divisions thereof, are within the personal jurisdiction of the District Court of Salt Lake County, and that the subject matter of this suit, i.e., the activities of the Respondents in carrying out the requirements of the Utah Neighborhood Development Act, is within jurisdiction of the District Court of Salt Lake County. The Appellant is not attempting to incorporate the federal regulations into the state law. The Respondents do, however, have the responsibility of complying with the conditions of any assistance it receives

from government or private source. The Appellant is entitled to the opportunity to present its case at trial and attempt to prove that the Redevelopment Agency has in fact received federal funds and that certain conditions are attached to the receiving of these funds, and that the Redevelopment Agency has not complied with these conditions and has not disposed of the project land in a fair and equitable manner as is required by the regulations. If those requirements are not met, then the Redevelopment Agency is in violation of the state statute which imposes upon them a mandate to comply.

The Appellant has alleged in its Amended Complaint that it is a Utah Corporation, and that its sole business has been the maintenance of parking facilities on property now located within the redevelopment project, said parking facilities providing intra-block entry into the stores owned or leased by the shareholders of the Appellant. The Redevelopment Agency condemned that property and to avoid a condemnation suit the Appellant entered into an agreement wherein reasonable compensation was paid to the Appellant for the project land. The Appellant did not, however, terminate its interest in that land simply because it was sold to the Redevelopment Agency. The Redevelopment Agency did not give the Appellant an opportunity to bid, in accordance with law, or to make its interest known, or to present a proposal for the redevelopment of this project property. The Appellant is only asking that the law and conditions be complied with so that the

Appellant can have an opportunity to compete to acquire the project land for redevelopment purposes.

POINT I (B)

THE TRIAL COURT'S DISMISSAL OF THE APPELLANT'S AMENDED COMPLAINT FOR FAILURE TO STATE A CAUSE OF ACTION WAS IN EFFECT A SUMMARY JUDGMENT.

Rule 12 (b) of the Utah Rules of Civil Procedure says in part:

> "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, *matters outside the pleading are presented to* and *not excluded by the court*, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." (Emphasis added).

On May 20, 1974 the Respondents filed their motion to dismiss the Appellant's Amended Complaint (R. 49). Incorporated in its motions were the affidavits of Mayor E. J. Garn and Danny Wall which had been previously filed with the Respondents' Motion to Dismiss the original Complaint. Also a supplemental affidavit signed by Danny Wall was included in the record in support of the Respondents' motions (R. 24). In addition to these affidavits several exhibits were also made a part of the record. The affidavits of Mayor E. J. Garn and Danny Wall

and the exhibits were "matters outside the pleadings . . . presented to and not excluded by the court, . . ." The Respondents' Motion to Dismiss for failure to state a claim under Rule 12 (b) (6) therefore became a Motion for Summary Judgment and must be governed by Rule 56 of the Utah Rules of Civil Procedure.

Rule 56 (c) says that a summary judgment can only be rendered if there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The Appellant submits that there are several genuine factual issues and that the Respondents are not entitled to a judgment as a matter of law. The Trial Court's Judgment of Dismissal of the Amended Complaint for failure to state a cause of action is tantamount to a judgment on the merits. A motion under Rule 12 (b) usually raises a matter of abatement and a dismissal for any of the reasons listed in that rule will not prevent the claim being reasserted once the defect is remedied. Thus a motion to dismiss for lack of subject matter or personal jurisdiction, or failure to join a party under Rule 19 only contemplates a dismissal of the proceedings, not a judgment on the merits for either party. Similarly, although a motion to dismiss under Rule 12 (b) (6) for failure to state a claim itself, the movement merely is asserting that the pleading to which the motion is directed does not sufficiently state a claim for relief. Unless the motion is converted into one

for summary judgment as permitted by the last sentence of Rule 12 (b), it does not challenge the actual existence of a meritorious claim. The motion under Rule 12 (b) (6) only entails an examination of the sufficiency of the pleadings unless converted to a motion for summary judgment. A motion for summary judgment typically is based on the pleadings and any affidavits, depositions, and other forms of evidence relevant to the merits of the challenged claim or defense that are available at the time the motion is made. The Lower Court is saying then that on the basis of the record as it presently exists, there is no genuine issue as to any material fact and that the Respondents are entitled to a judgment on the merits as a matter of law. The Utah Supreme Court has ruled that a sumary judgment is proper only if the pleadings, depositions, affidavits and admissions show that there is no genuine issue of any material fact and that the moving party is entitled to a judgment as a matter of law. *In re Williams' Estates*, 10 Utah 2d 83, 348 P.2d 683. *Hatch v. Sugarhouse Finance Company*, 20 Utah 2d 156, 434 P.2d 758. The record shows that there are several genuine issues of fact which cannot be dismissed summarily.

In addition to the Motion to Dismiss filed by the Respondents, they also filed an Answer to the Amended Complaint of Appellant (R. 51), in which Respondents denied they have failed to comply with essential provisions of the *Handbook*, which Appellant has alleged they must comply with. Respondents

raised the issue that any breach by the Respondents with HUD or with any regulations affecting such contractual relationships is not a proper basis upon which Appellant may rely in pursuing the relief as sought in said Amended Complaint. The Appellant has alleged that Respondents are required to follow certain procedures, rules and regulations, and has alleged that Respondents have not done so. The Respondents, by their Answer to the Amended Complaint, have denied that they have not complied. This is one of the main issues raised by the Appellant, and which is denied by the Respondents. Issues of fact are clearly created by the Amended Complaint and the Answer to the Amended Complaint.

An answer denying specific allegations raises genuine issues of material facts. Therefore, Respondents cannot as a matter of law be granted a summary judgment.

SUMMARY

The Trial Court committed error in dismissing Appellant's Amended Complaint. The Amended Complaint states a cause of action against the Respondents; the Answer to Amended Complaint by Respondents creates an issue as to material facts.

Under no condition could it be said with a certainty that the Appellant is not entitled to relief under any state of facts as alleged in its Amended

Complaint. The Appellant in substance has alleged that Respondents have not complied with the law of Utah by which it was created, and its powers given. The Respondents claim they have complied. There is no federal law involved; the only law involved is the Utah Neighborhood Development Act, Title 11, Chapter 19, Utah Code Annotated (1953 as amended). The issue is whether or not the Respondents have abided by the Utah law and the regulations and agreements entered into with HUD. The Appellant was an invited bidder, invited by the Respondents, and is entitled to have the rules and regulations and the law complied with. It certainly has a right as an invited bidder to submit a bid in accordance with the Utah law and regulations of HUD, and when the Respondents do not follow the rules and regulations under the law in the performance of the choosing of the bidder, Appellant has a right of action.

The Trial Court committed error in dismissing the Appellant's Amended Complaint, and The Main Parking Mall asks this Court to reverse the Lower Court's ruling and remand this case to the Lower Court for further proceedings.

Respectfully submitted,

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