

1978

Loye E. Martindale, Darwin W. Larson, Carol W. Clay Logan City Municipal Corporation; and the Municipal Council of Logan City v. Mayor Desmond L. Anderson, City Attorney J. Blaine Zollinger, City Auditor And Budget Director Duane A. Beck : Brief of Appellant

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Martindale v. Anderson*, No. 15498 (Utah Supreme Court, 1978).
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IN THE SUPREME COURT OF THE STATE OF UTAH

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LOYE E. MARTINDALE, DARWIN :
W. LARSON, CAROL W. CLAY; :
LOGAN CITY MUNICIPAL COR- :
PORATION; and THE MUNICIPAL :
COUNCIL OF LOGAN CITY, :
:

Plaintiffs and :
Respondents, :
:

vs. :

Supreme Court No. 15498

MAYOR DESMOND L. ANDERSON, :
CITY ATTORNEY J. BLAINE :
ZOLLINGER, CITY AUDITOR :
AND BUDGET DIRECTOR DUANE :
A. BECK, :
:

Defendants and :
Appellants. :

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BRIEF OF APPELLANT

* * * * *

An Appeal From the Judgment of the First Judicial
District Court in and for The County of Cache, State of Utah

* * * * *

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Appellants

FILED

JAN - 5 1978

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TABLE OF CONTENTS

	<u>Page</u>
NATURE OF THE CASE	1
DISPOSITION IN LOWER COURT	1
NATURE OF RELIEF SOUGHT ON APPEAL.	2
STATEMENT OF FACTS	2
ARGUMENT	8
POINT I	
THE 1977 ALTERNATIVE FORMS OF MUNICIPAL GOVERNMENT ACT GOVERNS ALL GOVERNMENTAL OPERATIONS IN A CITY ADOPTING A COUNCIL- MAYOR FORM OF GOVERNMENT AND PROVIDES FOR A COMPLETE SEPARATION OF EXECUTIVE AND LEGISLATIVE POWER.	8
POINT II	
THE AUTHORITY TO MANAGE CITY PROPERTY, INCLUDING THE POWER TO SELL AND -- WITHIN BUDGETARY LIMITS -- TO PURCHASE IS AN EXECUTIVE FUNCTION	19
POINT III	
THE POWER TO APPROVE SUBDIVISION PLANS HAS BEEN DELEGATED BY THE COUNCIL TO THE MAYOR.	26
POINT IV	
THE BUDGET OFFICER, WITH THE APPROVAL OF THE MAYOR, MAY TRANSFER FUNDS WITHIN A DEPARTMENTAL BUDGET WITHOUT PRIOR MUNICI- PAL COUNCIL APPROVAL	28
POINT V	
THE MAYOR HAS NO OBLIGATION TO ASSEMBLE DATA AND DELIVER IT TO AN INDIVIDUAL COUNCILMEMBER ON DEMAND.	31

POINT VI

THE COURT ERRED IN HOLDING THAT THE
COUNCIL COULD EXPEND CITY FUNDS FOR
LEGAL SERVICES TO SET ASIDE PAST SALES
OF REAL PROPERTY EXECUTED BY THE MAYOR. . . . 32

CONCLUSION. . . . 33

AUTHORITIES CITED

CASES

<u>Ashmore v. Greater Greenville Sewer Dist.</u> , 44 S.E.2d 88 (S.C. 1947)	23
<u>Bird v. Sorenson</u> , 16 U.2d 1, 394 P.2d 808 (1964). . . .	20, 21
<u>Keigley v. Bench</u> , 97 Utah 69, 89 P.2d 480 (1939). . . .	20
<u>Monahan v. Funk</u> , 127 Ore. 580, 3 P.2d 778 (1931). . . .	22
<u>Panama Refining Co. v. Ryan</u> , 293 U.S. 288, 79 L.Ed 446 (1934)	28
<u>Rampton v. Barlow</u> , 23 U.2d 383, 464 P.2d 378 (1970) . .	17, 27
<u>Revne v. Trade Commission</u> , 113 Utah 155, 192 P.2d 563 (1948)	28
<u>Spartanburg County v. Miller</u> , 135 S.C. 348, 132 S.E. 673 (1924).	24
<u>Springer v. Philippine Islands</u> , 277 U.S. 189, 72 L.Ed 845 (1928)	18, 26
<u>State ex rel Frank v. Salome</u> , 167 Kan. 766, 208 P.2d 198 (1949).	22
<u>Taylor v. Lee</u> , 119 Utah 302, 226 P.2d 531 (1951). . . .	18
<u>Union Trust Co. v. Simmons</u> , 116 Utah 442, 211 P.2d 190 (1949)	28

STATUTES

U.S. Const., art. I §1, art. II §2.	8
Utah Const., art. V §1.	8, 18

Utah Code Annotated (1953)

§§10-6-1 to 3 (repealed)	10
§10-6-24 (repealed)	11
§10-7-1 (repealed)	8
§10-8-2	9
§10-9-25	26
§10-10-46	28, 30

Utah Code Annotated (1975)

§10-6-112 (repealed)	11
--------------------------------	----

Utah Code Annotated (Supp. 1977)

§10-1-114	10, 11
§10-1-201	8, 13
§10-3-101	12
§10-3-1201 <u>et. seq.</u>	8, 12
§10-3-1205	14
§10-3-1209	12
§10-3-1219	16

SESSION LAWS

Act of March 12, 1975, Ch. 33 §1 <u>et. seq.</u> [1975] Laws of Utah 106	2
Act of February 28, 1975, Ch. 213, Item 51 [1975] Laws of Utah 1025	29

ORDINANCES

Logan, Utah, Ordinances §17-3-1 (1976)	27
Logan, Utah, Ordinances §17-3-2 (1976)	27
Logan, Utah, Ordinances §17-3-3 (1976)	24

TREATISES

Annot., 122 A.L.R. 776 (1939)	23
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BRIEF OF APPELLANT

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NATURE OF THE CASE

This is a declaratory judgment action wherein the Plaintiffs sought an adjudication in regard to the respective powers of the Municipal Council and of the Mayor under the council-mayor optional form of municipal government.

DISPOSITION IN LOWER COURT

The lower court entered a declaratory judgment holding that the mayor has only the powers specifically granted him by statute and that all other powers, including the executive powers not specifically granted to the mayor, are vested in the municipal council.

NATURE OF RELIEF SOUGHT ON APPEAL

The defendant-appellant seeks an adjudication by this court that under the statutes of the State of Utah in a municipal government organized and established under the optional form known as the council-mayor form, all executive power is vested in the mayor and all legislative power in the municipal council. The appellant also seeks reversal of the trial court's ruling in regard to specific matters where such rulings are based on erroneous decisions as to the scope of the mayor's power.

STATEMENT OF FACTS

The 1975 session of the Legislature of the State of Utah enacted the Optional Forms of Municipal Government Act, Act of March 12, 1975, Ch. 33, § 1 et. seq. [1975], Laws of Utah 106 (repealed 1977) [hereinafter cited as the 1975 Optional Forms Act]. In the spring of 1975, citizens of Logan, Utah, took steps to initiate an election to determine whether or not the city should adopt the council-mayor form of government as provided for by the 1975 Optional Forms Act, § 10 (1975), in place of the traditional commission form of government which had theretofore been in effect. In an election held July 1, 1975, the new form of government was approved to become effective on the 5th day of January, 1976. The Mayor,

having two years left to run on his elected term, carried over from the commission form into the new mayor-council form of government. Five new councilmembers were elected in the municipal election in the fall of 1975.

Within the first year of the operation under the new form of government, a dispute arose between the Mayor and three of the members of the municipal council as to the extent of the Mayor's authority under the new form of government. Three of the councilmembers took the position that the Mayor had only those powers specifically delegated to him by statute while all other municipal powers, both legislative and administrative, were vested in the municipal council. The Mayor and two of the councilmembers took the position that all of the executive power was vested in the Mayor and all of the legislative power in the council. That same division of opinion still persists. The three councilmembers that sought to restrict the Mayor's power were the parties Plaintiff in this action below, while the other two councilmembers who agreed with the Mayor in interpreting the scope of his power have appeared as amicus curiae in this case in support of the Appellant's position.

The principal points of contention between the Appellant and the opposing councilmembers have to do with the Mayor's authority to manage city property -- specifically to

buy and sell property -- and with the Mayor's authority to make budget adjustments after the council has adopted a budget. The Mayor's position was that the new council-mayor form vested in him exclusive authority over all specific property transactions, their being administrative acts exercisable only by the Mayor as executive within the new separate powers municipal government. The municipal council was of the view that, since Utah statutes did not expressly grant real property authority to the Mayor, he could not enter into specific transactions without council approval. The council also urged that all such transaction already effected by the Mayor alone were void, subject to rescission. Obviously, a resolution of this dispute is a central aim of this appeal.

A dispute also arose below as to the obligation of the Mayor to provide information to the council. The Mayor took the position below that in the absence of a specific resolution or ordinance by the council, his obligation under the statutes to report to the council was to report on the state of the city in the time and form in which he chose to report. On the other hand, one councilmember, the Plaintiff Larson, demanded that the Mayor search the records, compile and make copies of certain documents and deliver them to him. This the Mayor declined to do but did not contest the right of the Plaintiff Larson to examine the documents in question and to make copies for himself. While this appears to

be a rather petty argument, it shows the extent to which differing interpretations of the parties' respective powers and duties disrupted city governance and underscores the need for a definitive ruling on these questions from this court.

During the evidentiary hearing on the case, it developed that there was no dispute between the Plaintiff and Defendant as to some of the claims for relief set forth in the complaint. In regard to the third claim for relief, both sides agreed that the Mayor could make intra-departmental budget transfers without council approval but could not make inter-departmental transfers without such approval. The court held that there was one incident of an inter-departmental transfer made by the Mayor without council approval. Appellant is unable to identify any evidence substantiating this holding, but in view of the fact that both sides agree as to the general principle, there seems to be no need for declaratory relief on this particular issue.

However, the court held below that even in case of an intra-departmental transfer, the Mayor cannot use funds from a specifically budgeted-for item to purchase a different object even in cases of need, without council approval, but may only readjust uncommitted funds. The Mayor, on the other hand, contends that within a department, specific mention of particular items to be purchased are advisory only and that

the Mayor with the consent of the Budget Officer may transfer funds which are recommended for the purchase of a road grader, for example, to the purchase of an automobile or even to the employment of additional personnel, as the city's needs indicate.

In regard to the Fourth Claim for Relief, The Approval of Subdivisions, Appellant agrees that while the approval and recording of subdivision plats is in the nature of an executive action, because of the peculiar wording of the state statute, this power rests with the council. However, it is the position of the Appellant that a valid delegation of such authority to the Mayor was made by the council, by ordinance. (Record, p. 241-4)

In regard to the Fifth Claim for Relief, Appellant agrees that the council may spend city funds for the prosecution of this action to determine their rights and duties. On the other hand, appellant questions the right of the council to use city funds to pay for legal services to set aside consummated real estate transactions made by the Mayor. Both sides agree, however, that the resolution of this matter depends upon the resolution of the main question in this action, namely, did the Mayor have the right to make the real estate sales and purchases?

The Seventh Claim for Relief was dismissed by stipulation.

Therefore, this case distills to a determination of the following issues:

1. Does the alternate council-mayor form of government create a true separate-powers government thereby vesting the whole of executive power in the Mayor?
2. Is the management of city property, including the purchase and sale of property within budget limitations, an executive power?
3. Is the decision to adjust committed funds from one item to another as the city's needs dictate an executive power and, therefore, not subject to the specific departmental budget recommendations made by the municipal council?
4. What is the extent of the Mayor's obligation to assemble information for individual councilmembers?

It is the position of the Appellant that the factual situation was not sufficiently clear for the court below to have granted summary judgment on several of the points covered in the first order. However, the factual situation is sufficiently clear at the present time as a result of the later evidentiary hearing to enable this court and counsel to delineate the basic issues presented by this case. Appellant, therefore, will not press on appeal the question of the propriety of the summary judgment.

ARGUMENT

POINT I

THE 1977 ALTERNATIVE FORMS OF MUNICIPAL GOVERNMENT ACT GOVERNS ALL GOVERNMENTAL OPERATIONS IN A CITY ADOPTING A COUNCIL-MAYOR FORM OF GOVERNMENT AND PROVIDES FOR A COMPLETE SEPARATION OF EXECUTIVE AND LEGISLATIVE POWER.

It is Appellant's position that Utah's legislature intended the optional council-mayor form of municipal government established by the 1975 Optional Forms Act, as amended by Utah Code Ann., §10-3-1201, et seq. (Supp. 1977), to be patterned after the federal and state separate-power models. See U.S. Const., art. I. §I, art. II §1; Utah Const., art. V §1. The point of departure in any analysis of a particular type of governmental power is the organic law that creates the government itself. In the case of the federal and state governments, this creating body of law consists of these respective constitutions. In the case of the municipal model, state statutes are the creating law.

Initially, the state's legislature determines that the needs of the citizenry would be served by smaller, more localized, units of social order. Thus state statutes create municipalities -- new "governments" albiet in an abstract sense. (Utah Code Ann., §10-1-201 (Supp. 1977), repealing, §10-7-1 (1953)).

Since these municipal governments cannot serve the needs of their respective populaces unless they are vested with the ability to act in concrete ways, the state legislature next determines what actions these governments must be able to take. Having determined that it will further the general welfare if municipal governments are able to maintain order, to regulate conduct, and to provide for the needs of their citizens as they arise, the state legislature acts to grant these entities the specific power to do so. Obviously, when the legislature undertakes to grant the municipal government power to act, it grants the whole of that power -- both its legislative and its administrative components. This general vesting of the power in municipal government to act as an entity is reflected in Chapter 8 of Title 10 of the 1953 Utah Code, entitled "Powers and Duties of All Cities." This body of legislation operates as a general grant of the power to act as a government to municipalities.

Section 10-8-2 of the Code empowers the municipal government to:

purchase, receive, hold, sell, lease,
convey and dispose of property real
and personal for the benefit of the
city. . . .

This legislation only grants the governmental entity the specified power -- it says nothing about the manner of its

exercise. Nor does the statute attempt to separate the power to manage city property into its legislative or administrative components. Again, the statute simply vests the "whole" power over city property in the municipal governmental unit.

Having created the municipal unit of government and having vested it with power over its property and citizens, the state legislature then specifies the form under which the new governmental entity will operate. Utah municipalities have traditionally governed through a single body. Sometimes the body was referred to as the "City Council," or "City Commission" and sometimes as the "governing body." There has not traditionally been any provision for a separation of legislative from executive powers. See Utah Code Ann., §10-6-1 to 3 (1953), repealed by §10-1-114 (Supp. 1977), repealing, §10-6-35 (1975). Even under the 1977 Optional Forms Act, one of the two optional forms provided for -- the council-manager form -- continues to vest both executive and legislative functions in a single body.

Although Utah cities were, prior to the 1975 Optional Forms Act, authorized to operate via a mayor and city council or via city commission alone, the council or commission was the part of the city government that held all of the "governmental" power. Where there was a mayor, he was simply an administrator, having no vote on policy matters, and no veto. See Utah Code Ann.

§10-6-24 (1953), repealed, §10-1-114 (Supp. 1977). Thus, while the traditional city mayor might be said to have been a part of municipal government, he held no municipal governmental power, this having been vested in the council by virtue of the statutorily specified form of its exercise. In other words, prior to 1975, the whole of governmental power, both executive and legislative, was vested in city councils and boards of commission simply because that was the only statutorily allowed means of exercising municipal government power.

In 1975, however, the state legislature saw fit to provide an alternative to all Utah cities. This Act did not alter the existence of local governments, nor did it expand or contract the scope of the power vested in these units of government. 1975 Optional Forms Act, §6. What it did was to provide new forms for the exercise of this governmental power because:

increasing demands for services and growing citizen awareness and concern [had] strained the ability of Utah's local governments to respond effectively [and there was therefore] a need to provide optional forms of municipal government under which citizens may vote to organize to meet their needs and desires.

Id. §4, U.C.A. §10-6-112 (1975) repealed, §10-1-114 (Supp. 1977).

One of the alternatives created to meet these new demands was the council-mayor form. This change in form affected municipal governments in two ways. First, it vested

the mayor with governmental power formerly reserved exclusively to councils and to commissions, 1975 Optional Forms Act, §10. Second, it divided this vested governmental power into its executive and legislative components for the first time. See Id., §21.

Unfortunately, the state legislature assumed that it would be clear that this new council-mayor form was to be patterned after the state and federal separate-powers governments. Because this was not made explicit, the 1977 legislature added the following clarifications:

§10-3-101. Each municipality shall have a governing body which shall exercise the legislative and executive powers of the municipality unless the municipality is organized with separate executive and legislative branches of government.

. . .

§10-3-1209. The optional form of government known as the council-mayor form vests the government of a municipality which adopts this form in two separate, independent and equal branches of municipal government; the executive branch consisting of a mayor and the administrative departments and officers; and the legislative branch consisting of a municipal council.

. . . (Emphasis added)

Optional Forms of Municipal Government Act, Utah Code Ann., §10-
et seq. (Supp. 1977) [hereinafter cited as the 1977 Optional Forms Act].

The court below recognized that the 1977 Act was merely a more explicit statement of the intent of the 1975 Act when it stated in its final declaratory summary judgment:

The functions of the council embodied in this section are retained in Section 10-3-1201 of Senate Bill 204, but it does eliminate the phrase that the municipal council is the governing body. However, the functions and duties of the council and the functions and duties of the mayors are not substantially changed and remain basically the same. (R. p. 440).

Finally, therefore, the Utah State Legislature has created a means by which a municipality can exercise its governmental powers that is completely in accord with the federal and state models. Clearly, this new optional form modifies the literal language of Chapter 8 of Title 10 of the Utah Code. Now the "Powers and Duties of all Cities," vest in city councils exclusively, only in cases where the traditional governmental forms are retained. Where the new, optional council-mayor form is implemented, the whole of governmental powers vests in both the mayor and the municipal council. But, again consistent with the federal and state prototypes, the power is divided. The whole of the executive power now vests exclusively in the mayor. The whole of the legislative power now vests exclusively in the municipal council.

The 1977 Optional Forms Act is relatively short. The legislature did not attempt to revise all of the municipal statutes to make them applicable to the new council-mayor form of government nor to specifically explain the effect of the new Act on their interpretation. Rather, it provided in Utah Code Ann. §10-3-1205, (Supp. 1977):

Any municipality operating under this part shall retain and have the right, powers and duties now or hereafter granted to municipalities of the same class and those rights, powers and duties which could be granted the municipalities of the same class.

Therefore, those statutes creating municipalities and granting them corporate powers apply fully to the new form. The interpretation of those statutes, however, with respect to the manner of the exercise of those governmental powers is modified by the division of power established by the new council-mayor form. In short, where the general municipal laws are consistent with the council-mayor form, they are to be literally applied. Where they are not consistent, they are superseded and modified to the extent of the incompatibility.

The difficulty in this case arises principally from the fact that the general municipal law frequently provides that all municipal governmental power is vested in the "governing body" or in the city council or board of commissioners.

To repeat for emphasis, these provisions were all designed to apply to a form of government where the executive and legislative powers were vested in a single "governing body." However, the term "governing body" ceases to have any meaning in a mayor-council form because there is no longer such a single entity. Indeed, as was shown above, the statutes vesting governmental power in any single body are completely modified as applied to this new, separate-powers form of government.

Despite the explicit language contained in the 1977 Optional Forms Act, and the logical modification the Act has had on the general municipal statutes, Respondents continue to maintain that some inherent part of the executive power resides in the municipal council. This position is taken in the memoranda submitted to the trial court by counsel for the Respondents and during oral argument before the trial court. At the time of the evidentiary hearings, counsel for the Respondents stated:

We think, your Honor, that there is a question and that is a very important question, we think that, as Mr. Rampton framed it here, it is in part a question and fundamentally a question as to whether any administrative powers reside in the Council or whether they are in fact only and solely a legislative body. (Tr. p. 130)

In spite of the fact that the law now specifically provides that there is no governing body under the council-mayor form of government and that the intent of the law clearly is that the whole of executive power shall be vested in the mayor and only the legislative powers in the council, the trial court agreed with Respondents and held that the general powers of the municipality, both legislative and executive, reside in the council except where specifically by statute, e.g. Utah Code Ann. §10-3-1219 (Supp. 1977), they are granted the mayor.

Appellant has shown, however, that the question of who is vested with what specific power is not a question of statutory provision, but is, as in all separate-powers governments, a question of whether the power is executive or legislative in nature. The distinction between executive and legislative powers and functions is elaborated below. Nevertheless, it bears noting here that in the case of property transactions, the mayor in this new form has power over specific sales, exchanges, leases and purchases. The council, subject always to mayoral veto, has exclusive power over the amount of monies to be spent and over the general policies that broadly govern all transactions. The same holds true of budget matters. The council's exclusive province is to fix the total departmental budget and amounts. The mayor has the exclusive power

to make adjustments within the budgets as the need arises. No other interpretation is consistent with the distinction between legislative and executive functions as established by this court.

The court below ruled that Logan's municipal council has "exclusive" power over all aspects of city real property transactions (Record, p. 441). This property issue alone warrants this court's reversal and clarification of the rule of law applied.

Appellant has shown that the council-mayor form of municipal government in the context of which this action arose is a true separate-powers form of government. Appellant will establish below that the acts he took with respect to real property transactions were clearly executive and administrative and not legislative within the rule established by this court. It necessarily follows, therefore, that the lower court's decision constitutes an impermissible violation of the fundamental separation of the powers of municipal government established by the citizens of Logan City.

This court has been adamant in its refusal to condone violations of the separation of governmental powers established by the Utah State Constitution. In Rampton v. Barlow, 23 U.2d 383, 464 P.2d 378 (1970), this court struck down an attempt by the state legislature to infringe on the governor's power of appointment.

It may be stated then, as a general rule inherent in the American constitutional system, that, unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power; the judiciary cannot exercise either executive or legislative power. The existence in the various constitutions of occasional provisions expressly giving to one of the departments powers which by their nature otherwise would fall within the general scope of the authority of another department emphasizes, rather than casts doubt upon, the generally inviolate character of this basic rule.

Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions. . . .

464 P.2d at 381, quoting with approval, Springer v. Philippine Islands, 277 U.S. 189, 72 L.Ed. 845 (1928). Cf. Taylor v. Lee, 226 P.2d 531, 534-37 (1951).

Since the optional council-mayor form was intended by the legislature to function as does the state model, it follows that this court should be as sensitive to violations of the separation of powers in the former case as it is in the latter. Indeed, if this court does not apply the same standards to this new separate-powers form of municipal government that it does to its state counterpart, it will itself have violated the separation of judicial from legislative functions fixed by Article V of the Utah Constitution. For if this court approves the lower court's decision, it will have judicially repealed the Optional Forms of Municipal

Governments Act. This court will have declared that there are no options of government available to municipalities and that all Utah cities are once again relegated to the old system of governance exclusively by a single body -- the city council or commission.

POINT II

THE AUTHORITY TO MANAGE CITY PROPERTY, INCLUDING THE POWER TO SELL AND -- WITHIN BUDGETARY LIMITS -- TO PURCHASE IS AN EXECUTIVE FUNCTION.

It is the Respondents' position in this case that the authority to manage city property and to purchase and sell property is vested exclusively in the municipal council. This is based upon the language in the general municipal statutes that such authority is granted to the city council or board of commissioners. Appellant has already established, however, that these general municipal statutes do not literally apply to the alternate council-mayor form. Rather the general statutes now vest these powers in the mayor and in the council. The specific manner of exercise, in this case who shall enter into specific real estate transactions, now depends solely on whether the action is an executive or a legislative function.

It is obvious that there will be few cases directly on this point for the reason that substantially all of the cases delineating the power of municipal councils or commissions are concerned with the structure of municipal government where

the executive and legislative are combined in a single body. It is possible, however, to approach this matter on the basis of court decisions applying to state government where there is a clear division of powers, as the Appellant has shown there is under the council-mayor form of municipal government. Considerable light is shed on this subject from cases interpreting the referendum laws as they apply to municipal governments.

Even though legislative and executive functions are combined in the conventional forms of municipal government, laws of most states, including the State of Utah, have been interpreted to hold that only municipal governmental action of a legislative nature may be the subject of a referendum, while actions of an executive-administrative nature are exempt from provisions of the referendum law. This principle is firmly established in the State of Utah by the case of Keigley, et al. v. Bench, City Recorder, 97 Utah 69, 89 P.2d 480 (1939). Following Keigley, other Utah cases have made a determination under the referendum laws in regard to particular matters in determining whether such matters were legislative or executive in character.

One case that is very helpful in this regard is the case of Bird v. Sorenson, 16 U.2d 1, 394 P.2d 808 (1964). In that case, the City of Washington Terrace in Weber County

had in effect a master zoning plan ordinance which had been properly adopted by the city council. Thereafter, the council, by ordinance, changed a specific piece of property from one classification to another. An attempt was made to submit the latter specific ordinance to the people under the referendum law. This court held that the ordinance assigning the specific piece of property to a specific classification was an administrative and not a legislative matter and that therefore the ordinance was not subject to the referendum provisions. Id.

The similarity to this case is obvious. In Bird the act establishing the zoning classifications and providing for the restrictions which would apply to each classification was legislative in character. Assigning a specific piece of property to a specific classification, on the other hand, was executive in character. In this case, Appellant agrees that the council had full legislative authority to prescribe by ordinance general rules to be followed by the executive branch in purchasing or selling property. They could, for example, have provided procedures for the giving of notice and the taking of bids. However, a determination that Tract A should be sold by the city to John Doe is not a legislative act; it is an executive act. It is final and binding upon the city as being done by the executive in the manner prescribed by the general law.

There are several cases from other jurisdictions which support this position. In the Oregon case of Monahan v. Funk, 137 Ore. 589, 3 P.2d 778 (1931), the council authorized the purchase of a specific piece of real property to be used by the City of Portland for a crematory site. An effort was made to cause the ordinance to be submitted to a referendum. The court held that the ordinance directing the purchase of a specific piece of property was administrative in nature and was therefore not subject to referendum. The following language from the court is helpful in this regard:

The act of purchasing a parcel of real estate is no more legislative than the act of purchasing a fire engine and truck. It is not the enactment of a permanent law for the guidance of the citizens of Portland. [citation omitted]

. . .

When the city of Portland receives the title to the land described in the ordinance and pays the purchase price thereof, the ordinance in question will practically be defunct. It prescribes no rule of civil conduct; it is not permanent, uniform, or universal in its application to the general public. It was a carrying out of the business of the council by giving authority to the commissioner of public utilities for convenience in effecting the transaction.

Id. at 780.

In the Kansas case, State ex rel Frank v. Salome, 167 Kan. 766, 208 P.2d 198 (1949), the Board of Commissioners of the City of Wichita passed a resolution granting a right

of way for a flood control project to the Army Corps of Engineers. An attempt was made to submit the matter to referendum. The court held that the ordinance was not one of general application, but was one applying to a specific piece of property and was enacted to carry out general policy and, therefore, was executive in nature and not subject to referendum.

An annotation on this subject is found at 122 A.L.R. 776 (1939). The general holding of that part of the annotation entitled "Acquisitions of Property by Municipalities" and the cases there cited, is that the acquisition of specific pieces of property, even though directed by ordinance in the case of a council or commission having both legislative and executive powers, is an act administrative in nature rather than legislative and therefore not subject to referendum.

A case directly in point involving the management of public property as applied to state government is a South Carolina case, Ashmore v. Greater Greenville Sewer District, 44 S.E.2d 88 (S.C. 1947). In that case, the legislature created an auditorium district and provided that two members of the legislature should sit on the board of trustees which managed such district properties. The court in declaring such provisions unconstitutional, stated:

An enlightening discussion of the quoted provision is found in Spartanburg County v. Miller, 135 SC 348, 132 SE 673, 677, where it was said: "As a general rule the Legislature of the state may not, consistently with the constitutional requirement here involved, undertake both to pass laws and to execute them by setting its own members to the task of discharging such functions by virtue of their offices as legislators, would seem to be self-evident. The principle, as we apprehend, upon the correct application of which depends the solution of any such problem as to the exercise by the Legislature of nonlegislative functions, is that the Legislature may properly engage in the discharge of such functions to the extent, and to the extent only, that their performance is reasonably incidental to the full and effective exercise of its legislative powers." Paraphrasing the sentence which precedes this quotation from the opinion, it may be said that the members of the Legislature from Greenville County were elected for the purpose of making laws, not administering them.

In 1976, the majority of the Logan municipal council expressed its recognition of the fact that the sale and purchase of property is an executive function not within the jurisdiction of the council. On the 16th day of September, the council amended the Logan City, Utah, Ordinances §17-3-3, to read as follows:

(a) No real estate, except cemetery lots, may be sold, traded or purchased by the executive branch of city government unless and until said proposed sale, trade or purchase is presented to the Municipal Council for its information and suggestions, if any.

(b) The executive branch of government shall not lease any city real property for a term more than five years unless and until the proposed lease is presented to the Municipal Council for its information and suggestions, if any.

(Defendant's Exhibit #8)

While this ordinance was being discussed, one of the councilmembers moved to amend it to add the words "with Municipal Council approval." Such motion died for want of a second (Defendant's Exhibit #9). It appears, therefore, that the majority of the council clearly recognized the executive power to buy and sell property and were merely exercising the well-established legislative function of legislative oversight. Under this principle, the legislature can review executive actions for the purpose of making possible decisions on future legislation, even though they do not have the power to approve or disapprove the action taken.

The court below brushed aside the above ordinance by stating that the council could not delegate the power to buy and sell property to the administrative branch by inference, although it could by a direct delegation. In so holding, the trial court missed Appellant's point entirely. Appellant's contention was not that this assigned the power by implication; his position was, and is, that the power clearly resided in the executive branch and the adoption of the ordinance was a recognition of that fact.

POINT III

THE POWER TO APPROVE SUBDIVISION PLANS HAS
BEEN DELEGATED BY THE COUNCIL TO THE MAYOR.

An anomalous situation arises in regard to the recordation of subdivision plans. This appears quite clearly to be an executive function. However, the statutory section covering the approval of subdivision plans, Utah Code Ann. §10-9-25, (1953) specifically provides that no subdivision plat may be recorded until the "legislative body has approved it and has noted its approval in writing on the plat itself." If the statute used the term "governing body" it would be Appellant's position, for the reasons heretofore stated, that the power was vested in the Mayor. However, as the statute specifically uses the term "legislative body" under the division of powers doctrine, this power of final approval undoubtedly is vested in the council.

This in no way, however, argues against Appellant's general position that under the council-mayor form of government the general executive powers are vested in the Mayor. In fact, it strengthens that position for the reasons set forth by the Supreme Court in Springer v. Philippine Islands:

The existence in the various constitutions of occasional provisions expressly giving to one of the departments powers which by their nature otherwise would fall within

the general scope of the authority of another department emphasizes, rather than casts doubt upon, the generally inviolate character of this basic rule.

277 U.S. at 202, 72 L.Ed at 849, quoted with approval in Rampton v. Barlow, supra, at 381.

This matter becomes of importance in this case because the Mayor has been approving and having recorded plats for what are known as inner block and cluster developments, but which appear to be, in effect, subdivisions. The authority to take such actions has been delegated to the Mayor by §17-3-1 and §17-3-2 of the Logan City Ordinances. The complete text of these ordinances appear at R. p. 241-48. An examination of these ordinances, adopted on July 15th and July 20th, 1976, will clearly show that the municipal council delegated this final approval and recordation power to the Mayor, and properly accompanied this delegation with explicit and detailed guidelines as to the exercise of the delegated power.

The trial court, however, held that, as the state statute specifically delegates to the "legislative body" the authority to approve subdivision plats, this function cannot be delegated. The matter of the delegation of legislative powers is the subject of a great body of law in this country. A full review of the cases is not required here. The general and almost uniformly accepted rule is that the legislative power can be delegated by the legislature to an administrative

body provided that the delegation is accompanied by sufficiently definite guidelines to make certain that the administrators in exercising the delegated power are exercising it in accordance with the legislative intent. See Panama Refining Co. v. Ryan, 293 US 288, 79 L.Ed. 446 (1934). See also, Union Trust Co. v. Simmons, 116 Utah 442, 211 P.2d 190, 192-3 (1949); Revne v. Trade Commission, 113 Utah 155, 192 P.2d 563, 467 (1948). The trial court erred, therefore, not in its holding that this power is assigned by statute to the council, but in its holding that it was not and could not be delegated to the Mayor even when accompanied by detailed guidelines.

POINT IV

THE BUDGET OFFICER, WITH THE APPROVAL OF THE MAYOR, MAY TRANSFER FUNDS WITHIN A DEPARTMENTAL BUDGET WITHOUT PRIOR MUNICIPAL COUNCIL APPROVAL.

The Appellant, Respondents and the court below are all in agreement on the general principle with regard to budgetary transfers. The problem comes, however, in regard to the specific application of the principles. Budgeting in all municipalities is governed by the Uniform Municipal Fiscal Procedures Act. Utah Code Ann. §10-10-46 (1953) provides as follows:

With the consent of the budget officer, the head of any department may transfer any unencumbered or unexpended appropriation balance or any portion thereof from one expenditure account to another within the department during the budget year, or an excess expenditure of one or more line items may be permitted by any department head with the consent of the budget officer, provided the total of all excess expenditures or encumbrances do not exceed total unused appropriations within the department at the close of the budget year.

Although the quoted section refers to "line items," nowhere in the Code is this defined. Frequently, within a departmental budget, certain capital items which the legislature intends shall be purchased, are listed as units going to make up the total of the departmental budget. The question is whether those individual listings, or the composite total of the departmental appropriation are what is meant by the term "line item." Counsel has found no case law that is helpful on this point. However, it may be helpful to have reference to the appropriation acts of the State of Utah for illustrative purposes. A good example is the appropriation for the Department of Development Services, Act of February 28, 1975, Ch. 213, Item 51 [1975] Laws of Utah 1025. The entire appropriation to the department is included in line item 51. It is clear that the department head, or the Governor, cannot transfer money from item 51 to item 52. However, within item 51, even though there are listed 6 specific schedules of programs with a dollar

figure after each one, the department head with the consent of the Governor may transfer funds from one program to another. For example, they may transfer money from library to mansion maintenance.

Comparing this with the budget documents of Logan City, Plaintiff's Exhibit #14, it would appear that the designation of specific dollars for specific units within a departmental budget are advisory only and are used for the purpose of constructing the budget, as with the case of the schedule of programs under state appropriation acts, but are subject to modification by the budget officer and the department head as operations during the year may indicate that good management necessitates some transfer within a department.

For example, let us suppose that \$4500 is indicated in the budget request for the purchase of a passenger automobile. Does that mean that the passenger automobile must be purchased for \$4500, no more, no less? Certainly, if it were purchased for less than the \$4500, by the specific authorization of Utah Code Ann. §10-10-46 (1953), the amount not used could be transferred for another purpose within the department. Suppose that during the operation of the department during the year the passenger automobile which was to be replaced by the new car held up better than expected, but a truck which was believed to have been in good condition broke down. Can the department

head, with the approval of the budget officer, spend the money instead for a truck, or must he proceed to purchase the passenger automobile? It should be obvious that the exigencies of governance require that the administrative department have considerable latitude in adjusting funds, provided it does not go over the amount appropriated and provided it does not attempt to transfer funds from one department to another.

The Logan City Auditor, who was called as a witness by the Plaintiffs, testified that since implementation of the new government, budgetary procedures, including the transfer of funds, have been conducted exactly as they have been conducted over the past several years (Tr. 110). With that precedent, Appellant submits that state law allows the head of the department, with the permission of the budget officer, to transfer funds within a departmental budget, notwithstanding the fact that there may have been an indication within the departmental budget that at the time of the construction of the budget certain funds were intended for certain specific purposes.

POINT V

THE MAYOR HAS NO OBLIGATION TO ASSEMBLE DATA AND DELIVER IT TO AN INDIVIDUAL COUNCILMEMBER ON DEMAND.

The evidence in the case shows that at no time did the Mayor deny Councilman Larson access to the city records,

with the right to inspect the same and make his own copies. The Mayor merely declined to research voluminous city records, assemble the copies and deliver them himself to the Councilman. It does not appear that there was any violation of the law by either side here and the court below did not specifically find that there was, despite an inference from the Memorandum Opinion to the contrary. Counsel, therefore, will not burden this court with this rather petty matter, except to re-emphasize the extent to which a clarification of the respective powers and duties of the principals in the new council-mayor form is needed to prevent disruptions of city government and to effect the intent of the state legislature.

POINT VI

THE COURT ERRED IN HOLDING THAT THE COUNCIL
COULD EXPEND CITY FUNDS FOR LEGAL SERVICES
TO SET ASIDE PAST SALES OF REAL PROPERTY
EXECUTED BY THE MAYOR.

The court held that the council could use city funds to hire an attorney to set aside certain real estate transactions which the council alleged were made without authority. At the evidentiary hearing on the matter, both sides agreed (Tr. 9-11) that the correctness of this holding would depend upon the correctness of the lower court's holding as to the Mayor's power to manage city property. Therefore, if Appellant prevails in regard to the main issue

in this case, it follows that the finding of the court regarding the payment of attorney's fees in cases to set aside real property transactions should be reversed. Appellant does not question the right of the Respondents to employ and pay for out of city funds counsel to conduct the case now before the court.

CONCLUSION

Counsel recognizes that it is the function of this court to decide specific cases rather than to issue broad proclamations of law. However, we would fail in our duty to this court if we did not point out that the decision in this case will have application far beyond the particular actions which gave rise to this case. It will have application far beyond Logan City, because this is the first case to reach this court and perhaps any court of final jurisdiction in this country defining powers and duties between the executive and the legislative branches in a municipality that operates under a division of powers system of government rather than under a council or commission having joint legislative and executive authority. Presumably, if this proves to be a viable form, Logan will be followed by other cities and towns in the State of Utah. The court's decision in this case will become a landmark in the field of municipal governmental law.

RESPECTFULLY SUBMITTED this _____ day of January,
1978.

JONES, WALDO, HOLBROOK & McDONOUGH

By _____
Calvin L. Rampton

By _____
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CERTIFICATE OF SERVICE

I hereby certify that I served two copies of the
foregoing BRIEF OF APPELLANT, postage prepaid, this _____
day of January, 1978, upon:

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