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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 Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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LOYE E. MARTINDALE, DARWIN W. :  
LARSEN, CAROL W. CLAY; LOGAN :  
CITY, a Municipal Corporation :  
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 :

---ooo0ooo---

BRIEF OF RESPONDENT

\* \* \* \* \*

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

\* \* \* \* \*

DAINES & DAINES  
128 North Main  
Logan, Utah 84321

Attorneys for Plaintiffs-  
Respondents

Melvin E. Leslie, Esq.  
Steven W. Allred, Esq.  
LEGISLATIVE GENERAL COUNSEL  
408 Capitol Bldg.  
Salt Lake City, Utah 84114

Attorneys for Amicus Curiae

J. Blaine Zollinger, Esq.  
City Attorney  
61 West 100 North  
Logan, Utah 84321

Calvin L. Rampton, Esq.  
Suzanne M. Dallimore, Esq.  
JONES, WALDO, HOLBROOK &  
MCDONOUGH  
400 Walker Bank Bldg.  
Salt Lake City, Utah 84111

Attorneys for Defendants-  
Appellants

Councilman Glenn T. Baird  
Councilman Claude J. Burtenshaw  
61 West 100 North  
Logan, Utah 84321

As Amicus Curiae

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[Respondents have occasionally cited the original Optional Forms of Municipal Government Act as codified in the Utah Code Annotated (Supp. 1975). All such citations in text are clearly indicated by citation as "original Section \_\_\_\_." The Act was slightly amended and thoroughly recodified subsequent to the initiation of this Complaint. The amendments became effective during the trial court's consideration of Respondent's Motion for Summary Judgment. For a comparison of the two see Statement of Facts, infra at 6, 7.]

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IN THE SUPREME COURT OF THE STATE OF UTAH

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LOYE E. MARTINDALE, DARWIN W. :  
LARSEN, CAROL W. CLAY; :  
LOGAN CITY, a Municipal :  
Corporation; and the MUNICIPAL :  
COUNCIL OF LOGAN CITY, :

Plaintiffs and :  
Respondents, :

Supreme Court No. 15498

vs. :

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 RESPONDENT

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NATURE OF THE CASE

This is a declaratory judgment action wherein Respondents, individual members of the Logan Municipal Council, the Logan Municipal Council as a body, and the City of Logan sought declaratory relief against Mayor Desmond L. Anderson with regard to the respective powers of the Council and Mayor under the council-mayor optional form of municipal government.

DISPOSITION IN LOWER COURT

On Respondents initial Motion for Summary Judgment, the trial court awarded judgment to Respondent on its first,

second, and third claims for relief and while making certain legal conclusions with regard to the fourth, fifth, eighth, and ninth claims for relief reserved certain selected issues for an evidentiary hearing, T.R. at 295; see T.R. at 343. The trial court granted Appellant's Motion to Dismiss City Attorney Blaine Zollinger and Budget Officer Duane Beck as Defendants, holding that said parties would be bound by any decision, as subordinates of the Mayor.

At the evidentiary hearing, Appellant and Respondents stipulated to certain rulings including dismissal of the seventh claim for relief. Pursuant to the evidentiary hearing and as a result of memorandums briefing certain legal issues, the trial court entered its final declaratory judgment generally granting judgment to Respondent on all claims for relief, except the seventh which had been dismissed by stipulation. T.R. at 459.

The trial court found generally that the Municipal Council possessed the governing powers of the municipality except for those powers expressly vested in the Mayor by the Optional Forms of Municipal Government Act. The trial court specifically found that the Mayor could not buy, sell, or exchange municipal real property or make interfund transfers without specific authorization from the Municipal Council. Further, that subdivisions, including interblock developments, cluster developments, and planned unit developments, required Municipal Council approval. In addition, the Court held that the Council could retain counsel in regards to the instant declaratory action and with respect to a questioned real estate transaction. In connection with that ruling the trial court

delineated the characteristics of resolutions as opposed to ordinances, holding that only the latter could be vetoed by the Mayor. Ordinances were found to be acts of a general and permanent nature, as opposed to resolutions which dealt with administrative determinations. The court also found that the Council had a right of access to all municipal records and could obtain copies free of charge. The trial court also found that the city administration could not enter into conditional sales contracts, they being debt, without Council approval and finally that budgetary line items could not be added without Council approval. In sum, that the Municipal Council is the municipal governing body except as to those certain specific powers which are expressly given the Mayor.

#### NATURE OF RELIEF SOUGHT ON APPEAL

Evidently, Appellant concedes large portions of the Declaratory Judgment and has determined not to appeal therefrom. Appellant summarizes the partial relief requested from this Court as being the determination that "all executive power" is vested in the Mayor and that "all legislative power" is vested in the Municipal Council. Respondent seeks from this Court a reaffirmation of the trial court's ruling that allocations of municipal powers are as set forth in the Statutes of the State of Utah as modified and amended by the Optional Forms of Municipal Government Act. Further, that the Mayor's powers and duties are as set forth and enumerated specifically in the statute and that the powers not given to the Mayor are retained by the body referred to in the original

legislation as the "governing body" that being the Municipal Council.

#### STATEMENT OF FACTS

In 1975, the Utah State Legislature adopted the Optional Forms of Municipal Government Act. Logan was the first Utah municipality to initiate the optional council-mayor form in a referendum held in late 1975. When Logan citizens took their ballots they read a summary description of this new mayor-council form on their ballot title:

#### BALLOT TITLE

Shall the Council-Mayor form of Municipal Government be adopted by Logan City? Said form of government provides for the election of five (5) councilmen at large and one (1) mayor.

The Council would be the governing body of Logan City and its primary functions under said form would be to pass ordinances, appropriate funds, and review municipal administration.

The Mayor's primary functions would be to enforce ordinances, execute policies adopted by the Council, appoint officers and department heads with the advice and consent of the Council, and to exercise control of all departments, etc. within the City.

T.R. at 439 (emphasis added). The council-mayor form was narrowly passed. In 1976, Logan inaugurated the council-mayor optional form.

Disputes quickly arose as to the respective division of power within the municipality. The Mayor, Appellant herein, argued power was divided by recurrence to definitions of the terms "executive" and "legislative." The locus of each power

under this view would be determined by whether its nature was primarily "executive" or "legislative." Not only did the Appellant make such assertions but he proceeded to operate Logan City according to his own interpretation. This included the sale, purchase and exchange of municipal property without notice to, or approval of, the Municipal Council; large scale interfund transfers of Logan City funds again without notice to or approval of the Council; unilateral approval of planned unit developments, cluster housing and interblock developments; refusals to carry out resolutions of the Council; etc. Respondents, on the other hand, maintained that the Municipal Council was the residuary locus of the governing powers except as those powers had been specifically enumerated as belonging to the Mayor.

When the disputants were unable to satisfactorily resolve their differences, respondents initiated the instant action for declaratory relief seeking not so much a judgment affirming their position as a final and binding legal interpretation of powers. Once initiated, the Respondents determined that it was wise to raise not only the issues immediately pressing them, but the broader issues existing under this new form of municipal government.

After the instant litigation was initiated the Utah State Legislature passed certain laws heralded as a recodification of certain municipal laws. The Utah League of Cities and Towns of which Appellant is First Vice President, drafted these changes. Encompassed within that legislation were certain linguistic changes relative to the Optional Forms of Municipal



Government Act. Catch phrases such as "executive" and "legislative" were inserted where no such words had been before along with the following words, "separate, equal and independent branches." Language specifically stating that the Municipal Council was the "governing body" was dropped. However, the changes were caused or initiated, the trial court found that against the mosaic of the remaining portions of the original statute, the linguistic changes had, in fact, caused no substantive change in the thrust or divisions of powers inherent in the original legislation. That determination whether it be considered a factual or legal conclusion alleviated the labrinate effort of rendering two separate and conflicting judgments with one judgment and broadened the impact and applicability of the trial court's opinion. As such, the trial court's decision provides a continuing guide for proper operation of the municipality.

To assist the Supreme Court in comparing the original statute and its slightly altered and recodified twin, the relevant modifications between the two statutes are set out side by side:

1975 Optional Forms Act

10-6-104. Definitions.--  
As used in this act (a)  
"Governing Body" means the  
legislative body of any city  
or town organized under this  
act.

10-6-112. Council-mayor  
and council manager form  
defined.--The optional form of  
government known as the council-  
mayor form vests the government  
of a municipality which adopts  
this form in a mayor and a  
municipal council.

1977 Modifications

No corresponding section, but  
see §10-3-101, U.C.A.  
(Supp. 1977).

10-3-1209. Council-mayor  
and council-manager form  
defined.-- The optional form of  
government known as the council-  
mayor vests the government of a  
municipality which adopts this  
form in two separate, independent  
branches of municipal

1975 Optional Forms Act

form known as the council-manager form vests the government of a municipality in a council and a manager.

10-6-113. Municipal Council deemed governing body--Powers and duties.--The municipal council of a municipality adopting an optional form of government provided for in this act shall be the governing body of that municipality and shall pass ordinances, appropriate funds, review municipal administration, and perform all duties required of them by law.

1977 Modifications

government; the executive branch consisting of a mayor and the administrative departments and officers; and the legislative branch consisting of a municipal council. The optional form known as the council-manager form vests the government of the municipality in a municipal council which shall be deemed the governing body of the municipality and a manager appointed by the council.

10-3-1210. Functions of the Council.--The Municipal Council of a municipality adopting an optional form of government provided for in this part shall pass ordinances, appropriate funds, review municipal administration, and perform all duties that may be required of it by law.

Hereafter Respondents cite the original Optional Forms of Municipal Government Act by the following form "original Section \_\_\_\_." Because of the pervasive use of Utah laws citation as "Section \_\_\_\_" is used to refer to Utah Code Annotated 1953 and Supp. 1977.

Response to Appellant's Statement of Facts:

With respect to Appellant's Statement of Facts, Respondents have several disagreements. First, the issue of management of city property was never in dispute and to Respondents' knowledge the first time that issue was ever raised was in Appellant's Brief on appeal to this Court. The issue on

real property related solely to the Mayor's authority to buy, sell, or exchange municipal real property without authority of, or even notice to, the Municipal Council. T.R. 441. Second, with respect to information it was never contended that the Mayor had the duty to personally assemble, compile and copy municipal records. The contention of Respondents was that the Mayor directed his administrative subordinates to supply information only through his office and that he then placed conditions on the Council members' right to obtain that information. On this issue the trial court found conflicting evidence. T.R. at 446.

Response to Burtenshaw/Baird Statement of Facts

This Brief mingles purported facts throughout its arguments. Respondent will attempt to identify the salient facts with which it disagrees, identifying the same by page numbers in said Brief.

At page 3: Burtenshaw/Baird state the "gravel pit issue" in their opinion is at the heart of the instant action and confuses the issues before the Court. Respondents disagree and note the trial record is devoid of any such indication. Such a factual conclusion is unwarranted.

At page 8: Burtenshaw/Baird introduce purported evidence that the Optional Forms of Municipal Government Act is the reincarnation of earlier legislation called the "Strong Mayor Form." There is no such evidence in the record and Respondents dispute the same. Furthermore, that form of government was once proposed for Logan and the Logan citizens by vote rejected the same. In any event, Respondents question

the basic premise that the interpretation of that Act would vary from the trial court's interpretation of the council-mayor form.

At page 10: Burtenshaw/Baird introduce as though it were evidence certain vague theories of political science. Respondents dispute the same and the "obvious" conclusions arising from such theories.

At page 12 : Burtenshaw/Baird state "the judge's acceptance of this complaint . . . shows his failure to inquire about and to understand the nature of this dispute." Whether that statement is fact, law or emotional outburst, Respondents dispute the same.

At page 12: Burtenshaw/Baird state that "Basic to the theory of the system is that skilled administrators execute a policy made by the Council with far more equity and efficiency than an untrained council." Respondents urge the Court that this statement is unwarranted and based on some inherent assumptions about the qualities of individuals who Logan citizens will choose to elect. Respondents note Logan citizens in the past election chose a businessman, untrained in "public administration" as Mayor. Respondents do agree that the Council makes policy and the Mayor is to execute that policy.

At pages 16-19: Here and throughout their Brief, Burtenshaw/Baird question the trial judge's procedures, capacity and intentions. Respondents dispute the same.

Response to Legislative General Counsel Statement of Facts

A fact is introduced in the legal argument of this Brief even though such fact is not in the record, nor has there been any evidence supporting the same. That purported fact is that the Utah State Legislature continued a "trend" begun with the Strong Mayor Form of Government. Perhaps three legislators consider this to be the case but that can hardly represent the view of the entire legislature and such an assumption about the legislative process is clearly unsupported by any evidence except the opinion of three legislators. Respondents could contest this "trend" only by polling the legislators, cross-examining the legislators, etc., all of which would be appropriate at the trial level, but inappropriate in this Court. This "fact" surfaces again at Pages 9 and 10.

Respondents question the appropriateness and the procedures relative to introducing such a fact into the appellate record. More fundamentally, Respondents disagree with that factual conclusion urging this Court that the legislature's intent is plain on the face of the Optional Forms of Municipal Government Act wherein that Act gives the Council policy making authority and describes that body as the governing body.

ARGUMENT

POINT I

THE GOVERNING POWERS GIVEN MUNICIPALITIES BY TITLE 10 AND OTHER APPLICABLE LAWS OF THE STATE OF UTAH ARE VESTED IN THE LOGAN MUNICIPAL COUNCIL EXCEPT THOSE POWERS SPECIFICALLY GIVEN THE MAYOR.  
[Including Response to Appellant Point I, Burtenshaw-Baird Points I-VI and Legislative Counsel Point I-III.]

Respondents respectfully contend the original Optional Forms of Municipal Government Act and its recodified successor are, on their face, clear, specific and unambiguous. This clarity is complemented by meshing the Act with existing statutory and decisional law of the State of Utah and by recurrence to reputable treatises on municipal law and applicable judicial decisions in other jurisdictions.

I(A). Powers given to a municipality are vested in the Municipal Council unless expressly delegated to the Mayor or another officer.

The Act itself in original Sections 10-6-104 and 10-6-113 clearly stated that the Municipal Council was the "governing body," to wit:

The municipal council . . . shall be the governing body of that municipality and shall pass ordinances appropriate funds, review municipal administration, and perform all duties that may be required of them by law.

Original Section 10-6-113. Apart from the inherent substance of the words "governing body," those same words are used throughout the Utah statutes as terms of art which describe the locus of power within the municipal corporation. See, Sections 10-10-23 et seq.; see also Section 10-8-8.1. The Optional

Forms of Municipal Government Act meshes into this existing state law by its own Section 10-3-1204 which provides in relevant part:

All existing statutes governing municipalities shall remain applicable except as provided in this act.

Note also the final clause of Section 10-3-1210 which, after having clearly deemed the municipal council "the governing body," states that they are to "perform all duties that may be required of it by law." If the intention of that Section wasn't to tie the new Act back to existing state law setting out the duties of governing bodies, to what law does the Section refer?

The universal rule of legislative construction, express unius est exclusio alterius, indicates that when a legislature expressly enumerates powers given, those powers not given or enumerated are considered to be expressly withheld. The Utah Legislature carefully and specifically defined in Section 10-3-1204 the powers to be held by the Mayor:

In the optional form of government known as the council-mayor form, the mayor shall be a registered voter of the municipality from which is he elected and shall be elected for a term of four years. The mayor shall be the chief executive and administrative officer of the municipality. He shall have the power and duty to:

1. Enforce the laws and ordinances of the municipality;
2. Execute the policies adopted by the council;
3. Appoint and remove administrative assistants, including a chief administrative officer, and with the advice and consent of the council, appoint or remove department heads; and appoint or remove all other officers, commissions, boards, and committees of the municipality, except as may otherwise be specifically limited by law. Where state law provides for the appointment of municipal committees by the governing body, in the council-mayor form of government, the mayor shall appoint the members of the committee;

4. Exercise control of all departments, divisions, and bureaus within the municipal government;
5. Attend all meetings of the council with the right to take part in all discussions and the responsibility to inform the council of the condition and needs of the municipality and make recommendations and freely give advice to the council, except that the mayor shall not have the right to vote in council meetings;
6. Appoint a budget officer for the purpose of conforming with the requirements of the uniform municipal fiscal procedures act and in all other respects fulfill the requirements of that act;
7. Appoint with the advice and consent of the council a qualified person to each of the offices in cities of recorder, treasurer, engineer, and attorney and, in towns, town treasurer and clerk; create any other offices as may be deemed necessary for the good government of the municipality, and make appointments to them; and regulate and prescribe the powers and duties of all other officers of the municipality, except as provided by law or by ordinance;
8. Furnish the municipal council with a report, periodically as determined by ordinance, setting forth the amounts of all budget appropriations, the total disbursements to date from these appropriations, and the amounts of indebtedness incurred or contracted against each appropriation (including disbursements and indebtedness incurred and not paid) and the percentage of the appropriations encumbered to date, which reports shall be made available for public inspections; and
9. Perform such other duties as may be prescribed by this part or may be required by ordinance not inconsistent with this part.

Section 10-3-1219 (emphasis added). See also Section 10-3-1214 with respect to the mayoral veto. Following the accepted rule of construction, powers not specifically enumerated therein are withheld from that officer. Nowhere in the enumeration of Section 10-3-1219 is there any indication or even inference that the Mayor is to possess ultimate and exclusive control over the property, finances, subdivisions, etc., of a municipality.



When the original Optional Forms of Municipal Government Act was recodified in 1977, Original Sections 10-6-104 and 10-6-113, providing that the Municipal Council was the governing body, were replaced with the following:

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.

Section 10-3-101 (emphasis added).

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.

Section 10-3-1209 (emphasis added). The trial court in perusing this change recognized that no substantial modification had occurred:

The functions of the council embodied in this section [original Section 10-6-113] 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 Mayor are not substantially changed and remain basically the same.

Therefore in examining the specific areas of conflict the Municipal Council will be treated as the governing body related to those duties of legislation and other functions provided by law, and the power and duties of the mayor shall be determined under his authority as the chief executive and administrative officer of the municipality. As far as indulging in the semantics involved in the definition of governing power or powers, the Mayor's duties are restricted to those enumerated in the legislation.

T.R. at 440. The trial court recognized that a significant portion of authority formerly vested in the Commission by previous laws had, by the Optional Forms of Municipal Governme

Act been transferred to the Mayor. The authority so transferred was described in Section 10-3-1219 and included enforcement of laws, execution of policies adopted by the Council, appointments, control of administrative departments, etc.

The trial court found it unwarranted to presume that a wholesale grant of power was given to the Mayor by the words "chief executive and administrative officer of the municipality." Appellant's argument to the contrary ignores the fact that in other Utah laws the same terms are used in reference to mayors of municipalities without any such implication. See Section 10-1-104(2) referring to mayors in all cities as "executives" and Section 10-3-809 describing the mayor as the "chief executive officer." See State v. City of Seattle, 492 P2d 1078, in which the Washington Supreme Court finds such words are used loosely without clear legislative intent to force municipal actions into rigid classifications. See also J and M Realty Co. v. City of Norwalk, 239 A2d 534 (Conn. 1968). The Mayor's duties and powers under the Act are clearly defined, no loose and simplistic application of some general sense of what constitutes executive powers should expand those definitions.

This interpretation of the Optional Forms of Municipal Government Act is buttressed by reputable treatises and judicial decisions in other states and Respondents can find no reputable contradictory authority.

It is still the rule [referring to municipal governments having mayor-executive and municipal council-legislative divisions], however, that all powers granted to a municipal corporation are vested in the council unless expressly delegated to some other officer or body.

While the governing body of a municipal corporation is not the corporation itself, howsoever constituted, the council or other governing body is the general agent of the corporation for all purposes and exercises all the corporate powers not expressly committed by law to other boards or officers.

62 C.J.S., Municipal Corporation § 153 at 313 (footnotes omitted, emphasis added). See also §385 at 728-29, e.g. 2A Antieau, Municipal Corporation Law § 22.07 (hereinafter cited as Antieau).

In City of Princeton v. Woodruff, 104 NE2d 748, (Ind. 1952), the Supreme Court of Indiana approved the principle that powers not expressly given by the state legislature to another entity are reserved to the common council:

In every municipal corporation . . . there is and necessarily must be an official body or board constituted and empowered to exercise the sovereign powers of government delegated to, or vested in the corporation by the state . . . [which is] the legislative body or assembly of the municipality.

104 NE2d at 752. The Washington Supreme Court in Othello v. Harder confirmed:

It is the general rule . . . that the powers delegated to a municipal corporation by the legislature are vested in the city or town council unless expressly delegated to some other office or body

284 P2d 1099, 1102 (Wash. 1954), see, e.g., State v. O'Connell, 523 P2d 872, 889 (Wash. 1974) reaffirming Othello holding. In City of New Britain v. Hancock, the Connecticut court had occasion to apply this principle to real property purchases:

In the absence of a specific charter provision giving a similar power to other specified officials of the city, the court construes the charter to vest in the common council the power to purchase the subject land and not to vest that power in any other elected or appointed officials.

373 A2d 859, 862 (Conn. 1976). See, e.g., Shaw v. Common Council of City of Watertown, 63 NW2d 252 (S.D. 1954); Visone v. Reilly, 194 A2d 248 (N.J. Super, 1963). Nor is this a new rule, but one of long-standing significance. See Crouch v. Commonwealth, 189 SW 693, 700-701 (Ky. 1916); Comley v. B'd of Purchase and Supplies, 149 A. 410, 413 (Conn. 1930); 43 Corpus Juris, Municipal Corporation §§ 238, 240; 28 Cyc. 317.

I(B). Mayoral powers described and enumerated by Section 10-3-1219 and elsewhere should be narrowly construed

The Utah Supreme Court has interpreted strictly the powers given municipalities and their officers by Utah municipal law. In Stevenson v. Salt Lake City Corp., the Court, held:

That the powers of the city are strictly limited to those expressly granted, to those necessarily or fairly implied in or incident to the powers expressly granted, and to those essential to the declared objects and purposes of the corporation, is settled law in this state.

317 P2d 597, 598 (Ut. 1952) (emphasis added). See e.g., American Fork City v. Robinson 292 P. 249 (Ut); Wasfell v. Ogden City, 249 P2d 507 (Ut. 1952). This well worn principle should be followed along with its corollary:

It is a cardinal principle of municipal law that a city has only those powers which are expressly granted to it by the legislature or constitution, or which are necessarily implied from such powers as are granted. A corollary is that a city official has only such powers as are expressly granted to the official by the legislature, or are necessarily implied from those powers which are granted.

Watson v. State, 518 P2d 931, 933 (Wyo. 1974). Municipal officials are limited to those "powers and duties as are confirmed upon them expressly or by necessary implication."

Othello v. Harder, 284 F2d 1099, 1102 (Wash. 1954).

The treatises are in accord, holding that municipal officers "have only such powers as are specifically granted." 37 Am Jur § 260 at 884. The terms used to designate the mayor are not considered to be a substantive grant of power:

The mayor is the official head of a municipal corporation and, as such, is a municipal officer. He is the chief executive officer of the municipality . . . . Also, the term "mayor or chief executive," is a mere description of the office and not of the character or extent of the powers confided to that office . . . .

The mayor's functions, as prescribed in the charter or other governing law, differ in various municipalities, and his powers may be legislative, executive, or judicial, according to the particular governing law. . . .

As in the case of municipal officers generally . . . the functions and powers of the mayor of a city are derived from, and depend entirely on, constitutional, statutory, or charter provisions and valid ordinances, resolutions, or bylaws, passed in accordance therewith; and he takes nothing beyond the powers expressly conferred or necessarily implied.

62 C.J.S. § 543 and 998-999 (footnotes omitted) (emphasis added); e.g., 2A Antieau, Supp. at 127.

Thus as summarized in a hoary old Wisconsin case:

They [referring to municipal officers] and each of them, may proceed step by step within their prescribed orbit, and in strict conformity with the law that sets them in motion.

Ricketson v. City of Milwaukee, 81 NW 864, 866 (Wisc. 1900).

Failing this their acts constitute a usurpation of authority and result in the application of the ultra vires doctrines.

exercise unilaterally the authority of a municipal corporation. Not even under the most lenient construction of strong mayor municipal government forms, has any mayor pretended to be so "strong."

I(C). Comparable Mayor-Council, Strong Mayor and Federal government forms do not authorize the mayoral powers which the Appellant has presumed to exercise.

A careful reading of Utah's repealed Strong Mayor Form of Government, Section 10-6-76 et. seq., indicates nowhere a grant to the "strong mayor" of the kind of authority Appellant here asserts. For example, Section 10-6-79 vests the "board of commissioners" with power "to pass ordinances, review municipal administration and to perform all duties that may be required of them by law." This section then clearly removes the board from exercising any "administrative or governing authority conferred upon the mayor." But nowhere in the Act is the mayor conferred authority to incur indebtedness nor to transfer monies from one fund to another nor to buy, sell, and exchange real property. In similar fashion to the Optional Forms of Municipal Government Act, these powers continue to reside in the "commission" or "council."

New Jersey has developed at least fifteen optional forms for municipal government in what must be a record for one state. Parenthetically, we note the laws and annotated cases dealing with this bewildering variety of municipal forms covers six volumes of more than 700 pages each. In that infinite variety, there is not one form in which the mayor,

manager, chief executive or president wields the power asserted by Appellant herein. See N.J. Stat. Ann. 40:60-26 giving power of sale of real property to the "governing body" and which requires notice and public sale or passage of an ordinance and private sale, or resolution and delayed final approval or approval by a named state official. A unilateral sale by a "chief executive" or other titular head is simply not allowed.

New Mexico has what is termed a Mayor-Council form. See New Mex. Stat. Ann. §§ 14-10-1 et. seq. In that form the Council manages the property and the Mayor administers departments, appoints and enforces ordinances. See New Mexico Stat. Ann. §§ 14-10-4, 14-10-6, 14-11-3. Oklahoma has what it calls a Statutory Strong-Mayor-Council Government. See 11 Okl. St. Ann. § 962.1 et. seq. Nowhere in that Oklahoma statute is the "strong mayor" given authority to deal with real property although he very specifically is given authority to purchase supplies, equipment and materials subject to regulation by the Council. 11 Okl. St. Ann. § 962.24. See, e.g., Wash. Code (Rev) § 35A.12 et seq.

In Ohio, they have an optional form referred to as the "Federal Plan" which sets up an executive-legislative-judicial model based on the state and federal model. Ohio Rev. Code Ann. §§ 705.71 et. seq. In this form all legislative power expressly goes to the Council and all executive power expressly goes to the Mayor. But even under this clearest example of what Appellant tells us the Optional Forms of Municipal Government Act is, there is no authority express or implied for the Mayor to exercise the type of authority which

the Appellant claims. See Section 705.79 setting out specific duties of the mayor. Again the Council is the residuary holder or locus of power by reason of Section 705.86 which ties that "Federal Plan" to existing allocations of state powers, for example, to Sections 721.02, 721.03, 721.13, 721.26 requiring municipal land to be sold only upon the vote of the Council. Ohio Rev. Code Ann.

In fact, Respondents are unable to locate any state which under any statute sets up a municipal government wherein a mayor or chief executive can do the things Appellant contends. Furthermore, Respondents doubt such a system exists. It matters little what title is used to describe the functional units, forms or plans, the various state legislatures have not seen fit as a matter of policy to clothe a single individual with this type of unilateral authority.

The question before this court is simply whether the Mayor has power and authority to do the specific acts complained of. Perhaps as an aid to reasoning an inquiry into "executive" vs. "legislative" nature may be useful, but where is it so clearly indicated that an executive official has these unilateral powers? The model the Appellant seeks to foist upon the Optional Forms of Municipal Government Act does not exist even in the separation of powers, executive-legislative-judicial, federalistic system. Even should the Appellant be successful in proving to this Court that each and every scrap of "administrative" and "executive" function is possessed completely and solely by him, there still must be proof that the powers he asserts are of that nature. Respondents doubt,



that even in the most rigid executive-legislative delineation, the Mayor's power and authority even approaches the power asserted by him in Logan City government.

In conclusion, a careful reading of the Utah Optional Forms of Municipal Government Act as modified and recodified in 1977 reveals the true positions of the Council vis-a-vis the Mayor. In describing the Council's functions there is a broad grant of power terminating with the words "and performs all duties that may be required of it by law." Section 10-3-1210. To what law does the statute refer? To the general laws of Utah giving powers to municipalities. In describing the Mayor there is a specific enumeration of nine closely defined powers terminating with the words "and perform such other duties as may be prescribed by this part or may be required by ordinance not inconsistent with this part." Section 10-3-1219. To what "part" does the statute refer? "Part" refers solely to the Optional Forms of Municipal Government Act. The Mayor has no authority not specifically granted by the Act.

I(D). Response to Appellant's Brief - Point I

- (1) REPLY TO: "Utah's legislature intended the optional council-mayor form of municipal government . . . to be patterned after the federal and state separate-power models. [Appellant's Brief at 8.]

Respondents do not disagree that the legislature intended to separate powers, specifically that general administrative and executive duties were to be vested in the Mayor and his subordinate officers. However, a mere separation

model of separation be followed. The question better stated is which entity receives which powers? There is nothing inherent in the premise of separation of powers that says the federal model is mandatory. For example, in a business corporation there is also a separation of powers between the Board of Directors and the President which separation is not based on the federal model. There are good reasons for our federalistic national system that are not applicable to Logan City. Even were Respondents to concede this point, they deny that under that system Appellant would have the authority and power he has purported to exercise.

There are numerous indications from the wording of the Act itself that the Respondent's theory of separation was not intended by the legislature. For example, Section 10-3-1217 restricts the Municipal Council from meddling with employees of the City, proscribing the members of the council from individually seeking

to influence the acts of the chief executive or any other officer, to direct or request except in writing, the appointment of any person to, or his removal from office; or to interfere in any way with the performance by such officers of their duties. The council and its members shall deal with the administrative affairs of the municipality solely through the chief executive and shall not give orders to any subordinate of the mayor or manager either publicly or privately . . . .

Section 10-3-1217 (emphasis added). This Section is necessary and appropriate; city employees would be in a difficult position if they had to respond to six employers, the Mayor and five Council members. But Appellant's contention that the Act prohibits the Municipal Council from doing anything other than

pure legislative tasks is specifically negated by the Section. It states that the council "shall deal with administrative affairs solely through the chief executive (mayor)." That statute is a clear acknowledgment of the council's proper role, it cannot bypass the mayor and deal directly with department heads or employees but it can deal with administrative affairs. The Section does not prohibit the Municipal Council from involvement in any "administrative affairs," rather the Section acknowledges such a power and describes the proper manner of dealing with the specified administrative task--employee relations.

Appellant's assertion is that all "administrative or executive powers were assigned to the mayor" under Section 10-3-1219. That assertion is erroneous. Section 10-3-1219 nowhere gives the mayor unrestricted sway over all things "executive" or "administrative" in nature. That Section clearly and carefully enumerates a series of nine responsibilities or administrative roles. Those enumerated duties are hardly an exhaustive list of administrative functions, for example, nowhere is it stated that the mayor has authority to buy, sell, and exchange real property on his own volition.

Another example is the series of statutes which clearly require administrative or executive action on the part of the Municipal Council. See Sections 10-9-1 et. seq., clearly requiring the "legislative body" to perform administrative and executive tasks in regard to zoning and planning.

The recodified municipal legislation specifically provides that all legislative powers shall be exercised through

ordinances. Section 10-3-701. If Appellant's arguments are correct that the Municipal Council has only "legislative" powers then it is restricted to exercising all its power through ordinances. Yet the original act specifically mentioned resolutions were to be passed by the Council. See original Section 10-6-116. It is noted specifically that by Section 10-3-713 resolutions deal with "administrative powers." One of the specific examples given by the statute of a proper resolution is to regulate the "use and operation of municipal property." Section 10-3-717 (4).

In summary, it is clear that the Council is expressly vested with two distinct and distinguishable "rule making" powers. The first type of such "rules" they were to make were "ordinances." The second type of "rules" were "policy making" rules. Sections 10-3-701 et. seq. The Mayor is given veto power over the first (ordinances) coupled with an apparent duty to enforce them. Sections 10-3-1214, 10-3-1219(1).

As to the second type or "policy" rules, the Mayor is given neither the power to directly or by veto participate in their adoption, but he is given a clear ministerial duty to carry them out. Section 10-3-1219. It is this last class of express powers given to the Council that Respondents urge is the proper realm of council administration by resolution.

- (2) REPLY TO: "This legislation [Chapter 8, Title 10] only grants the governmental entity the specified power--it says nothing about the manner of its exercise. [Appellant's Brief at 9-10.]

Appellant misreads the statute. A close look at Chapter 8, indicates that the initial Section states:

The boards of commissioners and city councils of cities shall have the power to control the finances and property of the corporation.

Section 10-8-1. Subsequent Sections of this Chapter all begin with simply the words "they" which is a clear and unmistakable reference back to the initial Section. The draftsman's original form has been clouded by revisions, codifications and annotations but it appears reasonably clear that each use of the word "they" refers back to the first section. However, when subsequent Sections were added, the draftsmen short-circuited the original form and simply used the word "governing body" instead of "they" as was used in the older Sections. See Section 10-8-8.1.

It appears to Respondents that the "governing body" form in Section 10-8-8.1 is interchangeable with the "they" used in the remainder of the Chapter. Under Respondent's interpretation the Municipal Council would have all these powers unless they are expressly given the Mayor by the Optional Forms of Municipal Government Act.

Appellant makes much of insignificant linguistic forms such as Chapter 8. Are we to presume that the allocations of municipal power in Logan's form of government are to be determined in such a manner? Appellant's methodology and conclusions as exhibited in the example presented should be contrasted with Respondents' argument that the Logan Municipal Council has those municipal powers not specifically given the

Mayor in Section 10-3-1219.

- (3) REPLY TO: "Second it divided this vested governmental power into its executive and legislative components for the first time." [Appellant's Brief at 12.]

Appellant mistakes what occurred. Prior to the Optional Forms of Municipal Government Act there was a division of legislative and executive powers but the same persons exercised a dual role. See Section 10-3-101 setting up both legislative and executive powers in the governing body and then separating the same by the manner of their exercise. By Section 10-3-701 legislative power is to be exercised by ordinance; by Section 10-3-717 administrative power is to be exercised by resolution; and by Sections 10-3-801 et seq. executive powers are exercised through supervision of departments. A clearer division cannot be formulated. The Optional Forms of Municipal Government Act simply vests the supervision of departments and certain limited and enumerated administrative tasks in the mayor.

- (4) REPLY TO: "The 1977 legislature added 'clarifications'" [Appellant's Brief at 12.]

Respondent notes that there is no indication whatsoever in the record as to the legislature's intentions with respect to the Optional Forms of Municipal Government Act. Respondent was prepared at the trial level to deal with this issue by proffering evidence which would have shown:

1. The linguistic modifications were not called to the legislator's attention. There is no legislative history whatsoever, and further the changes were regarded as insignificant.
2. The modifications were actually made unilaterally

and secretly by Appellant on a rough draft copy after the

commencement of the instant dispute pursuant to his position as First Vice President of the Utah League of Cities and Towns.

- (5) REPLY TO: "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 superceded and modified to the extent of incompatibility." [Appellant's Brief at 14.]

Appellant has it backwards. The Optional Forms of Municipal Governments Act specifically states:

All existing statutes governing municipalities shall remain applicable except as provided in this part.

Section 10-3-1204. Clearly unless an existing general municipal statute is specifically modified it still applies. The Act on its face clearly recognizes this distinction. In Section 10-3-1219(3) the Optional Forms Act specifically makes reference to Utah's municipal laws providing for appointment of committees by the governing body and modifies that law by specifically providing the Mayor shall make all such appointments. Such a careful effort to apply and modify existing state law negates an interpretation that municipalities were to be cast upon mere definitions to determine powers of the Mayor vis-a-vis the Council.

There is no indication or even inference that general municipal powers are to be categorized and then divided into "executive," "administrative" and "legislative" pigeon holes. The awesome nature of such a task would simply overwhelm one. For example, the zoning and planning powers would somehow have to be categorized. An error in this division would cause the

city's exercise of these zoning powers to be ultra vires, and voidable. Such an uncharted and vaguely defined system based solely on defining "executive" vis-a-vis "legislative" would invite litigation, be impossible to control and a very strong reason not to adopt any such optional form of government.

- (6) REPLY TO: "The law now specifically provides that there is no governing body under the council-mayor form of government."  
[Appellant's Brief at 16.]

Respondent respectfully disagrees. Section 10-3-101 doesn't indicate there is "no governing body" in council-mayor cities, it just states that the governing body in such cities does not generally exercise both legislative and executive powers. Read in conjunction with Section 10-3-1209, it merely indicates that the Council and Mayor together form what was previously known as the "governing body," the Mayor having those governing powers given him in Section 10-3-1219 and the Council having all other governing powers. The changed wording is appropriate and correct for some of the powers formerly given only to the governing body are now specifically given to the Mayor. For example, the power to administer municipal employees under the old form of government was vested in the "governing body." Under the Optional Forms of Municipal Government Act, that power, except for some restrictions, is vested in the Mayor. See Section 10-3-1219 (6) and (7). In that sense, the Mayor becomes part of what was formerly the "governing body."

More fundamentally there is a political shallowness in this contention by Appellant. The original Optional Forms of Municipal Government Act specifically and unequivocally



provided that the Municipal Council was the governing body:

"Governing body" means the legislative body of any city or town organized under the Act.

Original Section 10-6-104(2);

The municipal council of a municipality adopting an optional form of government provided for in this act shall be the governing body of that municipality . . . .

Original Section 10-6-113. When the citizens of Logan received their ballots and voted to inaugurate this new system they found these words describing the new form of government:

The council would be the governing body of Logan City . . . . The Mayor's primary functions would be to enforce ordinances, execute policies adopted by the Council . . . .

T.R. at 346. If merely dropping the linguistic words "governing body" fundamentally changed the entire substance and form of this municipal government there rises the question of whether Logan's citizens freely chose such a system.

(7) REPLY TO: "This Court will have declared that there are no options of government available to municipalities." [Appellant's Brief at 14.]

Appellant mistates Respondents' position. Respondents view the Optional Forms of Municipal Government Act as providing for centralized administrative control and responsibility in a single individual, the Mayor. This system is new in Utah and is in wide use in many other states. See Part I(C), supra discussing municipal government forms in New Jersey, New Mexico, Ohio, etc., where statutes of similar import are in effect. The Act as interpreted by Respondents provides a realistic, workable alternative to the existing commission form.

I(E). Response to Burtenshaw/Baird Brief--Points I-VI

- (1) REPLY TO: "The state legislature intended to create . . . . a unique functional arrangement."  
[Burtenshaw/Baird Brief at 5.]

Respondents note here and generally that Appellants and both Amicus Curiae are confusing two separate forms, the one being the "federal plan" which is a miniature federal system with strict executive and legislative divisions with a second form which is generally referred to as the strong mayor or managerial form.

If Burtenshaw/Baird are asserting the "federal plan" is new or unique they are incorrect. The "federal plan" municipal form was at one time popular in this country:

The story of American municipal government in the nineteenth century forms a gloomy chapter in our national history. In a period of great economic development there was enormous growth both in number and size of urban communities. This was not matched, however, by progress in the development of municipal government. Municipal organization was strongly affected by popular antipathy to concentration of authority. There was a tendency to imitate the organization of state government, particularly in applying the idea of checks and balances. This was evident as early as 1789, in the case of Philadelphia. The city's charter of that year created a bicameral governing body and the mayor became an independent executive without membership in either branch of the council. . . . The complicated system thus constructed bred irresponsibility, political interference, inefficiency and corruption.

J. Fordham, Local Government Law, at 19-20 (Rev. Ed. 1975).

In the second stage of development [referring to municipal forms], the form of municipal government generally adopted was a complete copy in miniature of the government of the United States or of a state. The mayor was merely the chief executive officer with no legislative power except that of veto. The municipal council, usually a bicameral body, was stripped of all executive authority and

confined itself to making appropriations of the public funds and enacting policy regulations . . . . The wastefulness and corruption to which this system of divided responsibility led finally brought people to realize that the administration of the affairs of a great municipality is more nearly analogous to the conduct of a business than to the government of a sovereign state . . . .

56 Am Jur 2d, Municipal Corporations, etc. § 139 at 193-94.

(emphasis added).

It is Respondents' argument that the Optional Forms of Municipal Government Act was not intended to create a miniature federal government in Logan City. A careful comparison of the powers and duties of the elected Mayor and the appointed Manager in the Act reveals the Mayor has slightly more latitude but it also reveals the similar nature of their enumerated duties and functions. Compare Section 10-3-1219 with Section 10-3-1226.

I(D). Response to Legislative Council Brief--Points I-II

- (1) REPLY TO: "In . . . Section 10-3-1219 . . . we find that the Mayor shall be the chief executive and administrative officer. By virtue of that declaration, the mayor is empowered to perform certain administrative functions and these functions, in accordance with the separation of powers doctrine, are to be performed essentially unencumbered by legislative restraint." [Legislative Counsel Brief at 11.]

Respondents agree that the enumerated powers in Section 10-3-1219 are not to be encumbered by legislative restraint. However, the Brief errs in presuming the mere title "chief executive and administrative officer" ipso facto confers a broad range of other powers. If that is so why is there an enumeration in Section 10-3-1219? Furthermore, as previously

noted the only indication which is given that the Mayor has any powers other than those enumerated is Part (9) of Section 10-3-1219 which refers only to other powers given "in this part" which is a clear reference to the Act itself. These other powers in that part would be power to veto, Section 10-3-1214; power to appoint a chief administrative officer, Section 10-3-1220; power to propose an administrative code, Section 10-3-1221; power to call meetings, Section 10-3-1212, etc.

More interesting is to pose the question of why does Section 10-3-1219(9) refer to "other powers conferred by this part" when other sections of the same Act clearly indicate the Mayor is to perform additional duties. There is only one answer and that is because Section 10-3-1219 is generally intended to be an exclusive and exhaustive list of all powers of the Mayor.

## POINT II

APPELLANT MAYOR HAS NO AUTHORITY TO BUY, SELL OR EXCHANGE MUNICIPAL REAL PROPERTY WITHOUT NOTICE TO, OR APPROVAL BY, THE MUNICIPAL COUNCIL.  
[Including Responses to Appellant Point II, Burtenshaw/Baird Points I-VI.]

Respondents urge this Court that Appellant's brief mistates and obfuscates the issue before this Court with respect to the property issue. The lower court's ruling did not deal with "management" of city property nor was that issue ever before the lower court. The only issue was the power to buy, sell and exchange. Further, the lower court did not enter the thicket of describing "executive functions," the court simply and succinctly held that under Utah municipal law the Logan Municipal Council has authority over the sale, purchase and

exchange of municipal real property. The issue now before this Court on appeal is simply whether the Mayor under this Council-Mayor government form, may buy, sell or exchange municipal real property without notice, or approval by, the Municipal Council.

II(A). The trial court does not concern itself with "management" of municipal real property.

Prior to 1976, Logan City conducted its property transactions as did other Utah municipalities. The Logan City Commission would discuss the relevant property transaction in a meeting and pass a resolution to purchase, sell, or exchange the particular property. The Mayor with this authorization would then proceed to convey the property by signing a deed on behalf of the municipality reciting in the acknowledgment his authority given by a resolution of the Logan City Commission. Purchases similarly authorized would also be completed by the Mayor.

Upon the implementation of the council-mayor government form in Logan pursuant to the Optional Forms of Municipal Government Act, Appellant asserted his exclusive right over property transactions, alleging it was an "executive function", and, as such, his sole prerogative. Most indicative of the parameters of this assertion is the acknowledgment form used by Appellant on municipal deeds granting property:

On the 14th day of June A.D. 1976 personally appeared before me Desmond L. Anderson and Venal Jones who, being by me duly sworn, say that they are the Mayor and City Recorder respectively of the City of Logan and that the foregoing instrument was signed in behalf of said

corporation by authority of Optional Forms of Municipal Government Act and the afore-  
said officers acknowledged to me that said  
corporation executed the same.

Exhibit A to Affidavit of Chairman Larsen, T.R. at 42 (emphasis added); see also T.R. at 39, paragraph 5. When members of the Council objected, the City Attorney affirmed the Mayor's position. T.R. at 46. The dispute included not only authority to buy, sell, or exchange real property but whether notice had to be given the Council. The city Attorney finally did acknowledge that the Council could, by ordinance, require notice be given to it of real property transactions. Amidst the continuing debate over authority Logan City Ordinance 1-6-6 was passed requiring notice be given to the Municipal Council with respect to property transactions. T.R. at 213.

The members of Municipal Council, Respondents herein, concurrently requested the City Attorney to seek an opinion from the Utah Attorney General's Office with respect to whether an additional ordinance requiring Council approval to engage in property transactions would be legal. See proposed ordinance, T.R. at 214. That request to the Attorney General, dated October 12th, 1976, expressed the opinion of the City Attorney that such Council control "would completely destroy the form of government we have in Logan City." T.R. at 20. The Attorney General's Opinion written by Jack L. Crellin, dated November 4th, 1976, fully supported the Council, concluding:

It is, therefore, my opinion that the Municipal Council can indeed pass an ordinance requiring the Mayor to secure the approval of the council before either purchasing or selling real property and any attempt by the mayor to do otherwise would be invalid.

T.R. at 43-45. That Attorney General's Opinion was communicated to the Council by the City Attorney along with his letter disputing that opinion and Appellant openly characterized the opinion as not being worthy of a first year law student. T.R. at 51-53.

The Mayor then vetoed the proposed ordinance stating:

The Municipal Council may not, by ordinance or otherwise, confer upon itself administrative powers. This ordinance exceeds the limits of power granted the Council by that [Optional Forms of Municipal Government Act]. It is an unlawful and unwarranted intrusion by the legislative branch, or Municipal Council, into the powers of the executive branch.

T.R. at 56 (emphasis added); see proposed ordinance, T.R. at 2.

Under these circumstances, this legal issue was then placed before the trial court in Respondents' second claim for relief which sought a determination as to whether the Mayor could buy, sell, or exchange real property without notice to, or authority from, the Municipal Council. Eventually, the Court granted summary judgment to Respondents holding in its Memorandum Decision that control over real estate transactions belongs to the Municipal Council. Memorandum Decision, T.R. at 301-303; Partial Summary Judgment, T.R. at 348-350; Final Summary Judgment, T.R. at 441-42, 448-49. Nothing dealing with management was ever before the court.

II(B). The Municipal Council possesses plenary control over the sale, exchange and purchase of municipal real property

Section 10-8-1 specifically vests control of property of the municipal corporation in "boards of commissioners and"

councils of cities." Section 10-8-2 indicates these same entities "may purchase, receive, hold, sell, lease, convey, and dispose of property, real and personal . . . ." The Optional Forms of Municipal Government Act nowhere alters or speaks to this allocation of power and responsibility. The Mayor's duties enumerated in Section 10-3-1219 do not indicate or even imply any power over real property. There is wording in the Optional Forms Act itself which implies that the Council retains plenary authority over property, for it states "the council may hold executive sessions, but only for the purpose of discussion of personnel, land acquisitions, or lawsuits. Section 10-3-1212 (emphasis added). Of course the direct grant of this power is in Section 10-8-1 which power is given to the Council by Section 10-3-1204.

Without belaboring this property issue, Respondents note that its discussion of Point I of its Brief, supra, relied upon the property issue as a continuing example in its presentation. See particularly Part I(C), supra, dealing with other state statutes providing alternate government forms and real property control systems therein.

II(C). The Municipal Council power to specifically approve real property transactions cannot be delegated.

The general rule is that the governing body's power to approve real property transactions cannot be delegated to others. E.g., City of Bowling Green v. B'd of Education, 278 SW2d 726 (Ky. 1975), Jamoneau v. Local Government B'd, 78 A2d 553 (N.J. 1951). In determining what particular functions may be delegated, it is generally held that



unless a statute specifically provides otherwise, legislative and discretionary powers, as vested in the governing body of a municipality cannot be delegated by such a body to the administrative officials of the municipality. Commonly when the exercise of the discretion is involved, the municipal council cannot delegate the power of enacting policy regulations, of enacting or enforcing building regulations, of determining what public improvements shall be undertaken, and the character and extent of such improvements, of approving of certain acts, of selling municipal bonds, of purchasing fire equipment, of entering into contracts generally, or of leveeing of tax.

56 Am Jur 2d, Municipal Corporations § 196. The quotation, supra, indicates numerous functions considered too discretionary to be delegated, for example, it indicates "determining what public improvements shall be undertaken, and the character and extent of such improvements." In the matter at hand we do not discuss mere improvements but the sale, purchase and exchange of real property with values of \$300,000 and \$200,000 each, discretionary transactions involving the future operation and financial stability of a municipality.

Under the Optional Forms of Municipal Government Act the Mayor is the chief administrative officer. To presume that a mere general budgetary allowance, for example, an appropriation of funds for the purchase of park land, is sufficient authorization to vest the Mayor with complete authority to negotiate, select and purchase specific tracts is an excessive interpretation of the vesting of discretionary judgment in the Mayor. Respondents as a majority of the Municipal Council deny any intention to vest or delegate such power in the Mayor.

II(D). The Municipal Council should approve municipal real property transactions by resolution and transactions should be openly and fairly conducted.

Transactions involving municipal real property are properly authorized by Municipal Council resolution. The agency "to sell or otherwise dispose of real estate must be expressly authorized." 3 Am Jur 2d, Agency § 117. In Stone v. Salt Lake City, 356 P2d 631, 636, (Ut. 1960) this Court held a resolution to be proper authorization for the sale of real property in contrast with an ordinance.

An interpretation conferring unilateral authority upon the Mayor to buy, sell and exchange real property avoids the necessity of a public hearing, notice and a reasonable opportunity for those interested to appear and be heard. Vesting one individual with the complete and total power to buy, sell and trade avoids the critical opportunity for citizenry participation and reaction to one of the most important exercises of power on the local level. The Appellant has actually purported to conduct many real estate transactions with no notice or participation from even the Municipal Council much less from the citizens of Logan.

In Stone v. Salt Lake City, 356 P2d 631, 638 (Ut. 1960) this Court indicated the proper manner of conducting sales of real property:

We are entirely in accord with the contention that it is desirable and proper that sales of such public property be openly and fairly conducted. The essential of procedural requirements of that character is that there be notice, a reasonable opportunity for those interested to appear and be heard, and that fairness in the

procedure in connection with the sale be observed . . . . its procedure in publicizing the proposal, holding a public meeting, adopting a resolution . . . . soliciting bids for its sale encompasses the basic elements of propriety in dealing with such public business.

The requirements of the Stone case appear entirely appropriate and of equal application to purchases and exchanges of municipal real property. Antieau comments that, "exchanges are generally treated like sales as far as the notice provisions are concerned." 2A Antieau § 20.19 at p. 74.10. In the instant matter numerous sales and exchanges have been conducted without any resolution, notice or public hearing. For example, the Baugh purchase, the Hirschi purchase and the exchange with the L.D.S. church on August 24th, 1976. All three of these critical transactions were entered into without any notice to, or public hearing for, the citizens of Logan. The Municipal Council, itself, was merely informed after the fact. T.R. at 38.

II(E). The Municipal Council and previous Logan City Commissioners stand as trustees of municipal real property.

Antieau comments that "municipal corporations can have accountings against officers and employees when the municipal authorities believe that governmental properties have been misappropriated. 2A Antieau, § 22.10 at p. 249. The general rule everywhere is that a public office is a trust and a public official is a fiduciary.

II(F). Response to Appellant's Brief - Point II

- (1) REPLY TO: "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." [Appellant's Brief at 21.]

Respondents disagree. The decision in a municipality of whether Tract A should or should not be sold is a matter of policy. How can the Council adopt a policy of park expansion if it can't control which property the Mayor sells? The sale, purchase and exchange of municipal real property is at the critical nub of policy. Of course, once the city has determined as a matter of policy that Tract A should be sold then the Mayor would probably be directed to sell it and administratively might initiate procedures to implement this policy. It is of little import to policy whether John Doe or Richard Roe buys the property. Even so, the deed given should properly recite in its acknowledgment the authority given, preferably by a specific resolution, to the mayor to sell Tract A.

The critical nature of this policy determination becomes even more apparent when purchases are considered. The Appellant would have the Court believe it is merely an executive act whether Tract A or Tract B is purchased for the city. That contention is hardly worth stating. Quite obviously there is a critical policy determination involved.

Unfortunately, these are not abstract considerations in the instant case, Appellant actually purchased and sold large tracts belonging to Logan City without notice to or authority from the Municipal Council. T.R. at 38-40. For example, lands were purchased, ostensibly for a new downtown park, at a total

cost in excess of \$300,000.00. Isn't there a policy consideration involved in the decision to locate a \$300,000.00 park within three blocks of four other parks and recreational developments? Appellant would have the Court believe that the mere appropriation of monies for park purchases is sufficient authority for him to unilaterally select and purchase any given site.

- (2) REPLY TO: Appellant's referendum argument, to wit:  
That because referendums are sometimes required for sales of real property in other states, such sales are "administrative" and not "legislative" acts.  
[Appellant's Brief at 22.]

Appellant's argument is built on sand. Underlying this entire argument is the assumption that the Municipal Council is purely a legislative body having no administrative powers. Respondents have repeatedly denied that argument, noting in conjunction therewith that original Section 10-6-116 expressly referred to passage of resolutions by the Council which by Section 10-3-717 are for the purpose of exercising administrative acts. For example, Section 10-3-1217 expressly describes the mode whereby the Council can deal with certain administrative affairs concerning municipal employees.

The one salient conclusion that Appellant's referendum argument does lead to, is that various States have been so concerned about the sale of real property that they have required municipalities to put it to a public referendum. That determination hardly bodes well for Appellant's argument that he has complete and exclusive authority, unilaterally, to buy, sell and exchange municipal real property.

- (3) REPLY TO: "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." [Appellant's Brief at 24.]

Hardly. Respondents did pass legislation requiring, at a minimum, notice. It should be noted that they were given questionable legal advice by the City Attorney to the effect that any effort to pass an ordinance or obtain legal remedies restricting or interfering with the Mayor's exercise of his purported "executive right" to unilaterally buy, sell, and exchange real property would constitute a violation for which they could possibly lose their council seats. T.R. at 51-53, 82. See Section 10-3-1217 (last sentence).

What the Respondent Council members did is immediately pass legislation requiring notice. The City Attorney having informed them this step was permissible. Next the Respondent Council members demanded the City Attorney immediately seek a written opinion on this issue from the Attorney General's Office. See Part II(A), supra, which opinion indicated the City Attorney was, in the opinion of that office, wrong. They then passed, by majority vote, legislation demanding that the Mayor obtain authorization for sales, purchases and exchanges of municipal real property. When the Mayor vetoed that ordinance, groundwork for the instant action was commenced. Respondents do not understand how Appellant is able to glean from these facts or the ordinance in question an admittance by Respondents of such authority on the part of the Mayor.

### POINT III

THE MUNICIPAL COUNCIL IS THE "GOVERNING BODY" AS THAT TERM IS USED IN THE MUNICIPAL FISCAL PROCEDURES ACT.  
[Including Responses to Appellant and Burtonshaw/Baird, general]

Appellant has not chosen to directly appeal the ruling of the trial court with respect to the issues raised in this Point, Respondents' third claim for relief. However, there are rather broad and unspecific attacks by Appellant on the whole theory of there even being a governing body. Appellant's Brief at 16. In addition, Appellant urges that all powers should be divided into executive and legislative functions. Further, Appellant's Brief, Point IV, mistates certain issues and calls into question determinations made under this Point. The Burtenshaw/Baird Brief also levels a general attack at the entire trial court ruling. Under these circumstances Respondent requests a ruling by this Court reaffirming the determination of the trial court.

The critical issues inherent in this third claim for relief were decided by the trial court upon Respondents' motion for summary judgment. Appellant entered a general denial and alleged merely that the practices complained of had been "the established practice for a good number of years." T.R. at 126. The court held that interfund and inter-departmental transfers required approval of the Municipal Council, intra-departmental transfers required only the approval of the Mayor and budget officer. T.R. at 443-44.

III(A). The Municipal Council must authorize interfund and  
interdepartmental transfers.

The Uniform Municipal Fiscal Procedures Act, Sections 10-10-23 et. seq., establishes

uniform and sound fiscal procedures for the adoption and administration of budgets . . . that budgets may be balanced . . . [and] specifies the manner in which appropriations for various municipal activities are made and controls the expenditure thereof . . . . to ensure that executive staffs administer their respective functions in accordance with those plans, and to permit taxpayers and investors to form intelligent opinions based on sufficient information as to the financial policies and administration of the city . . . .

Section 10-10-24. The procedures in the Act are at the heart of the individual citizen's right to information about, and control of, the municipality which governs him; to the accomplishment of "this purpose, the provisions of this law shall be broadly construed." Section 10-10-24. The Act requires public approval by the "governing body" of a "tentative budget," a waiting period of "at least ten days," availability of the tentative budget for inspection, published notice of a public hearing and a "public hearing on the budget . . .at which all interested persons shall be given the opportunity to be heard" at the conclusion of which the budget may be finally adopted. Sections 10-10-34 et. seq.

Quite obviously the careful and meticulous procedures of the Uniform Municipal Fiscal Procedures Act would be circumvented by the allowance of unpublicized fund transfers by municipal officers after the adoption of the final budget. This is what has occurred in Logan City; it occurred without public notice or hearing to the public. The Municipal Council, itself, was never notified nor was its approval sought; the



transfers were done by Logan employees under the direction of Appellant. T.R. at 72.

The Fiscal Procedures Act specifically requires that the governing body approve transfers causing an increase in the general fund budget only after notice and a public hearing, a procedure similar in form to the adoption of the "final budget." Compare Sections 10-10-52 et. seq. with Sections 10-10-34 et. seq. To presume that "the governing body" in the Act's usage is not the Municipal Council ignores the express language of the Optional Forms of Municipal Government Act and the tenor and approach of the Uniform Municipal Fiscal Procedure Act. The result of such a premise is to allow a Mayor complete freedom to reallocate the budget without any semblance of notice or public hearing.

III(B). The Mayor's sole power as to interfund and inter-departmental transfers and other appropriation ordinances is the veto power.

Section 10-3-1214 of the Optional Forms of Municipal Government Act slightly modifies the manner of budgeting municipal funds, it allows the Mayor specific veto power. As the Mayor is given this power in regard to "appropriation ordinances" it is proper to regard him as having the same authority as to interfund transfers and interdepartmental transfers within the same fund. To allow either the Mayor or Municipal Council to obtain some superior leverage or power in subsequent alterations of a "final budget" would render nugatory their power in regard to the initial adoption of the "final budget."

III(C). Response to Appellant's Brief -- Point I, IV

- (1) REPLY TO: Argument that all powers should be functionally divided. [Appellant's Brief at 16-17.]

Appellant at one point argues there is no governing body and that all such usages of the term in former statutes require a division of those powers into executive and legislative molds. Appellant's Brief at 8-19. Section 10-3-1219 (6) of the Optional Forms Act specifically provides:

Appoint a budget officer for the purpose of conforming with the requirements of the uniform municipal fiscal procedures act and in all other respects fulfill the requirements of that act.

(Emphasis added.) Respondents note initially that a careful reading of the Uniform Municipal Fiscal Procedures Act, Section 10-10-23 et. seq. reveals a constant usage of the term "governing body" throughout. See, e.g., Sections 10-10-33, et. seq. Appellant would presumably have the Court examine each statute to pidgeonhole the various executive or legislative functions. Respondents urge that by Section 10-3-1214 the Mayor has a defined veto right in respect to "appropriation ordinances"; that is the power given the Mayor by the Optional Forms of Municipal Government Act and that is his limit.

- (2) REPLY TO: Appellant's Statement of Point IV. [Appellant's Brief at 28.]

Respondents note that Appellant's statement of Point IV restates a holding of the trial court. T.R. at 444. Respondents do not dispute that holding nor have they ever disputed it. However, as to the arguments in Point IV of Appellant's Brief, Respondents dispute the same. See

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Respondents' Point VIII, infra.

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POINT IV

THE MUNICIPAL COUNCIL MUST APPROVE PLANNED UNIT DEVELOPMENTS, INNERBLOCK DEVELOPMENTS AND CLUSTER DEVELOPMENTS AS SUBDIVISIONS  
[Including Responses to Appellant Point III.]

In this claim for relief Respondents sought a ruling that the approval and filing of a subdivision plat required Council approval. T.R. at 6. At the evidenciary hearing there was a discussion of this issue and Appellant stipulated that under Logan's ordinance interblock developments, cluster developments and planned unit developments were governed by state subdivision law. Transcript at 118-119; T.R. at 393. At the conclusion of that hearing it was agreed this issue would be presented to the court in legal memorandums. Transcript at 140-142. Respondent's Memorandum, T.R. at 372. Appellant's Memorandum, T.R. at 393. Thus, the issue before this Court is whether Logan City subdivisions must be approved by the Logan Municipal Council, it being conceded by Appellant that interblock developments, cluster developments and planned unit developments are subdivisions under state law.

IV(A). The Municipal Council has plenary control over subdivision approval.

There are three fundamental state statutes that control. The pertinent parts of Section 17-21-8 provide as follows:

It shall be unlawful for any recorder to record any map or plat of a subdivision of land situated in any city or town until the same shall have been approved by the legislative authority of the city or town in which such land may be situated . . . For each and

every violation of this section by any recorder, his deputies or employees, the recorder shall forfeit and pay to the county the sum of \$200.

(Emphasis added.) The pertinent parts of Section 57-5-3 provide as follows:

Such map or plat shall be acknowledged by such owner before some officer authorized by law to take the acknowledgment of conveyances or real estate, and certified by the surveyor making such plat; if the land is situated in any city or incorporated town such plat or map shall be approved by its governing body, or by some city or town officer for that purpose designated by resolution or ordinance of such governing body; and, if the land is situated outside of any city or incorporated town, shall be approved by the board of county commissioners of the county, or by some county officer for that purpose designated by resolution or ordinance of such board. When so acknowledged, certified and approved, it shall be filed and recorded in the office of the county recorder of the county.

(Emphasis added.) Section 10-9-25 provides as follows:

From and after the time when the planning commission of any municipality shall have adopted a major street plan and shall have certified the same to the legislative body, no plat of a subdivision of land lying within the municipality shall be filed or recorded in the county recorder's office until it shall have been submitted to and approved by the said planning commission and legislative body, and such approval entered in writing on the plat by the secretary of the planning commission and clerk of the legislative body, or other designated members or employees. No county recorder shall file or record a plat of a subdivision without such approval, and any county recorder so doing shall be deemed guilty of a misdemeanor. The filing or recording of a plat of a subdivision without such approval shall be void. In exercising the powers granted to it by the act, the planning commission shall prepare regulations governing the subdivision of land within the municipality. A public hearing thereon shall be held by the legislative body, after which the legislative body may adopt said regulations for the municipality.

(Emphasis added.)

The first and second statutes, supra, appear with the same legislative history going back to revised statutes of 1898. The first, Section 17-21-8, is an affirmative mandate contained in the law pertaining to County Recorders requiring "approval by legislative authority of a city" before recording with no delegation mentioned. The second, Section 57-5-3, is contained in the Real Estate Plats and Subdivisions Section of the Utah Code. It gives the approval power to the "governing body or some city officer for that purpose designated by resolution or ordinance of such governing body."

These first two statutes if taken in their most favorable light toward Appellant's position and without considering the third statute, a later enactment, require the specific delegation by resolution or ordinance of the approval power of the Council to an officer of the City.

A reading of the Logan City ordinances interpreted by the trial court clearly illuminates (a) the absence of any acknowledgment of the authority of the Council under either Section 17-21-8 or Section 57-5-3; and, (b) the absence of any express delegation of the unacknowledged authority; and, (c) a complete absence of any awareness or knowledge of the requirements under Sections 17-21-8 and 57-5-3, for recording plats in the County Recorder's office. There is no reasonable interpretation of the Logan City ordinances that, by them, the Municipal Council delegates authority to the Mayor for approval of the plats as a prerequisite for recording in the County Recorder's office. It should be noted that Respondents as a majority of the Council have by this action denied and contested any claim that they delegated any such authority.

IV(B). The municipal power to approve subdivisions is non-delegable.

The non-delegability of the Council's power to approve subdivisions is clear when viewed in conjunction with the third statute, Section 10-9-25, which was enacted in 1945, fifty years after the other two enactments. That statute referring to cities such as Logan with "Major street plan(s)" affirms that in those cities

[N]o plat of a subdivision of land lying within the municipality shall be filed or recorded in the county recorder's office until it shall have been submitted to and approved by the said planning commission and legislative body.

Section 10-9-25 (emphasis added).

This provision expressly negates any contention that the legislative body could delegate that authority. The questions as to interpretation of delegability are then left only for resolution as to cities without major street plans. That power is clearly non-delegable in Logan City.

This matter is serious and contemplates consequences beyond internal city operations. Section 10-9-25 makes it a misdemeanor for the County Recorder to accept and record plats not so approved. Why? Because properly approved plats are a prerequisite for title to the public who will be buying lots or buildings in subdivisions. Non-compliance with that Section makes the plat void.

IV(C). Response to Appellant - Point III

- (1) REPLY TO: "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." [Appellant's Brief at 26.]

Respondents note the mistaken significance which Appellant now ties to the mere words "legislative body." Those terms like "chief executive" are used not to define functions but as a generic name to identify a given governmental entity. It isn't difficult to recognize that the term "legislative body" was used by the draftsmen to indicate, not function, i.e., as opposed to "executive," but the relevant governmental body to exercise powers given in the Zoning Chapter, Sections 10-9-1 et. seq., further, that "boards of commissioners and city councils" were descriptive not functional terms used to describe that same entity as to general powers. Sections 10-8-1 et. seq. Indeed a careful look at Chapter 8 will show that there is no functional symmetry as to why certain sections begin with "they" and thereby refer back to "boards of city commissioners and city councils" and others begin by using the term "governing body." The difference is solely one of age and accident, the original statutes use "they," later amendments use "governing body." Compare Section 10-8-8 with Section 10-8-8.1, the former being enacted in 1898 and the latter in 1953.

Given that Appellant is now willing to recognize that some of the usages of the terms "legislative body," "governing body," etc. are devoid of substance and are merely to identify, how can Appellant continue to assert that the mere use of the words "chief administrative officer" and "executive department"

must be thoroughly substantive to the derogation of all established municipal laws and practices.

- (2) REPLY TO: "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." [Appellant's Brief at 27.]

Appellant's assertion here is that the trial court's ruling is based on an erroneous assumption that legislative powers are nondelegable. This is hardly a fair characterization of the trial court's reasoning. "Legislative body" is used as a code word for Council not only in this Section but throughout Chapter 9 of Title 10, and such use has nothing to do with what nature or kind of power is actually being given.

The trial court did not discuss nor even consider any broad "legislative delegability" doctrines, it simply read and followed the obvious import of Section 10-9-25 which requires among other things: submission to and approval by the legislative body; such approval entered in writing by clerk of legislative body; and a public hearing by the legislative body. The court didn't have to deal with whether the power was "legislative" or not, quite obviously the specific requirements of the Section indicated it was not a delegable duty. How can any public body delegate a duty when a state statute specifically requires that specific body by name to have a public hearing, to by name approve the submission and to enter such approval by its own named clerk.

Appellant here again finds substance in words such as "legislative body" where there is none. Quite obviously the



the use of that term in Section 10-9-25 has nothing to do with whether the exercised power is "legislative" or "executive" in nature, it is simply a name. Appellant doesn't seem to get beyond the conception that fellows named Shoemaker and Miller must make shoes and grind wheat.

POINT V

THE MUNICIPAL COUNCIL CAN RETAIN OUTSIDE COUNSEL TO REPRESENT ITS OWN INTERESTS.

[Including Responses to Appellant, Point VI.]

Appellant's Brief urges that this issue is inseparable from a decision on Point II of its appeal and that a reversal of the trial court ruling on the buy, sell and exchange property issue would necessitate a reversal on this issue as well. Respondents deny any such connection.

The trial court's ruling cites original Section 10-6-119 and then provides that the Council has "power to appropriate money for retention of counsel to represent their interests." T.R. at 445. Appellant has chosen to appeal only that portion of this ruling as it relates to retention of counsel in regard to the real estate question. This same issue, retention of counsel, was addressed collaterally in the sixth claim for relief and to understand the factual context of the trial court's ruling the judgment on both claims must be combined. The sixth claim for relief dealt with the power of the Council to do certain acts by resolution, one of the particular resolutions at issue being the retention of counsel to investigate and pursue a certain real estate transaction.

it was stipulated that the appointed City Attorney is disqualified to represent the City in any action related to the Clair Bernston property trade . . . .

The court holds as to this Sixth Claim for Relief that the Council does have the authority under the circumstances, to retain counsel for the purposes designated . . . .

T.R. at 445 (emphasis added.)

The factual context surrounding this issue was that the City Attorney was disqualified by reason of familial connections from pursuing the matter and the Mayor was admittedly one of the city officials directly implicated in the questioned real estate transaction. Under the circumstances the Municipal Council felt it had the power to independently appoint outside legal counsel. The Mayor and City Attorney vehemently denied this power maintaining such an exercise was illegal. T.R. at 82. The issue presented to the trial court was whether the Council could exercise this power "under the circumstances." The trial court, limiting its ruling to the circumstances, held the Council had such power.

Respondents urge the Court that pursuant to Section 10-3-1215 the Council is authorized and given power to effectuate its duties. Given what its duties are in respect to investigating municipal administration, Section 10-3-1217, and its duty collectively as a trustee of city property, Respondents were authorized under the circumstances to retain outside counsel. Those specific circumstances being disqualification of the acting City Attorney and a conflict of interest in the Mayor.

V(A). The Municipal Council may retain special counsel.

It is everywhere agreed, absent specific prohibition to the contrary, that

the legislative or governing body of a municipality--such as the city council . . . may employ counsel.

56 Am Jur 2d, Municipal Corporations § 221 at p. 281 (footnotes omitted). Indeed, even where there is a specific prohibition the governing body has been allowed to retain special counsel. In Judson v. Niagara Falls it was held that the governing body could employ special counsel, despite charter prohibitions, when the mayor was head of one of the departments being investigated and had the power of appointment and removal of the regular city attorney. 97NE 1107 (N.Y.)

The occasion upon which special counsel may be retained is not limited.

[A] municipal corporation having a regular salaried city attorney is not for that reason prevented from employing special counsel in particular situations when the city attorney is absent, ill or disqualified; nor is such implied power of the municipal corporation taken away where subsequent enactments create the office of city attorney, impose upon him the duty to prosecute or defend all actions to which the municipal corporation is a party, and provide that for duties devolving upon any municipal officer compensation shall not be paid to any other person . . . A municipality may employ special counsel where a vacancy exists in the office of the city or municipal attorney, or where he refuses to act, or where there is a conflict between departments or between officers of the municipal corporation.

56 Am Jur 2d, Municipal Corporations § 220 at p. 280. (emphasis added.) For example, in the case of Wiley v. Seattle, the

Washington Court held that when a question respecting the various powers of respective groups within the municipality arose and the municipal council and city attorney were arrayed against the mayor, the mayor could employ special counsel on behalf of the city. 35 P. 415 (Wash. 1893). Interestingly enough, it appears that courts have questioned more closely the mayor's right to employ special counsel. See, e.g., East St. Louis v. Thomas, 102 Ill. 453. (Ill.).

V(B). Appellant and City Attorney Zollinger were disqualified and antagonistic to the Municipal Council

Appellant Mayor was a member of the previous Logan City Commission which negotiated and authorized the exchange with Clair Bernston. Acting as Mayor, Appellant, actually effected the transfers to Mr. Bernston. Further, Appellant was an active participant in approving the transaction. T.R. 228 et. seq.

Appellant Mayor and City Attorney Zollinger were (and remain) in direct conflict with the majority of the Municipal Council concerning the gravamen of this Action. The Appellant stoutly defended his views regarding the power of his office and the City Attorney has supported that interpretation. Furthermore, they have actively carried out their duties in contravention of the rules of law which this Complaint seeks to establish.

The City Attorney Zollinger by his own admitted conflict of interest and public statements is disqualified. Transcript at 74. Under these circumstances it is entirely proper for the Municipal Council to retain special counsel.

E.g. Meeske v. Bauman, 241 N.W. 550 (Ieb.), 83 A.L.R. 131; Ireton v. State, 91 N.E. 1131. (Ohio).

#### POINT VI

THE MUNICIPAL COUNCIL MAY ACT BY ORDINANCE OR RESOLUTION, ONLY ORDINANCES BEING SUBJECT TO MAYORAL VETO.

[Including Responses to Burtenshaw/Baird Points III, IV, V.]

Appellant does not contest the trial court's ruling with respect to this issue. However, laced throughout the Burtenshaw/Baird Brief are challenges to this ruling. Under the circumstances Respondent feels the issue should be laid before this Court.

VI(A). The Municipal Council may act by resolution or ordinance

The original Section 10-6-116 in discussing the voting procedure of a municipal Council under the Optional Forms of Municipal Government Act stated that every

motion, resolution or ordinance shall be written and read before the vote is taken on it.

(Emphasis added.) This section is now recodified at Section 10-3-717. The obvious implication of such statutory language is that the Council could act by ordinance or resolution, depending on whether it is exercising legislative or administrative powers, respectively.

VI(B). Only ordinances or appropriation ordinances under the Optional Forms of Municipal Government Act are subject to veto.

Section 10-3-1214 provides that the Mayor may veto

"ordinances" or "appropriation ordinances." The Mayor is

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nowhere given veto power over resolutions or motions of the Municipal Council. Incidentally it should be noted that Section 10-3-1214 giving this veto power over "ordinances" originally followed on the heel of original Section 10-6-116 which provided that the Municipal Council may act by "resolution or ordinance." These Utah statutes follow the general rule that the Mayor's veto is limited to ordinances adopted by the Municipal Council or matters having the character of an ordinance.

The treatises indicate that

the weight of authority limits the mayoral veto in the absence of clear provision to purely legislative matters. The veto is ordinarily not applicable to the internal functions of the local legislative body, nor to administrative or administrative matters.

2A Antieau, § 4.37 at p. 4-71.

Where the mayor is given power of approval or veto in general terms, it does not extend to matters which are not legislative in character . . . . In the absence of a charter or statutory requirement, the resolution of the municipal council need not be signed or attested.

56 Am Jur 2d, Municipal Corporations § 359.

VI(C). Resolutions are only appropriate for certain matters

Utah law sets up certain mandatory procedures for the enactment of municipal ordinances. See Sections 10-3-701 et. seq. These procedures are applicable to a city following the Optional Forms of Municipal Government Act. See Section 10-3-1204. Section 10-3-711 requires the publication of ordinances. Resolutions, on the other hand, do not require publication. Section 10-3-719.

Municipalities in Utah and elsewhere have developed customs about what is an appropriate matter for resolution and what is more properly handled by ordinance. In one shape or another three distinctions are generally made: first, ordinances are acts of legislation where a resolution is not; second, resolutions are used for matters temporary in nature, ordinances represent a permanent rule; and third, resolutions are generally used for matters administrative in nature. Indeed Sections 10-3-701 et. seq., now establish these rules as law.

An ordinance is distinguished from a resolution by the degree of formality required by its enactment. An ordinance provides permanent rules of government for conduct desired to affect matters arising subsequent to its adoption. A resolution deals with matters of a temporary or special nature, where the action taken generally involves findings of fact and may be characterized as administrative.

2A Antieau § 4-14 at p. 4-30. Thus, resolutions are generally held appropriate when they concern some matter of administration and decide a particular matter. See, e.g., Kalamazoo Municipal Utilities v. Kalamazoo, 76 NW 2d 1 (Mich.); Salisbury v. Nagel, 420 SW 2d 37 (Mo. App.), Baker v. Lake City Sewer Dist. 191 P 2d 844 (Wash. 1948).

VI(D). The three resolutions passed by the Municipal Council regarding special counsel and litigation are effective.

The first resolution which authorized retention of special counsel to investigate the gravel pit exchange dealt appropriately with an administrative matter. The action taken was as to one specific matter, had no general impact and was not of a permanent nature. The second resolution retaining that special counsel and authorizing litigation, if necessary, was

of like import. T.R. at 83.

The third resolution seeking to retain special counsel incident to this litigation was also specific, temporary and administrative. T.R. at 84. Quite obviously, these actions are not the type which should receive a section number and be placed in a book as ordinances of a city. They are enacted pursuant to the Municipal Council's control over the real property and finances of a city and its power to have its legal status determined. Within these resolutions, there is no determination affecting future conduct.

#### POINT VII

INDIVIDUAL COUNCILMEMBERS HAVE A FREE AND UNLIMITED RIGHT TO MUNICIPAL RECORDS.

[Including Response to Appellant, Point V.]

Appellant does not clearly indicate in their Point V whether they are appealing from the lower courts' ruling or in what way said ruling is urged by them to be erroneous. The lower court's complete ruling with respect to this issue was as follows:

As to the Eighth cause of action, the testimony at the Evidentiary Hearing was conflicting as far as the evidence was concerned as to what the administration was supplying or not supplying to the Council as far as information is concerned regarding city government. The Mayor, as defendant, claiming information has always been available but also admitting that he did apply a condition before providing the information himself to the Council, that condition being a meeting between all department heads and the requesting Council chairman.

As far as supplying information generally is concerned, the Court holds that the Council is entitled to any information that are records pertaining to the city and in custody of the



executive branch and that they may, by resolution or ordinance, set the policy by which they may obtain this information in a reasonable manner and provide and allocate funds for its assembly in the form that they feel will be most efficient and effective for their use, and to give direction to the executive branch as to their policy on obtaining the information by resolution or ordinance as long as it does not make unreasonable demands especially involving the element of time for the accumulation of the information.

Final Summary Declaratory Judgment, T.R. at 446-447. [taken verbatim from the trial court's Memorandum Decision, T.R. at 405].

Evidently Appellant wishes to have the Supreme Court find the Mayor did not deny Chairman Larsen information but merely declined to himself assemble records. The trial court gave no evidentiary findings as to whether there was or was not such a denial. The trial court terminated the evidentiary process having found a justiciable issue and then proceeded to set forth what it found to be the law as to the information requests between the Council and Mayor. Transcript at 75-76. Evidently Appellant does not wish to contest the legal finding by the trial court on this issue, making reference to the same as a "rather petty matter." Appellant's Brief at 32. In answer thereto Respondents can only note the futility of arguing over Appellant's mischaracterization of the facts if Appellant is unwilling to appeal the legal finding. It is unusual to find a Brief challenging the trial court's fact finding which then acquiesces to the legal rule derived therefrom.

VII(A). Appellant mistakes the facts

Respondent does challenge the facts as represented in Appellant's Brief. Respondent maintains that the Mayor did refuse access, granted access which was only conditional, and, finally, inaugurated a city policy intended to effectively control and limit information obtainable by Council Members. Appellant's own Brief filed in the District Court accurately states the position taken by Appellant with respect to information requested by Council Members:

As Plaintiff Darwin Larsen has repeatedly demonstrated, to whatever he turns his attention develops into a "controversy" which often is not really a controversy. This is the case with respect to his request for information. If there is an issue perhaps the right of the City Administration to be free from undue interference from Municipal Council Members as reflected in Section 10-6-121 U.C.A. 1953, is the real question. Must City Administration immediately furnish all materials requested by a Municipal Council member regardless of the amount of information requested, the amount of time given to obtain the information, the relevancy of the material to legitimate Council business and the amount of time and money involved in seeking out, gathering, and copying the material? Access to public records (which no one disputes) is much different than repeated demands for substantial amounts of detailed material the purpose of which often appears to have no relation to council business and which not only disrupts City employee workloads, but has a demoralizing effect on all aspects of City administration. To set guidelines in an effort to minimize such adverse influences seems to be reasonable.

T.R. 131-32 (emphasis added). Admittedly, with sophisticated counsel the issues raised have been predictably shifted and reshaped, Appellant would have the Court believe the issue was whether the Mayor must himself supply information. That was not the issue before the trial court, and Respondents have

never urged that the Mayor himself was required to deliver information.

With respect to why Chairman Larsen directed his request to Mayor Anderson for certain documents it should be noted that there is a Logan ordinance requiring the same. Section 2-1-4, Logan Ordinances (1976), states that staff assistance to the Municipal Council is "to be furnished by the Executive Branch through the chief executive officer." That is, if Chairman Larsen wanted copies of certain documents rather than request it of the City Recorder, he would be required to direct such a request to the Mayor. In conjunction therewith the Mayor adopted a policy that no staff assistance or copies could be rendered to Council members except through his office. Transcript at 36. That quite adequately explains why the request was put to the Mayor rather than the custodian of the records. Furthermore, the suggestion that Chairman Larsen was in some fashion demeaning the Mayor by demanding he personally go copy the records, assemble and staple them is pure fiction and totally unsupported by any evidence in the record.

It should also be noted that these voluminous requests which "demoralized" the entire city administration and "disrupted" employee workloads were introduced as exhibits in the evidentiary hearing. See Plaintiff's Exhibits 3, 4, 5 and 6.

The only demoralizing or disruptive effect these requests produced was that resulting from the disclosure of information as to the manner in which the Appellant was misconducting city business. That is, the requests did not

demoralize or disrupt, but the public dissemination of the information may well have done so, for it revealed widespread violations of state and municipal law by the city administration. For example, unknown property transactions, interfund transfers, etc.

Mr. Larsen's testimony with respect to his requests was that

Mr. Zollinger [city attorney] said that I could have the information, if I was not going to make trouble with it. But he said that if I was going to make trouble with the information that I received that I would have to pay the cost of having the material assembled and the cost of reproducing.

Transcript at 63 (emphasis added). The Court should note that Mr. Larsen was no mere citizen, but the elected Chairman of the Municipal Council requesting information with regard to city matters.

The Logan City administration had imposed certain restrictions on information. The City Recorder's testimony at the evidentiary hearing was as follows:

Q Now has the Mayor on any occasion ever announced to you and other department heads any policy concerning circumstances or conditions upon which information in your office will be furnished to anyone?

A Yes.

Q When was the policy announced, as best you recall?

A I don't remember the dates. It was in one of our weekly department meetings.

Q And do you remember about when it would have been? Would it have been around the first of this year, 1977?

A I couldn't give you a date on it.

- Q Well, would you just tell us what that policy was that was announced, as best you recall it?
- A He just asked that information be cleared through his office as a management tool, you know.
- Q And after that period of time when a request came to you for information that was in your possession what did you do with those requests?
- A I accumulated whatever they requested and then gave it to the Mayor to clear through his office.

Transcript at 53. The testimony is buttressed by that of Mr. Larsen and Appellant's own testimony. See Transcript at 27-29, 54-56, 59, 65, 71-72.

The evidentiary hearing also showed quite clearly the placing of additional conditions on Mr. Larsen's access to information, to wit: that it would be provided him only on condition that he attend certain staff meetings. In fact, Appellant indicates that it was collected by city employees but that he refused to deliver it until Chairman Larsen complied with his conditions. See Transcript at 29-37, 42, 60-61.

Appellant's characterization of this issue on appeal as being a "petty matter" together with its characterization in open court as a "tempest in a teapot" well indicates Appellant's attitude. Transcript at 72. Respondent urges this Court that the Trial Record and particularly the Transcript of the September 13th, 1977, Evidentiary Hearing, evidence a disturbing attempt to reduce and limit access to public information concerning city administration. This attempt is characterized by nebulous "policies," vague "conditions," and administrative questioning of what is proper information

for the Council members and what they intend to do with it. These requests for information and the administrative reaction to them did not occur in a vacuum but at a time when the Council pursuant to its duty, was legitimately questioning widespread conduct by the Mayor and his subordinates. The trial court later found, pursuant to the instant case, the conduct of Appellant was contrary to Utah municipal law.

The trial court found evidence on this information issue conflicting, but because of the compelling and basic legal requirements regarding free and unlimited access to information was compelled to set out in detail the legal requirements. It might also be noted that Respondents did not present all their evidence on this issue as it was stipulated that sufficient evidence had been rendered to make the issue justiciable, thus finding the issue justiciable, the trial court gave its legal rule which Appellant does not dispute to this Court. Transcript at 75-76. Rather, Appellant now disputes the partial facts introduced. The legal ruling should now be reaffirmed.

#### POINT VIII

MUNICIPAL DEPARTMENT HEADS MAY TRANSFER ONLY UNENCUMBERED OR UNEXPENDED APPROPRIATIONS WITHIN A DEPARTMENT WITHOUT COUNCIL APPROVAL, UNENCUMBERED FUNDS BEING THOSE FUNDS NOT SET ASIDE FOR BUDGETED LINE ITEMS.

[Including Response to Appellant Point IV.]

Appellant's Point IV again mistates the issue before this Court. The trial court's Final Judgment clearly states that intra-departmental budgeting transfers may be made without the Council's consent or involvement. T.R. at 444. Neither Appellant nor Respondents have appealed that ruling. However,

the issue before this Court on Respondent's ninth claim for relief deals with what administrative respect must be accorded line items in Logan's budgetary process. That is, are the city's administrative departments free to reallocate monies from appropriated monies for a specified line item to an entirely new item not stated in the budget. For example, can administrative officers who have received budgetary approval for four automobiles for the Street Department unilaterally cancel that appropriation and purchase a patrol on a conditional sales contract? That is the issue before this court. T.R. at 10.

Subsequent to the evidentiary hearing where evidence was taken regarding Logan City practices, the issue was submitted to court by legal memorandums. Plaintiffs Memorandum, T.R. at 364-372, Defendant's Memorandum, T.R. at 399-401.

The trial court thereupon rendered judgment on this issue holding that the administrative officials could not enter into conditional sales contracts without Municipal Council approval as they were installment debts, binding future operation of the Municipality. T.R. at 447. The Court further held and reaffirmed that intradepartmental transfers of unencumbered and unexpended funds did not need Council approval. But in explaining that ruling the Court held funds budgeted for a specified line item were "encumbered." T.R. at 447. It is only from this last interpretation that Appellant has appealed in Point IV of his Brief.

VIII(A). The general operation of the Uniform Municipal Fiscal

Procedures Act provides public and Council inputs

into budgets and preserves Council control over  
diversion of funds from specified line items.

The Uniform Municipal Fiscal Procedures Act closely details the law relating to fiscal procedures in Utah municipalities. It provides for tentative budgets, public review and publication before final passage. There are requirements that detailed estimates of expenditures be submitted to the governing body. Section 10-10-33(5)(6). It requires the tentative budget with these detailed estimates shall be made public. Section 10-10-34. The public is notified of a public hearing regarding the budget. Section 10-10-36. The plain import of these procedures is to allow both the governing body and citizenry to speak concerning the items in the budget, i.e. "we don't need two new police cars" or "we need three cars," etc. Section 10-10-37 provides that in adopting the final budget the governing body may "insert such new items or may increase or decrease such items of expenditure."

After adoption of the budget, in relation to dealing with expenditure accounts and line items, there are restrictions upon the administrative officials:

To implement the use of the encumbrances system he [the budget officer] shall cause separate accounts to be kept for the items of appropriation contained in the budget of each fund, each of which shall show the amount of the appropriation, the amounts paid therefrom, the unpaid obligations against it and the unencumbered balance. No appropriation shall be encumbered and no expenditure shall be made for any item of appropriation unless there is a sufficient unencumbered balance of appropriation and available funds for said item, except in cases of emergency as hereinafter provided.



§ 10-10-43 (emphasis added).

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.

§ 10-10-46 (Emphasis added). These restrictions allow some flexibility; a department head with the consent of the budget officer may shift surplus funds from one expenditure account to another. In addition, the department head, again with budget officer approval, may cause excess expenditure for a given line item. But nowhere are the department heads and budget officer given authority to appropriate funds, designated for a particular line item, to a different purpose. That is, there is a recognition that there are miscellaneous funds and that some line items may be purchased with less than the set appropriation and thereby result in surplus funds. As to those funds the department head and budget officer have a needed flexibility, they may shift them to a line item for which the appropriation was low or they may shift them to another expenditure account. For example, the funds could be shifted to police salaries so as to pay a cost overrun due to overtime incurred by police officers, etc.

VIII(B). The Uniform Municipal Fiscal Procedures Act applies directly to Logan City

Section 10-3-1204 of the Optional Forms of Municipal Government Act provides that

All existing statutes governing municipalities shall remain applicable except as provided in this part.

Furthermore in Section 10-3-1219 (6) the Act further provides in delineating the specific powers of the Mayor, that he shall

[a]ppoint a budget officer for the purpose of conforming with the requirements of the uniform municipal fiscal procedures act and in all other respects fulfill the requirements of that act;

By these statutes, the Uniform Municipal Fiscal Procedures Act is made fully applicable to Logan City except as the Optional Forms of Municipal Government Act specifically provides otherwise. Respondents further contend that the only significant change made by the Act is set forth in Section 10-3-1214.

This statute provides participation by both the Municipal Council and Mayor in passing "appropriation ordinances" in that it allows the Mayor to veto an appropriation.

VIII(C). Appellant's theory would destroy the integrity of a participatory budget process.

Appellant contends that once the final budget ordinance is passed that Municipal Council control, except as to interfund and interdepartmental transfers, is at an end. Further, that the administrative officials of the city on their own authority may transfer any and all funds between accounts and line items.

Respondents urge the Court that if this were the case, the Uniform Municipal Fiscal Procedures Act procedures requiring notice, hearings, etc., are a mere facade, a public show, behind which, administrative officials determine actual expenditures. For example, after weighty consideration and public hearing the Council could decide the police department needs new

vehicles and create line items for their purchase. Were the Appellant's position adopted, the department head with the consent of the budget officer could without any other authority transfer funds from the employee allocation in his department budget and purchase fifteen police cars. If Appellant's position is correct the Municipal Council and citizenry should not bother discussing how many police cars are needed, a dollar sum should simply be allocated to each department. There is no control. Appellant's contention is that the "departmental grant" is the limit of the control which can lawfully be exerted by the Council. Quite obviously, the requirements of providing detailed estimates to the governing body, public hearings concerning the items of expenditure and a budget which appropriates to these line items would be of no binding effect. The whole procedure under that interpretation is a mere facade.

Respondents reject those arguments maintaining that fiscal procedures embody a set of legal controls, to wit: that the only appropriations which may be administratively reallocated are those which are earmarked miscellaneous or which are truly surplus. Further, that the Municipal Council, after proper citizen input, by adopting a budget with detailed line items legally binds administrative officials to use public funds for those purposes and none other. Of course, changes may be required and the Council is free to cause those changes in accordance with the Uniform Municipal Fiscal Procedures Act.

VIII(D). Line items are a definable and significant part of the budgetary control process.

The budgets of Logan City in the past and presently show little relation to the Uniform Municipal Fiscal Procedures Act. However, certain appropriations can be called "line items" for example:

Item #251	2 patrols	\$90,000.00
Item #252	3 pickup trucks	15,000.00
	2 - 1/2 ton trucks	
	1 - 3/4 ton truck	

In the example above, it is clear that one line item is two patrols and the other line item is the three pickup trucks and that there is left considerable administrative discretion. Logan City's budget has no such clear designations. However, it does appear in the Logan City budget what general equipment type the appropriation was for and, under the present circumstances, it appears reasonable to consider a specific appropriation for a particular equipment item as a line item. It should be noted that the legislative body by its use of the designation "Item" can control the amount of discretion left in administrative officials. In the example given, supra, in "Item #252" each vehicle could be made a line item or the three trucks could be made one line item. In the example's wording it appears that administrative officials could order two 3/4 ton pickups and one 1/2 ton pickup rather than as specified therein. Nowhere, of course, is there authority or discretion given to buy four pickups under Item #251 appropriating money for patrols.

A Colorado case dealing with the purchase of voting machines supports Respondents' reasoning:

It is undisputed that the budget items totaling \$132,843 and the subsequent appropriation of \$132,800 was intended to provide payment for the items of contemplated expense specifically itemized in the commission's budget, none of which pertained in any respect to purchase of voting machines. Under charter provisions, after the budget is made, the several sums shall then be appropriated by ordinance "to the several purposes and departments therein named." True, the charter provides that, "The budget shall be prepared in such details as to the aggregate sum and the items thereof allowed to each department, office or commission as the council shall deem advisable subject to limitations in this charter," and where, as in the case before us, a single appropriation is made covering the total of numerous items separately, but rather than the total expenditure for the amounts so budgeted together must not exceed the total of the appropriation therefor, and that the money appropriated to that class can be used for no other purpose except the items in the budget for which the appropriation was made. In the case before us, either the appropriations must be held void as being without a specified purpose, or they must be construed as being for the purposes specified in the budget upon which the appropriations are, and must be based. The payment of \$7,050 as authorized by the city under the ordinance and contract for purchase of the Shoup machines could not by any contortion be fitted into any of the purposes specified in those budgeted items . . . .

Under the provisions of the Denver charter, appropriation items must be tied to the budget; payments of city funds must be restricted to the purposes for which they were appropriated and budgeted, and any contract for payment during the year 1951 not so appropriated and budgeted for that year and not caused by any casualty, accident or unforeseen contingency after the passage of the annual appropriation ordinance, as provided in Section 304 of the charter, must be held void.

Kingsley v. City and County of Denver, 247 P.2d 605, 81-2-13  
(Colo. 1952).

Under Logan City's present budget practices it appears appropriate to consider each item for which a money value is tied to a specified purpose to be a line item and except for some aberrations this appears workable. One aberration is that each worker's salary is specified, it appears reasonable in the case of, for example, firemen salaries to regard the salary total as the line item rather than the specified amount for each particular individual.

The testimony of Logan Budget Officer, Duane Beck indicated that, in general, the interpretation presented herein corresponds with his opinion of what a line item is. Transcript at 92-93. However, Mr. Beck indicated line item treatment was not considered binding on administrative officials. Transcript at 95-96. Further, that the city administration had in fact purchased a very expensive patrol for the city on a conditional sales contract and out of Class C road funds not appropriated by the Municipal Court for such a purchase. Transcript at 100-105. Respondents urge that line item treatment for such a purchase is required.

VIII(E). General law requires specific appropriations by legislative bodies.

In dealing with budgets and appropriations there are numerous references to the need for specificity so as to allow citizen review and discussion of the application of tax monies.

A taxpayer has the right to have the purpose of an appropriation stated in sufficiently clear and intelligible manner, so that he can understand, from it, what it is for, and so that he may have a basis for determining priority.

Application of Cook County, 304 N.E. 2d 46, 48 (Ill. 1970).

The only logical interpretation of this provision [restricting expenditures to amounts appropriated, compare C.R.S. 1963, 88-1-14 with its Utah equivalents §§ 10-10-39, 45] is that since there is an absolute prohibition against spending in excess of an appropriation, there can be no sum spent when there is no appropriation. While application of this statute to the facts in the instant case may have harsh results, the statute is, nevertheless, binding upon us. Its purpose is to protect the taxpayer against improvident use of tax revenue, to encourage citizen participation and debate prior to the institution of public projects, to insure public disclosure of proposed spending, and to encourage prudence and thrift by those elected to direct expenditure of public funds. Accordingly, it, in conjunction with certain other provisions of the budget law, requires that certain formalities, such as public hearings and formal adoption of budgets, be complied with before public funds can be spent.

Shannon Water Dist. v. Norris Drilling Co., 477 P2d, 478 (Colo. 1970) (emphasis added).

Isn't the purpose of the budget law to require that all proposed expenditures be itemized and published for the scrutiny of the public, to the end that every constituent of the governing body may examine the items of anticipated expenditures? We think that is a fairly good analysis of its purpose, or one of them at least.

Washington Twp. v. Hart, 215 P2d 180, 181 (Wash. 1950).

The position of Appellant is that by law the public has no legal ground for input or control over the budget as within departments, and further, that Logan's governing body, the Municipal Council, also has no power over the budget once it is initially appropriated.

Respondents maintain that except for such authority,



officials by the Fiscal Procedures Act there is no administrative authority to juggle line items or appropriations.

An appropriation of public funds is a setting apart from public revenue of a certain sum of money for a specified purpose in such a manner that the executive officers of the government are authorized to use that money and no more for the purpose specified and no other.

State v. Moore, 69 N.W. 373

In specific terms, an appropriation may be defined as an authority of the legislative, given at the proper time and in legal form to the proper officers to apply a distinctly specified sum from a designated fund out of the treasury in a given year, for a specified object or demand against the state.

63 Am Jur 2d, Public Funds § 46 (footnotes omitted).

The power of the legislature with respect to the public funds raised by general taxation is supreme, and no state official, from the highest to the lowest, has any power to create an obligation of the state, either legal or moral, unless there has first been a specific appropriation of funds to meet the obligation.

42 Am Jur, Public Funds § 42 (footnotes omitted).

The object of such provisions is to prohibit expenditures of public funds at the mere will and caprice of those having the funds in custody, without direct legislative sanction therefor.

63 Am Jur 2d, Public Funds § 45 (footnotes omitted).

Respondents urge that they, as the Municipal Council, possess plenary budget control over the administrative officials of Logan City. And further, that under applicable state law their designation of appropriations for certain line items is binding on administrative officials. Respondents urge that the purchase of large scale equipment customarily accorded line item treatment is an appropriation within the authorization



therefore is contrary to the Uniform Municipal Fiscal Procedures Act. The citizens of Logan City and their elected officials have been deprived by the present budgetary operation of their legal right to notice and participation in the allocation of their tax monies. An old Massachusetts case sums up Respondents' position:

As has been held repeatedly the design of the budget law for cities was to set rigid barriers against expenditures in excess of appropriation, to cultivate municipal thrift, to prevent the borrowing of money for current expenses and in general to put cities upon a sound financial basis so far as those ends can be achieved by legislation. (Citing cases). It would strongly tend to frustrate this design if the juggling with appropriations already made, such as thus disclosed, were upheld.

Burt v. Municipal Council, 176 N.E. 511, 513 (Mass.).

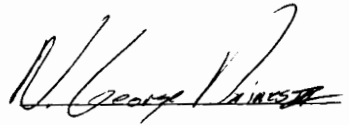
#### CONCLUSION

Respondents urge that the trial court's opinion should be reaffirmed in its entirety by this Court. The powers of the Municipal Council vis-a-vis the Mayor are determined under state law. The only reasonable interpretation of the laws governing Logan City is that the Council possesses the municipal governing powers except as those powers are specifically enumerated and given the Mayor by the Optional Forms of Municipal Government Act.

Respondents initially sought a court determination of their powers and duties so that they could properly represent, in their elected positions, the citizens of Logan City. Respondents now ask the Supreme Court to delineate those

responsibilities for the benefit of the citizens of Logan city  
and to thereby assist present and future elected officials to  
adequately perform their duties and responsibilities.

Respectfully submitted

A handwritten signature in dark ink, appearing to read "W. George Kincaid", written over a horizontal line.

CERTIFICATE OF SERVICE

I hereby certify that I mailed, prepaid, two copies to each of the following:

Melvin E. Leslie, Esq.  
Steven W. Allred, Esq.  
408 Capitol Building  
Salt Lake City, UT 84114

J. Blaine Zollinger, Esq.  
61 West 100 North  
Logan, UT 84321

Calvin L. Rampton, Esq.  
Suzanne M. Dallimore, Esq.  
400 Walker Bank Building  
Salt Lake City, UT 84111

Councilman Glenn T. Baird  
Councilman Claude J. Burtenshaw  
61 West 100 North  
Logan, UT 84321

this 30 day of March, 1978.

Wayne Christensen

IN THE SUPREME COURT OF THE STATE OF UTAH

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

MAYOR DESMOND L. ANDERSON,  
CITY ATTORNEY J. B. BARNES,  
ZOLLINGER, CITY AUDITOR,  
and BUDGET DIRECTOR  
BECK.

Defendants and  
Appellants

AN APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT  
OF THE STATE OF UTAH.

George D. Jones, Esq., LEWIS  
DAVIES & MARTINEZ, ATTORNEYS  
AT LAW, North Main  
St., Logan, UT 84301.

ATTORNEYS FOR PLAINTIFFS  
RESPONDENTS

Loye E. Martindale, Esq.,  
Darwin W. Larson, Esq.,  
Carol W. Clay, Esq.,  
LEGISLATIVE COUNCIL, ROOM 300,  
101 State Capitol Bldg.,  
Salt Lake City, UT 84119.

ATTORNEYS FOR DEFENDANTS APPELLANTS